

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

C.L., Appellant)

and)

U.S. POSTAL SERVICE, MIDISLAND)
PROCESSING & DISTRIBUTION CENTER,)
Islandia, NY, Employer)

**Docket No. 13-1428
Issued: September 25, 2014**

Appearances:
Paul Kalker, 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 May 29, 2013 appellant, through her attorney, filed a timely appeal of a May 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective May 5, 2013 based on the constructed position of receptionist as representing her wage-earning capacity.

On appeal, counsel argued that the loss of wage-earning capacity determination was in error as appellant lacked the necessary vocational and physical skills to perform the selected position.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 8, 2006 appellant, then a 58-year-old mail processor, filed an occupational disease claim² alleging that she developed torn rotator cuff tendons in both shoulders due to her federal job duties.

OWCP accepted her claim for bilateral rotator cuff tears on December 4, 2007. Appellant filed a recurrence of disability on January 14, 2008 alleging that she was totally disabled and awaiting surgery. Dr. Philip L. Schrank, a Board-certified orthopedic surgeon, performed a right shoulder surgical repair on January 22, 2008. He completed a form report on January 18, 2011 opining that appellant was totally disabled due to right shoulder weakness and loss of range of motion.

Dr. Sidney H. Levine, a Board-certified orthopedic surgeon, completed a report dated April 1, 2011 stating that appellant was unable to return to her date-of-injury position.

In a report dated June 29, 2011, Dr. Levine stated that appellant could not use her left shoulder repetitively above shoulder level. He also stated that she should not perform repetitive pushing, pulling or lifting over five pounds. On February 6, 2012 Dr. Levine completed a work restriction evaluation and indicated that appellant could not return to her usual job. He did not indicate how many hours a day appellant could work, but found that she should sit, walk and stand for two to three hours each day. Dr. Levine also found that she could push and pull intermittently, however, she could not reach above the shoulder.

On April 27, 2012 OWCP referred appellant for vocational rehabilitation services. It noted that as appellant's work restrictions included a five-pound lifting restriction which was classified as subsedentary, the vocational rehabilitation counselor was directed to target job goals in the sedentary category and ask each employer in the labor market survey as to whether appellant would be required to lift more than five pounds. On May 18, 2012 appellant appeared for her first vocational rehabilitation appointment accompanied by her son who served as an interpreter. In the initial report, the vocational rehabilitation counselor noted that appellant was a native of Taiwan and spoke Mandarin, Taiwanese and English. Appellant obtained a Bachelor's degree in German from the University of Taiwan in the late 1950's and moved to the United States in 1975. She was employed as a postal clerk from 1997 to 2006 and prior to that she worked in real estate for a brief period and was a homemaker.

Appellant underwent vocational testing evaluation on May 29, 2012. The tester noted that she spoke infrequently and that her right arm was visibly shaking. She also noted that it was difficult to tell if appellant understood verbal instructions it seemed she did not know what "close the door" meant. Appellant's mathematical skills were at the sixth-grade level including the ability to perform simple addition, subtraction, multiplication and division as well as percentages. She had difficulties with more complex division, fractions and percentages. Appellant's reading, vocabulary and comprehension were at the second-grade level or first percentile. She did not complete the reading comprehension portion within the normal testing

² The record reveals that appellant originally filed a traumatic injury claim for the same condition, under File No. xxxxxx113, which OWCP denied on April 25, 2006.

time limit. The tester stated that based on her scores appellant would not be able to participate in any vocational rehabilitation training.

In a memorandum to the file dated June 14, 2012, OWCP noted that the vocational rehabilitation counselor recommended a prevocational plan as appellant seemed to be struggling with English.

In a report dated June 27, 2012, the vocational rehabilitation counselor researched sedentary jobs such as clerk and receptionist and noted that the English communication requirements exceeded appellant's abilities. She began investigating English training options. On June 25, 2012 the vocational rehabilitation counselor met with appellant with an interpreter present. In a letter dated July 25, 2012, she noted that appellant was enrolled in English as a second language class.

On August 6, 2012 the vocational rehabilitation counselor noted that appellant was initially placed in a beginning conversation class. However, this class filled before appellant was enrolled. In a letter dated September 14, 2012, the vocational rehabilitation counselor stated that appellant was placed in the pre-beginning English as a second language class. This class was described as appropriate for students who have had little formal education and do not read or write well in their native language. Appellant was to learn the English alphabet and basic English vocabulary and practice listening and speaking English. She began attending classes on September 17, 2012.

