

FACTUAL HISTORY

This is the second appeal before the Board. By decision dated February 18, 2014,² the Board affirmed a March 26, 2013 merit decision of OWCP which affirmed an August 16, 2012 decision reducing appellant's wage-loss compensation based on her earnings in the selected position of customer complaint clerk (Department of Labor's *Dictionary of Occupational Titles*, DOT No. 241.367-014). The Board found that OWCP appropriately considered the proper factors in reducing her monetary compensation, including the availability of customer complaint clerk positions, appellant's vocational aptitudes and her physical limitations. The Board further found that OWCP properly followed the procedures established under *Albert C. Shadrick*,³ in calculating appellant's loss of wage-earning capacity. The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

During the pendency of the prior appeal, appellant submitted medical reports dated from September 11, 2002 to March 27, 2013 finding that her right shoulder, right wrist and right knee conditions remained permanent and stationary. In December 13, 2012 and March 27, 2013 reports, Dr. Nicole Pham-Bailey, an attending Board-certified physiatrist, emphasized that appellant's right upper extremity and right knee conditions remained unchanged. She reiterated August 20, 2007 work restrictions against repetitive motion of the right arm, overhead reaching or forceful pulling/ pushing with the right arm and no lifting over 10 pounds.

Effective June 2, 2013 appellant elected to receive retirement benefits through the Office of Personnel Management rather than compensation under FECA.

In a March 5, 2014 letter, counsel requested modification of the August 16, 2012 loss of wage-earning capacity determination.⁴ He contended that OWCP did not establish that the selected position actually existed in the present economy as the Department of Labor's *Dictionary of Occupational Titles* was obsolete and no longer described jobs available in the open labor market.

By decision dated June 3, 2014, OWCP denied modification of the 2012 loss of wage-earning capacity determination.⁵ It found that counsel's argument and the medical evidence submitted did not establish a material worsening of the accepted conditions, that the original determination was in error or that appellant had been retrained or otherwise vocationally rehabilitated. Regarding counsel's assertion that the Department of Labor's *Dictionary of Occupational Titles* was obsolete, OWCP noted that the vocational rehabilitation counselor

² Docket No. 13-1347 (issued February 18, 2014).

³ 5 ECAB 376 (1953).

⁴ In his March 5, 2014 letter, counsel also requested reconsideration of the Board's February 18, 2012 decision and order. OWCP properly interpreted counsel's letter as a request for modification of the August 16, 2012 loss of wage-earning capacity determination.

⁵ The Board notes that the June 3, 2014 decision also contains language denying reconsideration of the Board's February 18, 2014 decision and order. As OWCP properly adjudicated the correct issue of counsel's request for modification of the standing wage-earning capacity determination, OWCP's remarks concerning reconsideration of the Board's prior decision and order are harmless, nondispositive error.

found that the selected position of customer complaint clerk was available in sufficient numbers and that the weekly earnings of \$533.20 were based on the California Employee Development Department wage data for appellant's commuting area.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination.⁶

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁷ OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁰

ANALYSIS

OWCP accepted that appellant sustained multiple injuries and conditions of both shoulders and hands and degenerative osteoarthritis and a meniscal tear of the right knee. Following vocational rehabilitation, it issued a loss of wage-earning capacity determination on August 16, 2012, based on the selected position of customer complaint clerk. Counsel requested an oral hearing, contending that the selected position exceeded appellant's medical restrictions and vocational skills. OWCP affirmed the determination on March 26, 2013, finding that the physical requirements of the customer complaint clerk position were within the restrictions submitted by appellant's physicians and commensurate with her work experience and vocational aptitudes. On February 18, 2014 the Board affirmed OWCP's March 26, 2013 decision.

In his March 5, 2014 letter requesting modification, counsel contended that the August 16, 2012 loss of wage-earning capacity determination was in error. He argued that the

⁶ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁹ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁰ *J.J.*, Docket No. 13-623 (issued July 25, 2013); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

Department of Labor's *Dictionary of Occupational Titles* was obsolete and no longer described positions performed in the current labor market. OWCP's procedures provide that a vocational rehabilitation counselor use the "[Department of Labor's] *Dictionary of Occupational Titles*, or OWCP-determined equivalent" in selecting medically and vocationally suitable work.¹¹ The selected position must then be shown to be reasonably available in appellant's commuting area using a local labor market survey utilizing current state and local job databases and employment listings.¹² The position selected using the Department of Labor's *Dictionary of Occupational Titles* must be confirmed as present and available in the current labor market using additional reference data. In this case, the vocational rehabilitation counselor performed a labor market survey on January 24, 2012 and determined that customer complaint clerk positions were reasonably available in appellant's commuting area. Therefore, counsel's contention that the Department of Labor's *Dictionary of Occupational Titles* did not describe a position performed in the open labor market is not supported by the evidence of record. The Board finds that OWCP's June 3, 2014 decision properly denied modification on the grounds that counsel failed to establish that the August 16, 2012 loss of wage-earning capacity determination was in error. Counsel did not contend that appellant's accepted conditions had worsened significantly or that she had been retrained or vocationally rehabilitated.

On appeal, counsel asserts that OWCP's June 3, 2014 decision was contrary to law and fact. As noted, OWCP properly denied modification of the 2012 wage-earning capacity determination. 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 properly denied modification of the August 16, 2012 wage-earning capacity determination.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7a(1) and (2), (February 2011).

¹² *Id.* at Chapter 2.813 a(3).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2014 is affirmed.

Issued: November 3, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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