

FACTUAL HISTORY

On March 20, 2009 appellant, then a 54-year-old part-time flexible clerk, fractured his right fibula when he slipped on a sunken piece of concrete. OWCP accepted closed fracture of tibia and fibula, right. Appellant was placed in a cast and returned to part-time modified duty on June 13, 2009. He stopped work in October 2009 when Dr. Christopher P. Dale, Board-certified in orthopedic surgery, performed arthroscopic debridement. Appellant returned to modified duty on December 14, 2009. He had additional surgery on August 11, 2010 and returned to modified duty in October 2010.² Appellant continued work until December 2010 when he was dismissed under the National Reassessment Process. He thereafter received total disability compensation and was placed on the periodic compensation rolls.

An August 24, 2011 functional capacity evaluation demonstrated that appellant had the capacity to work for approximately four hours a day with job site modifications, such as performing tasks from a seated position with a lifting restriction of 20 pounds.

In December 2012, appellant was referred for vocational rehabilitation. He was separated from the employing establishment effective February 8, 2013 due to disability. In a February 4, 2013 report, Stephen H. Porter, Ph.D., a vocational rehabilitation counselor, advised that appellant, who lived in the greater Madison, Wisconsin, metropolitan area, had earned an associate arts degree in 1981 and took additional college courses. Appellant's job history included an eight-year history as a full-time deputy sheriff from 1986 to 1994 and as a real estate sales agent. Regarding transferable skills, Mr. Porter stated that, while appellant had completed extensive post-high school education and training, he did not possess a degree, diploma, certification, or endorsement that would readily transfer into another occupational field. He considered several occupations as meeting appellant's requirements, including that of data entry operator clerk, stating that it was semiskilled.

Dr. Dale completed a work capacity evaluation on February 21, 2013. He indicated that appellant could sit, reach, perform repetitive movements, push, and pull for eight hours daily, could walk, stand, and twist for two hours daily, could bend and stoop for one hour daily, and could never squat, kneel, or climb. Dr. Dale could operate a motor vehicle to and from and at work. In answer to specific OWCP questions, he diagnosed ankle arthritis caused by the employment injury and advised that the condition was permanent with pain and decreased motion. Dr. Dale advised that appellant could work at a sit-down, sedentary position.

In reports dated March 8, 2013, Mr. Porter indicated that appellant informed him that he did not intend to cooperate with a sincere job search. The rehabilitation counselor identified the positions of telephone solicitor Department of Labor's *Dictionary of Occupational Titles* (DOT), (DOT No. xxxxxx014), dispatcher motor vehicles (DOT No. xxxxxx014), and data entry operator clerk (DOT No. xxxxxx054) as within appellant's sedentary physical limitations. He advised that the positions were reasonably available in the local labor market at entry-level weekly wages of \$426.00, \$729.00, and \$558.00 respectively.

² By decision dated March 17, 2010, OWCP denied appellant's claim for compensation for the one day, December 1, 2009, because the medical evidence did not support the claimed time off that day.

On March 18, 2013 OWCP informed appellant that the job duties of the selected positions were within his limitations and informed him of the consequences of failure to cooperate. It further advised that at the end of a 90-day placement period, whether he was actually employed or not, OWCP would reduce his compensation based on his ability to earn wages of \$426.00 to \$729.00. On April 1, 2013 appellant informed Mr. Porter that he did not intend to search for a job and was contemplating retirement. Rehabilitation services were closed in May 2013.³

By letter dated August 29, 2013, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a data entry operator clerk (DOT No. xxxxxx054). Based on the opinion of Dr. Dale, it found that appellant could return to an eight-hour workday and that the data entry operator clerk position was within the restrictions provided by Dr. Dale. OWCP further noted that the labor market survey prepared by the rehabilitation counselor confirmed that the position was reasonably available in the local labor market and that the entry level weekly wage was \$558.00.

The August 29, 2013 notice stated that the claim was accepted for closed fracture of tibia and fibular shaft, right; fracture of ankle unspecified, closed, right; pain in joint, ankle, and foot, right; and sprain of knee, lateral collateral ligament, right. The duties of the data entry operator clerk position were described in the Department of Labor's *Dictionary of Occupational Titles* as: operates keyboard or other data entry device to enter data into computer or onto magnetic tape or disc for subsequent entry; enters alphabetic, numeric, or symbolic data from source documents into computer, using data entry device, such as keyboard or optical scanner; and following format displayed on screen. Compares data entered with source documents or reenters data in verification format on screen to detect errors. Deletes incorrectly entered data and reenters correct data. May compile, sort, and verify accuracy of data to be entered. May keep record of work completed. It had a sedentary strength level and did not require climbing, balancing, stooping, kneeling, crouching, or crawling. The position required the specific vocational preparation (SVP) at a level of four, and educational development a level of three for reasoning, two for mathematics, and three for language development. OWCP noted in a transferable skills analysis that appellant had worked in jobs that have required an SVP of four which is three to six months experience. Appellant had extensive work experience beyond high school and that he should be able to work in a job with an SVP of four. OWCP found him very qualified for this position based upon his work history and education level. Specifically, appellant's work history included positions requiring professional and technical skills. He also had an associate's degree.

