

FACTUAL HISTORY

On May 16, 2008 appellant, then a 56-year-old transportation screening supervisor, filed a traumatic injury claim asserting that standing on a hard cement floor on September 7, 2008 caused posterior tibial tendon dysfunction of the left ankle. She stopped work on April 2, 2008 and returned on April 9, 2008. OWCP accepted left tibial tendinitis. In a July 3, 2008 decision, it denied appellant's claim for continuation of pay, finding that her accepted condition was an occupational disease rather than a traumatic injury. Appellant missed intermittent periods from work and was paid appropriate compensation.² On March 8, 2010 Dr. Keven A. Kirby, a podiatrist, excised a soft tissue mass on the left foot. Appellant returned to modified duty on April 7, 2010.

In reports dated February 13 and 21, 2012, Dr. Kirby diagnosed chronic peroneal spasm and sinus tarsi syndrome of the left ankle. He prescribed foot braces and restricted appellant's walking and standing to three hours with lifting restricted to 25 pounds. On March 19, 2012 appellant accepted a modified position with a single job function, baggage screening duties only. On July 31, 2012 the employing establishment terminated appellant's modified position, effective that day. On August 28, 2012 appellant was granted a schedule award for a six percent impairment of the left lower extremity. She was placed on the periodic compensation rolls beginning August 1, 2012. In reports dated October 12, 2012, Dr. Kirby advised that appellant was permanent and stationary and that she wore a brace while walking. He indicated that her left ankle was still tender with mild spasm and that supination was painful. Dr. Kirby reiterated his diagnosis of chronic peroneal spasm and sinus tarsi syndrome of the left ankle.

In February 2013 appellant was referred for vocational rehabilitation services. She had bachelor and master degrees, had vocational testing on March 11, 2013 that demonstrated that she had average reading skills and basic math skills. In April 2013 Michael Frank, a vocational rehabilitation counselor, identified the positions of customer service complaint clerk (DOT No. 379.367-010) and surveillance system monitor (DOT No. 241.367-014), as within appellant's physical limitations. He advised that the positions were reasonably available in the local labor market at entry-level weekly wages of \$430.00 and \$479.60 respectively. On April 15, 2013 appellant completed a one-day training class on the power to arrest and weapons of mass destruction. A placement conference was held on May 15, 2013 with appellant, the vocational rehabilitation counselor, and an OWCP claims examiner participating. The memorandum of conference indicated that at the 90-day placement phase, appellant's compensation could be reduced, whether or not she had found a job. In reports dated June 7, July 3 and 13, 2013, the rehabilitation counselor indicated that appellant continued to participate in placement activities. On July 14, 2013 the rehabilitation counselor reported that appellant had reached the end of placement services, was not desirous of an extension, and wished to retire.

In a July 26, 2013 report, Dr. Kirby noted that appellant was permanent and stationary and was retired. He reiterated his diagnosis and advised that appellant was permanently disabled from her previous employment but was not disabled from all work and had permanent

² In an April 1, 2010 decision, OWCP found that an overpayment of compensation in the amount of \$547.73 had been created because appellant continued to receive compensation after her return to work.

restrictions of no running or jumping, no more than 45 minutes of continuous walking or standing at any one time followed by at least a 15-minute sitting break, and that she must wear a left ankle brace while at work.

Rehabilitation services were closed on July 31, 2013. The closure memorandum indicated that the entry-level weekly pay rate for the surveillance system monitor position, based on actual employer quotes, ranged from \$394.00 to \$504.00 weekly. By letter dated August 22, 2013, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a surveillance system monitor. It indicated that, based on the opinion of Dr. Kirby, she could return to full-time work, and that the surveillance system monitor position was within the permanent restrictions identified by him. OWCP further noted that the labor market survey prepared by the rehabilitation counselor indicated that the position was reasonably available in the local labor market and that the entry-level wage was \$394.00. The August 22, 2013 notice indicated that the claim was accepted for tibialis tendinitis, left; sprain of foot, tarsometatarsal, left; plantar fibromatosis, left; other enthesopathy of ankle and tarsus, left; neoplasm of uncertain behavior, connective and other soft tissue, left. The duties of the surveillance system monitor position were described in the Department of Labor's *Dictionary of Occupational Titles* as: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action: Observes television screens that transmit in sequence views of transportation facility sites; pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity; adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions. It has a sedentary strength level and does not require frequent reaching, handling, or fingering.