In a September 9, 2012 letter to appellant's counsel, Dr. Levine recounted the history of injury and his accompanying treatment. He opined that appellant remained totally disabled from carrying out her regular work activities. Dr. Levine indicated that she requires further surgical intervention to repair a torn rotator cuff but doing so will not improve her overall condition to allow her to return to her preinjury job. With regard to work activity, he found that returning appellant to some type of sedentary activity could potentially place additional physical stress on her shoulders. Dr. Levine noted that, even with simple activities of daily living, appellant experiences significant increase in her level of pain and soreness within her shoulders. He concluded that appellant would, therefore, be precluded from all forms of gainful employment, including sedentary work activity.

In a letter dated October 21, 2012, counsel informed the vocational rehabilitation counselor that appellant had a brain tumor and must undergo brain surgery. He stated that she would not be able to attend her English language classes.

The vocational rehabilitation counselor informed appellant by letter dated November 5, 2012 that her file was in an interrupt status to allow her to undergo surgery and recovery. She stated that the file could be interrupted for only 90 days and that appellant was required to submit medical documentation. Counsel responded on January 30, 2013 and submitted medical evidence dated January 28, 2013 from Dr. Mon-Ta Tsai, a Board-certified internist, who diagnosed meningioma with excision of the tumor on October 31, 2012. Dr. Tsai stated that appellant was experiencing postoperative ataxia resulting in a lack of voluntary muscle coordination, trigeminal neuralgia, persistent dizziness and imbalance. In a letter dated February 13, 2013, the vocational rehabilitation counselor selected the positions of either a

receptionist or information clerk. She stated that, in order to work as a receptionist, appellant required training in basic computer skills to supplement her existing knowledge and work experience. The specific vocational preparation was three to six months. The vocational rehabilitation counselor provided a labor market survey listing 10 receptionist positions, 5 of which did not require lifting over five pounds and one which provided help when such lifting was necessary.

On March 1, 2013 the vocational rehabilitation specialist agreed that the two positions of receptionist and information clerk were medically and vocationally suitable and existed in sufficient numbers to be reasonably available within appellant's commuting area. The vocational rehabilitation specialist stated, "I recommend either position with an entry level salary of \$9.00 per hour be used. The claimant would have been qualified for either position at this entry level salary had she completed her English second language training and a complete vocational training program in office skills."

OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a receptionist (Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 237.367-038) earning \$360.00 per week. It found that she was capable of light-duty work based on Dr. Levine's February 6, 2012 work restriction evaluation indicating that appellant could lift five pounds and sit, walk and stand for two to three hours each.

In a letter dated April 11, 2013, counsel disagreed with the proposed reduction on the grounds that appellant lacked the necessary English language skills as found by the vocational rehabilitation counselor and that appellant was unable to participate in an English program as a result of her brain tumor.

By decision dated May 3, 2013, OWCP finalized the proposed reduction of appellant's compensation finding that she had the capacity to earn wages as a receptionist effective May 5, 2013. It reduced her compensation based on her earning capacity in the constructed position at \$360.00 per week. OWCP stated that the medical evidence established that her current disability was due to a postemployment injury brain tumor.

OWCP finalized the reduction of compensation, finding that appellant had the wage-earning capacity of a receptionist. It applied the *Albert C. Shadrick*³ formula based on a weekly pay rate of \$1,043.09, effective December 9, 2007 and found that appellant had the capacity to earn weekly wages of \$360.00 in the position of a receptionist. OWCP divided her constructed earnings of \$360.00 by the current pay rate for her date-of-injury job of \$1,112.35 to find a 32 percent wage-earning capacity. It multiplied that percentage by appellant's December 9, 2007 recurrent pay rate of \$1,043.09, to find an adjusted wage-earning capacity of \$333.79. OWCP subtracted her wage-earning capacity of \$333.79 from the recurrent pay rate of \$1,043.09 to find a loss of wage-earning capacity of \$709.30. It then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$531.97.

³ 5 ECAB 376 (1953).

LEGAL PRECEDENT

Section 8115 of FECA⁴ provides that 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 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 suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁵ In determining an employee's wage-earning capacity based on a position defined 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 postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected positions 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.⁶

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 Department of Labor's *Dictionary of Occupational Titles* 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*⁷ 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.⁸ Where the employee has one or more dependents as defined in FECA, he or she is entitled to have his or her back compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁹

ANALYSIS

OWCP accepted appellant's claim for bilateral rotator cuff tears. Appellant's attending physician, Dr. Levine, opined that she could return to work with restrictions including a five-pound lifting limitation as well as restrictions on sitting, walking and standing of two to three hours each. OWCP found that the position of receptionist, DOT No. 237.367-038, in the

⁴ 5 U.S.C. §§ 8101-8193, 8115.

