

FACTUAL HISTORY

On January 12, 2010 appellant, then a 48-year-old city carrier, filed a traumatic injury claim alleging that she tripped and fell that day while on her route, thereby sustaining a sprain to her left ankle. OWCP initially accepted her claim for left ankle sprain. It subsequently accepted tenosynovitis of the left foot and ankle and lateral ligament dysfunction and synovitis of the left ankle. Appellant underwent surgery on January 25, 2011 for a microfracture procedure of the talus, arthroscopic synovectomy and postoperative arthrocentesis with injection.

In a July 25, 2011 report, Dr. Sharoun Porat, a Board-certified orthopedic surgeon, diagnosed appellant with a left ankle osteochondral injury after a chronic ankle sprain, status postsurgery with no improvement. She opined that appellant could perform limited duties with seated work only. Dr. Porat noted that it was becoming less likely that appellant would be able to return to her previous activity levels.

By letter dated September 7, 2011, OWCP referred appellant for vocational rehabilitation.

In a November 7, 2011 permanent and stationary evaluation, Dr. Porat advised that appellant had permanent restrictions limiting her to seated work only. In a December 12, 2011 work capacity evaluation, she limited appellant to walking and standing one hour a day and noted that she was not able to squat, kneel or climb. Dr. Porat stated that these restrictions were permanent.

In a December 20, 2011 report, the vocational counselor noted that the employing establishment could not accommodate appellant's physical restrictions and that she was proceeding with plan development. From March 5 through August 24, 2012, appellant completed courses at the Institute of Network Technology in Windows O/S 7; typing/Microsoft Word 10; Microsoft Excel 10, Microsoft Access 10; Microsoft PowerPoint 10; Publisher; and Outlook and Career Development. She then received job placement assistance for 90 days. In a closing labor market survey report dated February 6, 2013, the vocational counselor noted that, although appellant was very active in her job search and participated in several interviews, she was not offered employment. The vocational counselor opined that the position of customer complaint clerk was suitable for appellant. The job description for this position, DOT No. 241.367-014, states as follows:

“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 Tracer Clerk (clerical). May investigate overdue and damaged shipments or shortages in shipments for common carrier and be designated Over-Short-And-Damage Clerk (clerical). May be designated according to type of complaint adjusted as Bill Adjuster (clerical); Merchandise-Adjustment clerk (retail trade); Service Investigator (utilities; [telephone]).

The vocational counselor noted that appellant had a certificate in Computerized Office Occupations; a typing speed of 63 words per minute, courses at Long Beach City College in Social Work, computer and writing and that she owned a computer. She contacted 10 employers, five of whom had current openings. There were seven plus openings within the past year. The vocational counselor concluded that the physical requirements of all the positions fell within the work limitations provided by Dr. Porat in that the duties could be varied, not to exceed the restrictions and that the type of work allowed for alternating the duties and physical demands at will. She noted that the wage information from the State of California Employment Development Department established that the salary for this occupation in the Los Angeles County area was \$13.47 per hour. The vocational counselor stated that the skills and abilities required by employers included knowledge of customer service principles and practices; knowledge of administrative procedures; numeric, oral and written language applications; interpersonal skills, communication skills both verbal and written; good listening skills, problem-solving; attention to detail and accuracy; adaptability; team player with high initiative and follow-through; English written and verbal skills; self-motivated and responsible; great customer service skills; positive attitude; experience with MS Office including MS Word, Excel, Outlook, PowerPoint; Access; ability to type; high school diploma or equivalent.

The vocational counselor noted that appellant was a mature, responsible and intelligent person, with prior experience as a letter carrier, caregiver, kitchen assistant/room service, account executive and file clerk. She concluded that these skills in combination with the computer office training received at Institute of Network Technology result in appellant being qualified for the position of customer complaint clerk. Toward the end of her placement process, appellant advised that she was providing caregiving services to her roommate and was hoping to provide such services on a full-time basis. The vocational counselor concluded that because of the ambiguous nature of such employment and the fact that it could potentially exceed the documented work restrictions, placement services were terminated and she proceeded with the constructed rating. It was her professional opinion that there was reasonable availability for full-time openings as a customer complaint clerk in appellant's commuting area.

On April 29, 2013 OWCP issued a proposal to reduce appellant's compensation benefits to reflect her ability to earn wages as a customer complaint clerk at a rate of \$538.80 per week.

