

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.D., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Atlanta, GA, Employer**

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**Docket No. 13-1641  
Issued: May 9, 2014**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 1, 2013 appellant, through her attorney, filed a timely appeal from a January 31, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> She also appeals a March 7, 2013 merit decision and a May 29, 2013 nonmerit decision. Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly reduced appellant's compensation benefits effective September 23, 2012 based on its finding that she had the capacity to work in the selected position of cashier II; (2) whether she has established that August 23, 2012 loss of wage-earning capacity determination should be modified; and (3) whether OWCP properly

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<sup>1</sup> In a decision dated July 31, 2013, an OWCP hearing representative affirmed the January 31, 2013 decision. As appellant filed her appeal with the Board on July 1, 2013, the July 31, 2013 decision is null and void as it pertained to the same issue over which the Board has jurisdiction. *See Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

refused appellant's request to reopen her case for further review of the merits under 5 U.S.C. § 8128.

### **FACTUAL HISTORY**

On October 23, 2008 appellant, then a 49-year-old correctional officer, filed a traumatic injury claim alleging that on October 8, 2008 she sprained her shoulder in the performance of duty. OWCP accepted the claim, assigned file number xxxxxx743, for right shoulder impingement and a right rotator cuff tear. It further accepted that appellant sustained left shoulder tendinitis, impingement, subacromial bursitis and bicipital tenosynovitis as a result of a May 11, 2009 work injury, assigned file number xxxxxx556.<sup>3</sup>

On June 28, 2009 appellant accepted a modified position at the employing establishment. On February 4, 2010 she underwent a subacromial decompression and partial bursectomy of the left shoulder. Appellant stopped work at the employing establishment and received compensation from OWCP beginning June 19, 2011.

In a December 30, 2010 work restriction evaluation, Dr. Gregory Lee, an attending Board-certified orthopedic surgeon, found that appellant could work with no reaching at or above the shoulder level and pushing, pulling and lifting up to 10 pounds. On April 8, 2011 he listed permanent work restrictions of no reaching or repetitive pushing and pulling.

On August 25, 2011 OWCP referred appellant to a rehabilitation counselor for vocational rehabilitation. In a report dated September 24, 2011, the rehabilitation counselor discussed appellant's work history in the military as an office clerk, secretary and mail distribution clerk. She further noted that she had worked as a corrections officer, mail clerk, landscape laborer and data clerk. Appellant attended some college but did not graduate.

On October 20, 2011 Dr. Lee evaluated appellant for bilateral posterior pain in her shoulders. He diagnosed residual scapulothoracic dyskinesia/scapular syndrome of both shoulders following bilateral arthroscopies. Dr. Lee recommended a functional capacity evaluation to determine her work capacity.

On November 23, 2011 the rehabilitation counselor related that appellant had worked in the past as a secretary and office clerk. Referencing the Department of Labor's *Dictionary of Occupational Titles* (DOT), she identified the positions as an appointment/reception clerk, DOT No. 237.367-010, cashier I/accounting clerk, DOT No. 211.362-010 and information customer clerk, DOT No. 237.367-022 as suitable, sedentary jobs available in the relevant commuting area. The rehabilitation counselor advised that appellant would require 22 hours of training at a technical college to qualify for the positions. She also noted that Dr. Lee's December 30, 2010 work restriction evaluation limited appellant's reaching to zero and indicated that she would seek his opinion regarding whether the identified jobs were within her restrictions.

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<sup>3</sup> In decisions dated July 22 and October 20, 2010, OWCP granted appellant schedule awards for a 14 percent permanent impairment of the left arm. By decision dated October 28, 2010, it granted her a schedule award for a 10 percent permanent impairment of the right arm. On April 13, 2011 OWCP found that appellant had abandoned her request for an oral hearing.

On November 14, 2011 the rehabilitation counselor completed labor market surveys for the positions of information customer clerk, cash accounting or cashier clerk, DOT No. 211.362-010 and receptionist.

