

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

D.V., Appellant)	
)	
and)	Docket No. 15-1533
)	Issued: December 2, 2015
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION PLANT, Oakland, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2015 appellant filed a timely appeal of a May 14, 2015 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 over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective June 14, 2013 based on her capacity to earn wages in the constructed position of information clerk.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 13, 2007 appellant, then a 54-year-old mail clerk, filed an occupational disease claim (Form CA-2) alleging that on September 30, 2007 she first realized that her right rotator cuff tear was due to her repetitive motion duties. OWCP accepted the claim for right shoulder and upper arm strains and right complete rotator cuff rupture. It authorized right rotator cuff repair and partial collar bone removal surgery, which occurred on March 11, 2008. OWCP also authorized right shoulder arthroscopy with mini-open rotator cuff repair, which occurred on July 8, 2009 and right shoulder arthroscopic rotator cuff repair, which occurred on December 13, 2010. Appellant had intermittent periods of disability since March 11, 2008, before stopping work on July 8, 2009. By letter dated October 8, 2009, OWCP placed on the periodic rolls for temporary total disability.

In progress reports dated May 19, June 16, 20, and July 25, 2011, Dr. Alan Hsu, a treating physician, Board-certified in occupational and family medicine, provided physical examination findings, objective findings, and diagnosed status post rotator cuff tear repair. He released appellant to return to modified work with restrictions. The restrictions included no carrying or lifting more than a half pound with the right upper extremity by itself, that it must be close to the body, and not above stomach level, and no right upper extremity overhead or forward reaching.

Dr. Hsu, in progress reports dated August 30, September 27, October 28, November 30, and December 28 2011, indicated that appellant was capable of carrying or lifting up to two pounds with the right upper extremity by itself, that it must be close to the body, and not above stomach level, and no right upper extremity overhead or forward reaching. He increased the restriction to three pounds in progress notes dated January 18 and February 21, 2012.

In a January 20, 2012 report of a second opinion physician, Dr. Bruce R. Huffer, a Board-certified orthopedic surgeon, diagnosed right shoulder girdle strain, status post three surgical interventions due to significant rotator cuff tear, right shoulder, rotator cuff and upper arm strains, and right complete rotator cuff rupture. He opined that appellant was capable of lifting up to five pounds no more than four hours per day, no reaching above shoulder level, no more than five pounds of pushing and pulling up to two hours per day, and up to two hours of reaching per day.

Dr. Hsu, in progress notes dated April 3, 2012, provided appellant's weight restriction at five pounds, which was described as permanent in subsequent progress notes.

On February 13, 2014 OWCP referred appellant for the development of a vocational rehabilitation program and scheduled her for a functional capacity evaluation.

On March 11, 2014 appellant underwent a functional capacity evaluation (FCE) to determine her work restrictions. The FCE report detailed the testing performed and set forth work restrictions. The results revealed that appellant was capable of working a sedentary position eight hours per day with restrictions including lifting up to 10 pounds to waist level, no reaching overhead with her right arm and shoulder, and occasional forward reaching with her right arm.

By letter dated March 14, 2014, the vocational rehabilitation counselor provided Dr. Hsu with a copy of the March 11, 2014 FCE and requested that he complete an attached work restrictions form (Form OWCP-5c).

On a June 2, 2014 Form OWCP-5c Dr. Hsu noted that appellant was not capable of working her usual job, but was capable of working an eight-hour day with right upper extremity restrictions. The restrictions included no lifting over 8 to 10 pounds at waist level, occasional reaching above the right shoulder, no overhead reaching, no continuous right arm reaching, pushing up to 21 pounds, and pulling up to 18 pounds.

On August 28, 2014 the vocational rehabilitation counselor identified the positions of information clerk, *Dictionary of Occupational Titles* (DOT) No. 237.367.022, and security surveillance monitor, No. 379.367.010, as long- and short-term goals.

On September 17, 2014 OWCP received labor market surveys dated September 8 and 9, 2014 from the vocational rehabilitation counselor containing information for the position of information clerk and security surveillance monitor. The hourly pay range was noted as \$11.00 to \$16.00 for the security surveillance monitor position and \$11.00 to \$13.00 for the information clerk position as noted by the information given by employers in the East Bay Counties, California area who were contacted by the vocational rehabilitation counselor. OWCP also received a September 16, 2014 Individual Rehabilitation Placement Plan and Job Search Plan and agreement from the vocational rehabilitation counselor which identified 50 miles from Newark, California as within appellant's commuting area.

The record contains evidence that appellant successfully completed training at the Loss Protection Group in Oakland, California and obtained a California security guard card.

In an October 30, 2014 summary of contacts, the vocational rehabilitation counselor detailed communications with appellant for the period September 18 to October 30, 2014. On October 13, 20, and 30, 2014 he sent appellant a list of 11 job openings on October 13, 2014, a list of 10 job openings on October 20, 2014, and a list of 6 job openings on October 30, 2014 or a total of 27 job openings.

On November 6, 2014 a job placement conference was held with appellant, the claims examiner, and the vocational rehabilitation counselor. The claims examiner informed appellant that at the end of the job placement services that her compensation would be reduced whether she was placed in a job or not. If further explained the method used in adjusting her compensation based on a constructed position.

On December 1 and 29, 2014 the vocational rehabilitation counselor provided an updated summary of contacts and lists of job openings.