On September 11, 2013 appellant elected FECA benefits. She submitted an August 28, 2013 report in which Dr. Kirby reiterated appellant's diagnosis and conclusions.

By decision dated September 26, 2013, OWCP reduced appellant's compensation benefits based on her capacity to earn wages as a surveillance system monitor. By utilizing the *Shadrick* formula OWCP found that appellant had a 64 percent loss of wage-earning capacity. Appellant, through her attorney, timely requested a hearing, and submitted September 25 and October 23, 2013 reports in which Dr. Kirby again indicated that appellant was permanent and stationary. He provided physical examination findings and reiterated his diagnosis of chronic peroneal spasm and sinus tarsi syndrome of the left ankle.

At the hearing, held on March 18, 2014, appellant testified that she was not working. She indicated that she had applied for two surveillance system monitor jobs but the positions were not sedentary and not within her restrictions because if, while monitoring, she witnessed anything, she would be required to get up and physically respond to the event. Appellant's attorney maintained that the Department of Labor's *Dictionary of Occupational Titles* was antiquated and no longer valid.

In a July 3, 2014 decision, an OWCP hearing representative affirmed the September 26, 2013 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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.⁴

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.⁵

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 upon which OWCP relies must provide a detailed description of the condition.⁶ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁷

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.⁸ Finally, application of the principles set forth in *Albert C. Shadrick*,⁹ as codified in

³ *James M. Frasher*, 53 ECAB 794 (2002).

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

⁵ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

⁶ *William H. Woods*, 51 ECAB 619 (2000).

⁷ *John D. Jackson*, *supra* note 4.

⁸ *Supra* note 3.

⁹ 5 ECAB 376 (1953).

section 10.403 of OWCP regulations,¹⁰ will result in the percentage of the employee's loss of wage-earning capacity.¹¹

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.¹²

ANALYSIS

The Board finds that OWCP met its burden of proof in reducing appellant's compensation on September 26, 2013 based on her capacity to earn wages in the constructed position of surveillance system monitor.

The medical evidence as characterized by reports from Dr. Kirby, appellant's attending podiatrist, established that she was no longer disabled from all work. OWCP then properly referred her for vocational rehabilitation counseling in February 2013.¹³ In April 2013 the vocational rehabilitation counselor, identified two positions that as within appellant's work limitations. OWCP determined on September 26, 2013 that she had the capacity to earn wages as a surveillance system monitor, based on the opinion of Dr. Kirby of appellant's physical capabilities.

In numerous reports beginning in February 2012, Dr. Kirby diagnosed chronic peroneal spasm and sinus tarsi syndrome of the left ankle. He prescribed foot braces and restricted appellant's walking and standing to three hours and lifting to 25 pounds. The surveillance system monitor position was classified as within the sedentary strength category.¹⁴ The physical demands of the surveillance system monitor position fell within the restrictions provided by Dr. Kirby. The vocational rehabilitation counselor advised that the position was reasonably available in the local labor market with an entry-level weekly wage of \$430.00, and actual reported weekly entry-level wages ranged from \$394.00 to \$504.00 weekly.

The Board finds that OWCP considered the appropriate factors in determining that the position of surveillance system monitor represented her wage-earning capacity.¹⁵ These factors

¹⁰ 20 C.F.R. § 10.403.

¹¹ *Supra* note 3.

¹² *John D. Jackson, supra* note 4.

¹³ 5 U.S.C. § 8104(a); *see Ruth E. Leavy*, 55 ECAB 294 (2004).

¹⁴ *Supra* note 3. The Department of Labor's *Dictionary of Occupational Titles* indicates that sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

¹⁵ *Supra* note 3.

include the availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications. The evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the position of surveillance system monitor reflected appellant's wage-earning capacity and, using the *Shadrick* formula,¹⁶ properly reduced her compensation on September 26, 2013.¹⁷

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 to justify reduction of appellant's wage-loss compensation on the grounds that she had the capacity to earn wages in the constructed position of surveillance system monitor.

ORDER

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

Issued: February 2, 2015
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

¹⁶ *Supra* note 10.

¹⁷ *James Smith*, 53 ECAB 188 (2001).