In a May 13, 2013 report, Dr. Porat advised that there had been no changes in her work status since the prior examination and that she remained limited to seated work.

On June 18, 2013 OWCP reduced appellant's monetary compensation effective June 30, 2013.

On June 24, 2013 appellant, through counsel, requested a hearing before an OWCP hearing representative. At the hearing held on November 26, 2013, counsel argued that the salary utilized for the position of customer complaint clerk was too high. He contended that the labor market survey was made up; and that there were no listings for a customer complaint clerk on Craigslist, YELP or in the newspaper. Counsel argued that, if the job existed, it was outsourced to a foreign country. Appellant testified that it was difficult to stand for a long period of time, that she had never performed office work and that she had a hard time talking on the telephone and using a computer at the same time.

By decision dated February 12, 2014, OWCP's hearing representative affirmed the June 18, 2013 decision. She found that the position was reasonably available within appellant's commuting area and vocationally suitable.

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 proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on proper factual and medical background.³

Under section 8115(a) of FECA, 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 if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the 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.⁴

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 relied upon must provide a detailed description of the condition.⁵ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁶

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation specialist will submit a final report to the vocational

² *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

³ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁴ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

⁵ *William H. Woods*, 51 ECAB 619 (2000).

⁶ *John D. Jackson*, 55 ECAB 465 (2004).

rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have provided the report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.⁷ 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 employee service or other applicable service. Finally, application of the principles set forth in the *Shadrick*⁸ decision will result in the percentage of the employee's loss of wage-earning capacity.

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 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.⁹ Additionally, 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.¹⁰

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's monetary compensation based on her capacity to earn wages as a customer complaint clerk.

The Board finds that the medical evidence establishes that appellant was capable of performing the duties required for the constructed position, as it was sedentary and Dr. Porat limited appellant to seated work. Appellant had the appropriate training for the position. Despite her alleged inability to work on the computer, she received training through the vocational rehabilitation process at the Institute for Network Technology with proficiency in Windows O/S 7, typing/Microsoft Word; Microsoft Excel, Microsoft Access, Microsoft PowerPoint, Publisher and Outlook and Career Development. The vocational counselor conducted a search and determined that such work was reasonable availability for full-time positions as a customer complaint clerk in appellant's commuting area. She determined the wage through contact with the State of California Employment Development Department which advised that the salary for this occupation in the Los Angeles County area was \$13.47 per hour.

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

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ *James Henderson, Jr.*, 51 ECAB 619 (2000).

¹⁰ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

qualifications, in determining that the position of customer complaint clerk represented her wage-earning capacity.¹¹ 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 geographic commuting area in which the employee lived. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer complaint clerk and that the position was reasonably available within the general labor market of appellant's commuting area.

Appellant has not submitted any evidence to support her argument that such positions were not reasonably available in the general labor market. Furthermore, the Board notes that FECA's Procedure Manual clearly states that the vocational counselor shall include in her report the DOT description of all the duties and physical requirements of each job.¹²

OWCP properly applied the principles set forth in the *Shadrick*¹³ decision to determine appellant's employment-related loss of wage-earning capacity. It calculated that her compensation rate should be adjusted to \$280.46 using the *Shadrick* formula. OWCP indicated that appellant's salary as of February 27, 2010, the date her disability began, was \$890.40 per week. It stated that her current adjusted pay rate for the job on the date of injury was \$923.96. OWCP determined that appellant was currently capable of earning \$538.80 per week, the rate of a customer complaint clerk. Therefore, it determined that she had a 58 percent wage-earning capacity, which when multiplied by 2/3 amounted to a compensation rate of \$280.48. OWCP found that appellant's current adjusted compensation rate, per four week-period (prior to any deductions), was \$1,200.00. It therefore properly determined that the position of customer complaint clerk reflected her wage-earning capacity and using the *Shadrick* formula, properly reduced her compensation effective June 30, 2013.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits, effective June 30, 2013, based on her capacity to earn wages in the constructed position of customer complaint clerk.

¹¹ *D.W.*, Docket No. 14-347 (issued June 4, 2014).

¹² *Supra* note 7.

¹³ *Supra* note 8; *see also* 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 12, 2014 is affirmed.

Issued: September 17, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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