

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

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**A.M., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE,  
INSPECTIONS OPERATIONS PROGRAM,  
Brawley, CA, Employer**

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**Docket No. 14-161  
Issued: May 13, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 26, 2013 appellant filed a timely appeal from an October 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly reduced appellant's compensation effective October 31, 2013, based on his wage-earning capacity to perform the duties of a customer complaint clerk.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 31, 2011 appellant, a 53-year old food inspector, filed a Form CA-2 claim for benefits, alleging that he developed a bilateral carpal tunnel condition causally related to employment factors. OWCP accepted the claim for bilateral carpal tunnel syndrome. Compensation for temporary total disability began on February 8, 2011.

In a report dated June 16, 2011, Dr. Carrie Beaty, a specialist in internal medicine, advised that appellant had been diagnosed with moderate to severe bilateral carpal tunnel syndrome, which resulted in pain and numbness in his hands. She stated that he was currently awaiting carpal tunnel release surgery to ameliorate this condition. Dr. Beaty asserted that any repetitive wrist action would worsen appellant's pain; she recommended that reasonable accommodations be made for appellant to allow him to do work which did not require using knives or any other repetitive wrist action that would worsen his condition.

In order to determine appellant's condition, OWCP referred him for a second opinion examination with Dr. Gary K. Frykman, a specialist in orthopedic hand surgery. In a February 7, 2012 report, Dr. Frykman stated that appellant continued to have pain, numbness and weakness in both hands in addition to gout, which could contribute to the development of carpal tunnel syndrome. He also asserted that appellant had sensory loss in the fingertips of both hands and marked weakness of grip due to his condition. Dr. Frykman advised that due to appellant's repetitive work activity he would probably require surgery. Dr. Frykman was uncertain as to whether appellant could eventually return to his usual job as a food inspector. He restricted appellant from forceful and repetitive lifting, gripping or twisting activities with either wrist or hand due to weakness and sensory loss but advised that he could function well in daily activities with no other limitations.

In a work capacity evaluation dated February 7, 2012, Dr. Frykman indicated that appellant could work an eight-hour day with restrictions on repetitive movements of the wrists and elbows for no more than two hours; pushing not exceeding 10 pounds for no more than two hours; pulling not exceeding 10 pounds for no more than two hours; and lifting not exceeding 10 pounds for no more than two hours.

On March 1, 2012 OWCP referred appellant for vocational rehabilitation services, based on Dr. Fryman's February 7, 2012 report.

In reports dated February 11, 20 and 25, 2013, a vocational rehabilitation counselor summarized his efforts to find vocational training or suitable alternate employment for appellant within his indicated restrictions. The vocational counselor recommended a position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, (DOT) customer complaint clerk, DOT No. 247.361-014, within his indicated restrictions and reasonably reflected

his ability to earn wages.<sup>2</sup> She also opined that he had the vocational and work history, education, skills and training to qualify for job openings in this occupation. The vocational rehabilitation counselor stated that there were a number of customer complaint clerk jobs within a reasonable commuting distance. She advised that appellant had a significant level of professional supervisory and management experience, which were transferrable to the selected position. Appellant was informed that he would receive 90 days of placement assistance to help him locate work in this position, provided that he cooperated. She also advised him that his compensation would be reduced based upon the salary of the selected positions at the end of the 90-day placement assistance period.

In a report dated May 7, 2013, the rehabilitation counselor indicated that appellant was reluctant to fully participate in job search activities. Appellant advised that he had accepted a position with an insurance company on May 3, 2013. In e-mails dated June 3, 2013, however, he advised that he was seeking employment independently and studying to obtain a California State insurance license.

On June 14, 2013 the vocational rehabilitation counselor terminated placement assistance efforts and vocational rehabilitation services. In several memorandums she indicated that appellant had not fully participated in placement efforts. Appellant spent most of his time studying for insurance license and seeking employment with private insurance firms.

In a telephone call dated July 9, 2013, appellant advised OWCP that he had been hired by an insurance company in California with the condition that he pass and obtain his California State insurance license; he subsequently obtained this license. He stated, however, that while he was currently in training the position did not provide for full-time base pay or salary and he was currently not receiving any earnings; the job was commission-based with an advance based on projected sales.

By notice of proposed reduction dated July 10, 2013, OWCP advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a customer complaint clerk, DOT No. 247.361-014, at the rate of \$360.00 per week, in accordance with the

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<sup>2</sup> The job description for the customer complaint clerk position indicated that appellant would have the following duties: "Investigates customer complaints about merchandise, service, billing or credit rating: Examines records, such as bills, computer printouts, microfilm, meter readings, bills of lading and related documents and correspondence and converses or corresponds with customer and other company personnel, such as billing, credit, sales, service or shipping, to obtain facts regarding customer complaint. Examines pertinent information to determine accuracy of customer complaint and to determine responsibility for errors. Notifies customer and designated personnel of findings, adjustments and recommendations, such as exchange of merchandise, refund of money, credit of customer's account or adjustment of customer's bill. May recommend to management improvements in product, packaging, shipping methods, service or billing methods and procedures to prevent future complaints of similar nature. May examine merchandise to determine accuracy of complaint. May follow up on recommended adjustments to ensure customer satisfaction. May key information into computer to obtain computerized records. May trace missing merchandise and be designated [t]racer [c]lerk (clerical). May investigate overdue and damaged shipments or shortages in shipments for common carrier and be designated [o]ver-[s]hort-[a]nd-[d]amage [c]lerk (clerical). May be designated according to type of complaint adjusted as [b]ill [a]djuster (clerical); [m]erchandise-[a]djustment [c]lerk (retail trade); [s]ervice [i]nvestigator (utilities; tel. & tel.)."

