

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

T.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Boston, MA, Employer**

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**Docket No. 13-1895
Issued: May 7, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2013 appellant, through his attorney, filed a timely appeal of a July 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of information clerk.

On appeal, counsel contends that OWCP's decision was contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the July 3, 2013 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 48-year-old clerk, sustained a lumbar sprain on March 3, 2007 and subsequent recurrences on March 12, 2008 and March 22, 2010. He was placed on the periodic rolls and received monetary compensation benefits.³

A functional capacity evaluation (FCE) dated June 17, 2010 found that appellant was capable of sustaining a light level of work, exerting 20.8 pounds of force occasionally and/or 10.4 pounds of force frequently and/or 4.2 pounds of force constantly to move objects.

On March 10, 2011 Dr. Jeremy Shore, a Board-certified orthopedic surgeon, advised that appellant was status post L4-5 microdiscectomy in 2006. He stated that appellant continued to have persistent low back pain and intermittent pain in the right posterolateral thigh. Appellant felt that he was not capable of any sort of sedentary duty. Dr. Shore opined that appellant had reached maximum medical improvement and advised that he was capable of working for eight hours a day with the following permanent restrictions: must be able to sit, stand and adjust based on level of pain; no pushing, pulling or lifting more than 20 pounds.

On January 17, 2012 a vocational rehabilitation counselor identified the position of information clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 237.367-022 as suitable to appellant's work experience, physical restrictions and education. It was noted that he enrolled in courses at a local community college in keyboarding and Excel software. The information clerk position was identified as sedentary work, which involved exerting up to 10 pounds of force occasionally or a negligible amount of force frequently or no amount of force constantly to move objects and the duties included: answering and routing calls, greeting visitors and answering questions from the public. The vocational rehabilitation counselor indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis. As confirmed by the state employment service.

In a January 24, 2012 addendum report, Dr. Shore amended his work restrictions to include: lumbar support required; must be able to sit or stand based on pain; no repetitive bending, turning or twisting.

Appellant enrolled in computer courses at a local community college, which he successfully completed. As of June 14, 2012, OWCP provided 90 days of placement assistance. Placement was not successful.

On September 18, 2012 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as an information clerk at the rate of \$570.00 per week. It afforded him 30 days in which to submit evidence or argument regarding his capacity to earn wages in the constructed position.

³ On April 30, 2010 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$518.49 because he returned to work for eight hours on February 23, 2010 and was paid on a loss of wage-earning capacity based on a six-hour workday until March 13, 2010. By decision dated July 22, 2010, it finalized the overpayment of compensation finding that he was with fault and deducted the sum of \$50.00 from his continuing compensation payments.

By decision dated October 22, 2012, OWCP finalized the proposed reduction of compensation benefits finding that appellant had the capacity to earn wages as an information clerk. It determined that he had a 53 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of \$1,524.00 every four weeks.

On October 29, 2012 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. He submitted a January 25, 2013 report from Dr. Shore, who diagnosed chronic low back pain and a history of right L5-S1 herniated nucleus pulposus. Dr. Shore reiterated that appellant was capable of light-duty or sedentary work with the following restrictions: must be able to change positions frequently; reaching above the shoulder for six hours per day; sitting, walking, standing and operating a motor vehicle for four hours per day; reaching for two hours per day; pushing and pulling up to 30 pounds for two hours per day; lifting up to 20 pounds for two hours per day; squatting, kneeling and climbing for one hour per day.

A hearing was held before an OWCP hearing representative on February 13, 2013. Appellant provided testimony and his attorney argued that the information clerk position was not suitable.

By decision dated July 3, 2013, the hearing representative affirmed the October 22, 2012 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴

Section 8115(a) of FECA,⁵ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent 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 his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁸ In determining an employee's

⁴ See *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ 5 U.S.C. § 8115.

⁶ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ See *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.⁹

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which it relies must provide a detailed description of the condition.¹⁰ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹¹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position, listed in the DOT or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. 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*¹² will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.¹³

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁴

ANALYSIS

OWCP accepted appellant's claim for lumbar sprain and referred him to vocational rehabilitation. In its October 22, 2012 decision, it reduced his compensation benefits based on his capacity to earn wages as an information clerk. OWCP determined that this position was medically and vocationally suitable for appellant. It found that he was capable of earning \$570.00 per week and had a 53 percent wage-earning capacity. The question is whether appellant had some capacity to earn wages and the Board finds that the weight of the evidence of

⁹ See *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁰ See *William H. Woods*, 51 ECAB 619 (2000).

¹¹ See *John D. Jackson*, 55 ECAB 465 (2004).

¹² 5 ECAB 376 (1953).

¹³ See *Karen L. Lonon-Jones*, 50 ECAB (1999).

¹⁴ See *John D. Jackson*, *supra* note 11.

record establishes that he had the requisite physical ability, skill and experience to perform the position of information clerk.

On January 17, 2012 a vocational rehabilitation counselor advised that appellant would be capable of performing the position of information clerk, DOT No. 237.367-022, with an average weekly salary of \$570.00 per week. The position was identified as sedentary work, which involved exerting up to 10 pounds of force occasionally or a negligible amount of force frequently or no amount of force constantly to move objects and was reasonably available on a full-time basis. The duties included: answering and routing calls, greeting visitors and answering questions from the public. Further, appellant was enrolled in a specific course of vocational rehabilitation at a local community college and completed seven computer courses. He had a prior 27-year history of work with the employing establishment.

A June 17, 2010 FCE indicated that appellant was capable of sustaining a light level of work, exerting 20.8 pounds of force occasionally and/or 10.4 pounds of force frequently and/or 4.2 pounds of force constantly to move objects.

In support of his claim, appellant provided reports from Dr. Shore, whose reports provided findings which were not inconsistent with the duties required for the selected position of an information clerk.

The Board finds that the evidence establishes that appellant was capable of performing the duties required for the selected position of an information clerk. Dr. Shore advised that appellant was capable of doing light-duty or sedentary work with restrictions. The vocational rehabilitation counselor determined that appellant was able to perform the position of an information clerk. She provided a job description which was comprised of sedentary requirements which involved exerting up to 10 pounds of force occasionally or a negligible amount of force frequently or no amount of force constantly to move objects and determined that the position fell within appellant's medical restrictions. The position of information clerk conforms to appellant's physical restrictions. The vocational rehabilitation counselor noted that the position was available on a full-time basis within his commuting area and that the wage of the position was \$570.00 per week, in consultation with the state employment service.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of information clerk represented his wage-earning capacity.¹⁵ The evidence of record establishes that he had the requisite physical ability, skill and experience to perform the duties and that the position was reasonably available within the general labor market of his commuting area. The information as set forth by the vocational counselor determined that the wages for the position of information clerk were \$570.00 per week. Applying the *Shadrick*¹⁶ principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of \$570.00 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had a 53 percent loss of wage-

¹⁵ See *James M. Frasher*, 53 ECAB 794 (2002).

¹⁶ See *supra* note 12.

earning capacity and his compensation was reduced to a net compensation of \$1,524.00 every four weeks. The Board finds that OWCP met its burden of proof to reduce his compensation in this case.

On appeal, counsel contends that OWCP's decision was contrary to fact and law. The Board finds that the record supports that the constructed position conforms to appellant's medical restrictions, education and work experience. For the reasons stated above, the Board finds that the attorney's arguments are not substantiated.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of information clerk.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2014
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board