On December 1, 2011 the rehabilitation counselor informed Dr. Lee that she wanted appellant to learn some office and computer skills at a vocational technical institute with a goal to working in a sedentary position as a receptionist, information/appointment clerk or cashiering customer clerk. She related that these positions did not require repetitive pushing or pulling, reaching over the shoulder or lifting over 10 pounds. On December 7, 2011 Dr. Lee indicated that appellant could work as a receptionist, information/appointment clerk or cashier customer clerk.

On January 13, 2012 the rehabilitation counselor provided updated labor market surveys for the positions of cashier clerk, receptionist/appointment clerk and information customer clerk. On January 13, 2012 OWCP approved a six-month training program at a technical college.

In a report dated February 8, 2012, Dr. Robert D. Cohen, an internist, diagnosed carpal tunnel syndrome and tenosynovitis. He advised that appellant could not take a typing class because of her condition. Appellant was scheduled for a right carpal tunnel release on February 27, 2012.

On March 2, 2012 OWCP indicated that appellant underwent a carpal tunnel release on February 27, 2012.<sup>4</sup> It noted that the carpal tunnel syndrome was not an accepted condition. On March 4, 2012 OWCP placed the vocational rehabilitation in an interrupted status pending her release by her physician.

On June 29, 2012 the rehabilitation counselor closed the file at the request of OWCP's rehabilitation specialist.

On July 18, 2012 OWCP notified appellant of its proposed reduction of her compensation based on its finding that she had the capacity to earn wages as a clerk I or cashier I, DOT No. 211.362-010. It enclosed a copy of a position identified as DOT No. 211.362-010.<sup>5</sup> The position of cashier I was sedentary and required exerting up to 10 pounds of force occasionally and a negligible amount of force frequently.

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<sup>4</sup> On May 9, 2012 OWCP informed appellant that she was scheduled for surgery February 27, 2012 but that it did not appear that it was performed. It noted that there was no evidence showing that she was disabled from carpal tunnel syndrome and informed her that she had 30 days to advise whether she wanted to continue rehabilitation training or have her wage-earning capacity reduced by what it would be had she completed the training program. In a May 12, 2012 response, appellant related that she had undergone surgery on February 27, 2012.

<sup>5</sup> In the issue statement and the concluding paragraph of the proposed reduction of compensation, OWCP referred to the position as cashier II rather than cashier I; however, this appears to be a typographical error.

By letter dated July 31, 2012, appellant's attorney challenged the proposed reduction based on medical evidence from Dr. Lee.<sup>6</sup>

In a decision dated August 23, 2012, OWCP reduced appellant's compensation based on its finding that she had the capacity to earn wages as a cashier II, DOT No. 211.462-010. The position of cashier II is classified as light duty requiring lifting up to 20 pounds occasionally and 10 pounds frequently. OWCP applied the formula set forth in *Albert C. Shadrick*<sup>7</sup> to determine her wage-earning capacity.

On August 28, 2012 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative.<sup>8</sup> On December 9, 2012 she filed a claim for compensation beginning June 19, 2011.

By letter dated December 19, 2012, OWCP noted that appellant filed a claim for total disability beginning June 19, 2012. It indicated that it had paid her compensation until August 26, 2012, when it reduced her compensation based on its loss of wage-earning capacity determination. OWCP advised her of the criteria for modifying a loss of wage-earning capacity determination.

At the telephone hearing, held on December 13, 2012, appellant related that she attended two weeks of typing classes but then had to stop for wrist surgery. Her attorney argued that a cashier II required extensive standing and training to use a cash register.

By decision dated January 31, 2013, OWCP denied appellant's claim for compensation from August 26, 2012 to January 31, 2013 after finding that she had not established that the August 26, 2012 loss of wage-earning capacity determination should be modified.<sup>9</sup>

By decision dated March 7, 2013, OWCP's hearing representative affirmed the August 23, 2012 decision.

On April 17, 2013 appellant, through her attorney, requested reconsideration. In a nonmerit decision dated May 29, 2013, OWCP denied her request for reconsideration after finding that she had not submitted evidence or raised an argument sufficient to warrant reopening the case for further review of the merits under section 8128.

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<sup>6</sup> In a progress report dated July 6, 2012, Dr. Lee found that appellant had a "history of bilateral shoulder arthroscopy with continued residual scapulothoracic dyskinesis despite a prolonged period of physical therapy" and that she was "still awaiting a functional capacity evaluation."