⁵ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999); 5 U.S.C. § 8105(a).

⁶ *D.N.*, Docket No. 13-38 (issued August 28, 2013).

⁷ *Supra* note 3.

⁸ *Supra* note 5.

⁹ 5 U.S.C. § 8110(b).

Department of Labor's *Dictionary of Occupational Titles*, represented appellant's wage-earning capacity. To be an appropriate position for a wage-earning capacity determination under 5 U.S.C. § 8115(a), the position must be medically and vocationally suitable.¹⁰

With respect to the issue of medical suitability of the selected position, OWCP referred to the reports of Dr. Levine who limited appellant to three hours of sitting, three hours of standing and three hours of walking, no overhead reaching and lifting of no more than five pounds. The position is specifically described as a sedentary position.¹¹ The Department of Labor's *Dictionary of Occupational Titles* defines sedentary work as exerting up to 10 pounds of force occasionally (up to 1/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Based on the evidence of record, including the restrictions of appellant's treating physician, the Board finds that the selected position was within appellant's permanent work restrictions and was appropriate for a wage-earning capacity determination.¹²

With regard to appellant's lifting restriction, OWCP's vocational rehabilitation specialist noted that appellant did not meet the physical requirements of lifting up to 10 pounds and that her physical abilities were subsedentary. The vocational rehabilitation specialist directed the vocational rehabilitation counselor to conduct a survey of the local labor market and determine whether the position of receptionist was available with a subsedentary lifting restriction of five pounds. The vocational rehabilitation counselor found that 6 of the 10 employers surveyed indicated that a five-pound lifting restriction could be met. The Board finds that this is sufficient to establish that the weight limit is reasonably available.¹³

In his narrative report of June 29, 2011, Dr. Levine opined that appellant had the ability to perform sedentary work duties, but commented that she had lost 50 percent of her preinjury capacity for lifting, pushing, pulling, grasping, pinching, holding, torquing or performing other activities involving comparable physical effort as well as activities requiring repetitive pushing, pulling, lifting in excess of five pounds. More specifically, in an OWCP Form 5c dated February 6, 2012, Dr. Levine indicated that appellant was a candidate for retraining. He further indicated that she had a restricted work capacity with an ability to sit, stand and walk for three hours and the ability to push, pull and lift five pounds. In a September 6, 2012 letter to appellant's counsel, however, Dr. Levine opined that returning appellant to some type of sedentary work could potentially place additional physical stress on her shoulders and as such, she would be precluded from all forms of gainful employment including sedentary work activity. The Board finds that the September 6, 2012 response of Dr. Levine does not fundamentally negate his prior opinion that appellant has a sedentary work capacity. OWCP met its burden of

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814 (October 2009).

¹¹ *A.L.*, Docket No. 12-1634 (issued May 7, 2013).

¹² *Johnnie Hawkins*, Docket No. 05-806 (September 23, 2005).

¹³ *R.P.*, Docket No. 13-236 (issued April 11, 2013) (finding that as seven of eight employers who responded were able to provide modified work for appellant within the selected position description, the position was reasonably available).

proof to establish that the selected receptionist position was physically appropriate. The Board further finds that appellant had the necessary vocational training to function in the selected position of receptionist. Appellant was a college graduate and had worked at the employing establishment for eleven years. The Board finds that these educational and vocational skills would qualify her for the selected position, despite her inability to complete the English training and the office skills training due to the subsequently-acquired medical condition which limited her cognitive abilities.¹⁴ As appellant met both the physical and vocational skills necessary for the selected position of receptionist, OWCP met its burden of proof to reduce her compensation benefits.

Finally, the Board finds that OWCP properly applied the principles set forth in the *Shadrick*¹⁵ decision to determine appellant's employment-related loss of wage-earning capacity. OWCP calculated that her compensation rate should be adjusted to \$531.97 per week using the *Shadrick* formula.

On appeal counsel also argued that OWCP failed to meet its burden of proof to reduce appellant's compensation benefits due to her inability to adequately communicate in English. The Board finds that appellant's prior work experience and education clearly qualified appellant for the selected receptionist position.

CONCLUSION

The Board finds that OWCP properly determined appellant's loss of wage-earning capacity based on the selected position of receptionist, as it was consistent with both her physical abilities and her vocational capacity.

¹⁴ OWCP did not reduce appellant's compensation benefits due to failure to cooperate with vocational rehabilitation efforts, but based her capacity to earn wages on her physical condition and vocational abilities prior to her after-acquired medical condition.

¹⁵ *Supra* note 3.

ORDER

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

Issued: September 25, 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