On January 15, 2015 the vocational rehabilitation counselor indicated that vocational rehabilitation was closed. He noted the positions of information clerk, and security surveillance monitor, and stated that both positions were performed in sufficient numbers within appellant's commuting area. The vocational rehabilitation counselor reported that the hourly wages were \$11.00 to \$13.00 for the information clerk position and \$11.00 to \$16.00 for the security surveillance monitor position. He recommended that the information clerk position be used to

calculate appellant's wage-earning capacity as it was more readily available in appellant's commuting area.

DOT job classification was provided for the selected position of information clerk. The duties of the position were described noting that the primary duties included answering inquiries from persons entering the establishment, and providing information regarding activities conducted at the establishment, as well as the location of departments, offices, and employees. The position was listed as sedentary in nature, requiring occasional lifting up to 10 pounds, and occasional reaching and handling.

On April 8, 2015 OWCP issued a notice proposing to reduce appellant's wage-loss compensation based upon her ability to earn wages in the constructed position of information clerk, as it determined that the position of information clerk was medically and vocationally suitable for her and represented her wage-earning capacity. It advised her that she had the capacity to earn wages as an information clerk, at a rate of \$440.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.² OWCP calculated that appellant's compensation should be adjusted to \$2,019.00 per four-week period using the *Shadrick*³ formula. It indicated that the salary for her job when injured was \$1,069.75 per week and that the current salary for her job and step as of April 7, 2015 was \$1,178.50 per week and that she was currently capable of earning \$440.00 per week, as an information clerk. OWCP therefore determined that appellant had 37 percent wage-earning capacity. It found that her current adjusted compensation rate per four-week period was \$2,019.00. OWCP found that the case had been referred to a vocational rehabilitation counselor who determined that the information clerk position was medically and vocationally suitable for appellant, given her work restrictions, and was reasonably available in her commuting area. Appellant was afforded 30 days in which to submit any contrary evidence. She did not respond within the time she was afforded.

In a decision dated May 14, 2015, OWCP reduced appellant's benefits effective May 31, 2015 to reflect that she was capable of performing the duties of an information clerk earning \$440.00 per week.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ 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.⁵

² *Id.* at § 8113.

³ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁴ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁵ 20 C.F.R. §§ 10.402, 10.403.

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 the employee's wage-earning capacity or if the employee has no actual wages, 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 and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁶

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's DOT or otherwise available in the open market, that fit the employee's capabilities with regard to her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the 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 and codified by regulations at 20 C.F.R. § 10.403⁸ should be applied. Subsection (d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP by the current pay rate for the job held at the time of the injury.⁹

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.¹⁰ 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. 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.¹¹

ANALYSIS

OWCP accepted that appellant sustained right shoulder and upper arm strains and right complete rotator cuff rupture while in the performance of duty. It authorized right rotator cuff

⁶ 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403.

⁹ *Id.* at § 10.403(d).

¹⁰ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹¹ *Id.*

repair and partial collar bone removal surgery, right shoulder arthroscopy with mini-open rotator cuff repair, and right shoulder arthroscopic rotator cuff repair.

The medical evidence of record establishes that appellant was able to return to work with restrictions. A March 11, 2014 FCE indicated that appellant was capable of working eight hours a day in a sedentary position with restrictions including no lifting more than 10 pounds to waist level, no overhead reaching with her right arm and shoulder, and occasional forward reaching with her right arm. In his June 2, 2014 report, Dr. Hsu, appellant's treating physician, opined that while appellant could not perform her regular work duties she could work an eight-hour day with restrictions. He determined that she could lift up to waist level within the 8- to 10-pound range, with restrictions of no overhead reaching with the right arm, restricted reaching above the right shoulder, no continuous reaching with the right arm, and weight restrictions on pulling and pushing activities.

On August 28, 2014 appellant met with the vocational rehabilitation counselor who identified two jobs that she could perform that were reasonably available. One of these positions was information clerk. The Board finds that the selected position of information clerk was medically and vocationally suitable.

The selected information clerk position was within the restrictions provided by Dr. Hsu. The position as described by the DOT job classification was sedentary in nature, required occasional lifting up to 10 pounds, and only occasional reaching. The described duties involved answering questions and providing information to individuals entering the employing establishment. The vocational rehabilitation counselor properly determined that the position was medically suitable for appellant.

The Board finds that the position of information clerk was also vocationally suitable for appellant. The vocational rehabilitation counselor determined that the duties of the information clerk position were reflective of appellant's previous work experience and educational history and qualified her for the position. OWCP also advised that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.

As OWCP considered the proper factors such as appellant's physical condition, availability of employment, usual employment, age, and employment qualifications, the Board finds that it properly determined that the selected position of information clerk represented her wage-earning capacity.¹²

Finally, 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 appellant's compensation should be adjusted to \$2,019.00 every four weeks using the *Shadrick* formula. OWCP indicated that her weekly rate for the job she held when injured was \$1,069.75 and that the weekly pay rate for her job and step as of April 7, 2015 was \$1,178.50. It noted that,

¹² See *S.J.*, Docket No. 09-1794 (issued September 20, 2010); *Loni L. Cleveland*, 52 ECAB 171 (2000).

¹³ *Supra* note 7.

as she was capable of earning \$440.00 per week, she had 37 percent wage-earning capacity with an adjusted compensation rate of \$2,019.00 every four weeks.

OWCP properly found that appellant was no longer totally disabled as a result of her accepted conditions and it followed established procedures for determining her employment related loss of wage-earning capacity.

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 reduced appellant's compensation benefits effective May 31, 2015 based on her capacity to earn wages in the constructed position of information clerk.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2015 is affirmed.

Issued: December 2, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board