<sup>7</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

<sup>8</sup> Appellant submitted progress reports from Dr. Lee dated September 11 and October 26, 2012.

<sup>9</sup> On February 6, 2013 appellant, through her attorney, requested a telephone hearing on the January 31, 2013 decision. An OWCP hearing representative affirmed this decision on July 31, 2013. Appellant has filed no Board appeal with respect to this decision. See 20 C.F.R. § 501.3.

## LEGAL PRECEDENT -- ISSUE 1

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>10</sup> Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>11</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.<sup>12</sup> Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>13</sup> will result in the percentage of the employee's loss of wage-earning capacity.

## ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right shoulder impingement and a right rotator cuff due to an October 6, 2008 work injury under file number xxxxxx743 and left shoulder tendinitis, impingement, subacromial bursitis and bicipital tenosynovitis as a result of a May 11, 2009 work injury, assigned file number xxxxxx556. It paid her compensation for total disability beginning June 19, 2011.

In work restriction evaluations dated December 30, 2010, Dr. Lee found that appellant could not reach at or above shoulder level and could lift, push and pull up to 10 pounds. On April 8, 2011 he found that she could perform no reaching. On August 25, 2011 OWCP referred appellant for vocational rehabilitation.

In a report dated November 23, 2011, the rehabilitation counselor identified the positions of appointment/reception clerk, cashier I/accounting clerk, and information customer clerk as suitable sedentary positions reasonably available within appellant's commuting area. The rehabilitation counselor completed labor market surveys from the DOT for the position of cashier I, DOT No. 211.362-010. At her request, Dr. Lee reviewed the position of cashier I and

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<sup>10</sup> *T.O.*, 58 ECAB 377 (2007).

<sup>11</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>12</sup> *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

<sup>13</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

found that appellant was capable of working in the described sedentary positions. OWCP approved the training program; however, appellant was unable to complete the program due to subsequently-acquired carpal tunnel syndrome.

On July 18, 2012 OWCP notified appellant of its proposed reduction of her compensation based on its finding that she had the capacity to earn wages as a clerk I or cashier I, DOT No. 211.362-010. It enclosed a copy of a position identified as DOT No. 211.362-010.<sup>14</sup>

By decision dated August 23, 2012, OWCP finalized its reduction of appellant's compensation effective September 23, 2012 based on its determination that she had the capacity to work as a cashier II, DOT No. 211.462-010. However, there is no evidence from a rehabilitation counselor or OWCP rehabilitation specialist identifying the position of cashier II, which is classified as light rather than sedentary work, as appropriate for appellant. Dr. Lee reviewed the sedentary position of cashier I and found that it was within her work capabilities. He did not review the position of cashier II.

Further, the proposed notice of reduction of compensation indicated that OWCP was considering reducing appellant's compensation based on the position of cashier I, and provided her with the position description of cashier I. It reduced her compensation, however, based on its finding that she could perform the duties of cashier II. OWCP's regulations provide that, when terminating or reducing compensation, it must advise the claimant of written notice of the proposed action including a description of the reasons for the proposed action and a copy of the specific evidence upon which OWCP is basing its determination.<sup>15</sup> Consequently, it did not adequately advise appellant of the basis for the proposed reduction in accordance with its procedures. For these reasons, the Board finds that OWCP improperly reduced appellant's compensation based on its finding that she could work as a cashier II.

### **CONCLUSION**

The Board finds that OWCP improperly reduced appellant's compensation benefits effective September 23, 2012 based on its finding that she had the capacity to work in the selected position of cashier II.<sup>16</sup>

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<sup>14</sup> In the issue statement and the concluding paragraph of the proposed reduction of compensation, OWCP referred to the position as cashier II rather than cashier I; however, this appears to be a typographical error.

<sup>15</sup> 20 C.F.R. § 10.540.

<sup>16</sup> In view of the Board's finding regarding the September 23, 2012 loss of wage-earning capacity determination, the issues of whether OWCP denied modification of the decision and the issue of whether it properly denied appellant's request for reconsideration under section 8128 is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 29, March 7 and January 31, 2013 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: May 9, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board