factors outlined in 5 U.S.C. § 8115.<sup>3</sup> It calculated that his compensation rate should be adjusted to \$481.77 using the *Shadrick*<sup>4</sup> formula. OWCP found that appellant's current adjusted compensation rate, every four-week period, was \$379.00, that the case had been referred to a vocational rehabilitation counselor, who had located a position as a customer complaint clerk, which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. It allowed appellant 30 days in which to submit any contrary evidence.

In an October 11, 2013 decision, OWCP reduced appellant's compensation to a new compensation rate of \$337.00 every four weeks. It modified the July 10, 2013 proposed termination in part, finding that it contained a typographical error, which stated that he had a compensation rate per week of \$360.00 for the selected position of customer complaint clerk. OWCP found that the actual, corrected rate for a customer complaint clerk was \$480.00 per week based on his capacity to earn \$480.00 per week. It concluded that appellant had an 80 percent wage-earning capacity and was therefore entitled to compensation at the rate of \$337.00 every four weeks.

### **LEGAL PRECEDENT**

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>5</sup>

Section 8115(a) of FECA<sup>6</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>7</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>8</sup>

If the actual earnings do not fairly and reasonably represent wage-earning capacity or 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, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of

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<sup>3</sup> 5 U.S.C. § 8115.

<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

<sup>5</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>6</sup> 5 U.S.C. § 8115(a).

<sup>7</sup> *Id.*; *Loni J. Cleveland*, 52 ECAB 171, 177 (2000).

<sup>8</sup> *Lottie M. Williams*, 56 ECAB 302 (2005); see *Edward Joseph Hanlon*, 8 ECAB 599 (1956).

suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>9</sup>

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>10</sup> Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives.<sup>11</sup>

### ANALYSIS

Dr. Frykman indicated in his February 7, 2012 report that appellant could perform work for eight hours per day with restrictions on forceful and repetitive lifting, gripping or twisting activities with either wrist or hand due to weakness and sensory loss; these stemmed from his accepted bilateral carpal tunnel condition. The February 7, 2012 work capacity evaluation stated that appellant could work an eight-hour day with restrictions on repetitive movements of the wrists and elbows for no more than two hours; pushing not exceeding 10 pounds for no more than two hours; pulling not exceeding 10 pounds for no more than two hours; and lifting not exceeding 10 pounds for no more than two hours. Dr. Frykman indicated that appellant could function well in daily activities with no other limitations. The rehabilitation counselor assigned to assist appellant in placement efforts identified a position as a customer complaint clerk listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on Dr. Frykman's work restriction evaluation. The physical requirements of this position was within and did not exceed the work restrictions outlined in Dr. Frykman's February 7, 2012 report. OWCP used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a customer complaint clerk and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials.

While appellant informed OWCP on July 9, 2013 that he had obtained a position in the insurance industry, he also indicated that he was in training and was not earning any wages. As he did not have any actual earnings, OWCP properly proceeded to determine his wage-earning capacity based upon a selected position.

OWCP properly applied the principles set forth in the *Shadrick*<sup>12</sup> decision to determine appellant's employment-related loss of wage-earning capacity. It calculated that his

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<sup>9</sup> 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, 55 ECAB 465, 471 (2004); *Robert H. Merritt*, 11 ECAB 64, 65 (1959).

<sup>10</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989); *Hattie Drummond*, 39 ECAB 904 (1988).

<sup>11</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>12</sup> *Shadrick*, *supra* note 4.

compensation rate should be adjusted to \$337.00 every four weeks using the *Shadrick* formula. OWCP indicated that appellant's salary as of January 29, 2011, the date he stopped working, was \$602.21 per week, that his current, adjusted pay rate for his job on the date of injury was \$602.21 and that he was currently capable of earning \$480.00 per week, the rate of a customer complaint clerk. It therefore determined that appellant had an 80 percent wage-earning capacity, which when multiplied by 2/3 amounted to a weekly compensation rate, with cost-of-living adjustments to \$84.25. OWCP found that his current adjusted compensation rate, per four-week period, was \$337.00.

OWCP properly found that appellant was no longer totally disabled as a result of his accepted condition and it followed established procedures for determining his employment-related loss of wage-earning capacity. The Board therefore finds that OWCP met its burden of justifying a reduction in his compensation for total disability in its October 11, 2013 decision.

### **CONCLUSION**

The Board finds that OWCP properly reduced appellant's compensation effective October 11, 2013, based on his capacity to perform the duties of a customer complaint clerk.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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