Appellant did not respond to the notice of proposed reduction. By decision dated October 3, 2013, OWCP reduced his compensation benefits based on his capacity to earn wages as a data entry operator clerk, effective October 20, 2013. By utilizing the *Shadrick* formula, it

³ The record indicates that a third-party claim had been filed regarding appellant's injury. A recovery statement was completed and signed by him on August 1, 2013.

found that appellant had a 46 percent loss of wage-earning capacity.⁴ Appellant, through counsel, timely requested a hearing.

At the hearing, held on April 11, 2014, counsel noted that the October 3, 2013 decision found appellant capable of performing the duties of “security guard.” He further asserted that the DOT was antiquated and no longer valid, and that appellant was not vocationally capable of performing the duties of the data entry operator clerk position because he had no training in computer entry. Appellant testified regarding his job history, including as a deputy sheriff from 1982 to 1994 and as an acting postmaster on two occasions. He stated that he had a laptop computer that he used for internet searches, e-mail, and to look at photographs from his camera, but he stated that he had never used a computer at work and had never had computer training.

In a June 11, 2014 decision, an OWCP hearing representative affirmed the October 3, 2013 decision. He found that, as for vocational suitability, appellant had previously obtained an associate’s degree, and his prior work history included work in such capacities that required greater technical and professional skills than the selected data entry operator clerk position required.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶

Section 8115 of FECA and OWCP regulations provide 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, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee’s usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.⁷

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

⁴ The Board notes that, in its conclusion, the October 3, 2013 decision contains a typographical error indicating that the selected position was “security guard.” A review of the decision, however, indicates that the position selected was that of data entry operator clerk.

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

⁶ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁷ 5 U.S.C. § 8115; *id.* at § 10.520; *John D. Jackson, id.*

medical evidence upon which OWCP relies must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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 or her 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.¹⁰ Finally, application of the principles set forth in *Albert C. Shadrick*,¹¹ as codified in section 10.403 of OWCP regulations,¹² will result in the percentage of the employee's loss of wage-earning capacity.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 issued its October 3, 2013 wage-earning capacity determination based on appellant's ability to work as a data entry operator clerk. Before making that determination, OWCP must determine a claimant's medical condition and work restrictions and then select an appropriate position that reflects his or her wage-earning capacity. The medical evidence used by OWCP must provide a detailed description of appellant's condition.¹⁵ In a February 21, 2013 work capacity evaluation, Dr. Dale advised that appellant could sit, reach, perform repetitive movements, push, and pull for eight hours daily; could walk, stand, and twist for two hours daily; could bend and stoop for one hour daily; and could never squat, kneel, or climb. He stated that

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, *supra* note 6.

¹⁰ *Supra* note 5.

¹¹ 5 ECAB 376 (1953).

¹² 20 C.F.R. § 10.403.

¹³ *Supra* note 5.

¹⁴ *John D. Jackson*, *supra* note 6.

¹⁵ *Supra* note 8.

appellant's condition was permanent and that he could work at a sit-down, sedentary position. The position selected is sedentary, and its physical requirements and within the restrictions provided by Dr. Dale are within appellant's restrictions. The Board finds appellant has the physical capacity to perform the duties of the selected position.¹⁶

The Board finds that appellant had the necessary vocational and educational preparation for the selected position of data entry operator clerk. Appellant has considerable job experience, a post-high school degree, and a functional knowledge of computers, based on his personal use. He has successfully performed in jobs that required preparation and training. Appellant made a choice not to complete actual vocational rehabilitation. This left OWCP without the option to further train him in the details of a suitable constructed position.

The vocational rehabilitation counselor advised that the position of data entry operator clerk was reasonably available in the local labor market with an entry level weekly wage of \$558.00. The Boards finds that OWCP correctly evaluated the relevant evidence, including the SVP level of the proposed job.¹⁷

OWCP considered the appropriate factors and correctly determined that the position of data entry operator clerk represented appellant's wage-earning capacity.¹⁸ These factors include availability of suitable employment and his physical limitations, usual employment, age and employment qualifications.¹⁹ OWCP therefore properly determined that the position of data entry operator clerk reflected his wage-earning capacity and, using the *Shadrick* formula,²⁰ and properly reduced his compensation on October 20, 2013.²¹

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 data entry operator clerk.

¹⁶ *Id.*

¹⁷ The SVP value of a given job merely one factor among several and should not be given disproportionate importance if other aspects of a claimant's work experience, education, and medical condition indicate that claimant is qualified.

¹⁸ *John D. Jackson, supra* note 6.

¹⁹ *Id.*

²⁰ 20 C.F.R. § 10.403. *See supra* note 11

²¹ *James Smith, 53 ECAB 188 (2001).*

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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