

her federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome and a bilateral lesion of the ulnar nerve. On May 15, 2009 it authorized a left cubital tunnel decompression. OWCP paid appellant compensation for total disability beginning May 15, 2009.

Appellant had a previously accepted claim for sustained left carpal tunnel syndrome and cervical strain under file number xxxxxx646. In a decision dated November 29, 1994, OWCP found that she had no residuals of her work injury under file number xxxxxx646. Appellant also had an accepted claim for bilateral carpal tunnel syndrome in file number xxxxxx324, which was in a closed status beginning December 2000.

To determine appellant's work capacity, on November 17, 2009 OWCP referred appellant to Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 4, 2009, Dr. Boeck diagnosed postoperative bilateral carpal tunnel syndrome and postoperative left elbow cubital tunnel syndrome. He found that appellant had continued residuals of the work injury. Dr. Boeck also noted that she had preexisting neck, low back, and left shoulder complaints. He opined that appellant could work for eight hours per day performing repetitive wrist and elbow movements for two hours per day and pushing, pulling, and lifting up to 20 pounds for two hours per day.²

In a report dated January 19, 2010, Dr. Jacob E. Tauber, an attending Board-certified orthopedic surgeon, reviewed Dr. Boeck's opinion and found "no basis to disagree with his findings on examination. He further found that Dr. Boeck provided reasonable work restrictions.

On May 19, 2010 OWCP referred appellant for vocational rehabilitation. In a report dated August 10, 2010, the rehabilitation counselor noted that appellant had already attended junior college. On October 14, 2010 OWCP approved vocational training for appellant with the goal of gaining employment as an information clerk or customer complaint clerk. An OWCP rehabilitation specialist noted, on April 5, 2011, that appellant's junior college had closed for the summer due to budget cuts. On April 19, 2011 OWCP approved a training program for appellant at the Larson Training Center from April 25 to July 14, 2011 in a general office clerk computer business skills program.

By letter dated May 16, 2011, OWCP referred appellant to Dr. Richard P. Pollis, a Board-certified orthopedic surgeon, to determine whether appellant could perform the duties of an information clerk. In a report dated June 3, 2011, Dr. Pollis found that appellant had a positive left Tinel's sign and Phalen's test. He advised that she had residuals of her cubital tunnel syndrome. Dr. Pollis opined that appellant could work as an information clerk. In a work restriction evaluation, he found that she could perform repetitive wrist and elbow movements for six hours per day and push, pull, and lift up to 20 pounds for four hours per day.

² In a supplemental report dated March 9, 2010, Dr. Boeck advised that appellant had no restrictions on lifting.

In a progress report dated August 9, 2011, Dr. Tauber related that electrodiagnostic tests were negative but that a magnetic resonance imaging (MRI) scan study of the cervical spine showed “substantial pathology.”³

In a job classification from the Department of Labor’s *Dictionary of Occupational Titles* dated March 2, 2012, the rehabilitation counselor advised that the constructed position of information clerk was sedentary and required occasional reaching, handling, and fingering. He found that appellant met the specific vocational preparation of 4 to 6 months based on her work as a mail processing clerk, her successful completion of a 16-week program in computer-based office skills, and her prior work as a general office clerk. The rehabilitation counselor advised that there were sufficient openings in appellant’s geographical area at a median wage of \$13.02 per hour.

In a closure memorandum dated March 8, 2012, an OWCP rehabilitation specialist determined that the position of information clerk was within appellant’s work restrictions, that she had the vocational capacity to perform the duties, and that the position was reasonable available in her commuting area at a salary between \$400.00 and \$600.00 a week.

On March 20, 2013 OWCP notified appellant of its proposed reduction of her compensation based on its finding that she had the capacity to work as an information clerk earning \$520.00 per week.

In a report dated February 26, 2013, received by OWCP on March 27, 2013, Dr. Tauber found that appellant had continued symptoms of her carpal and cubital tunnel syndromes. He stated, “[Appellant] is not currently working, but she could work at an occupation that did not require repetitive or strenuous duties with her upper extremities.”

A February 28, 2013 nerve conduction study (NCS) showed mild compression of the ulnar nerve on the left. An electromyogram (EMG) was normal.

On April 2, 2013 Dr. Tauber related that another physician recommended that appellant undergo surgery on her cervical spine. He indicated that he had reviewed the position description for the job of information clerk. Dr. Tauber stated, “Even though the job is sedentary, an individual with cervical issues will have difficulty carrying out such activities. It is my opinion that [she] should not be working as an information clerk on a full-time unmodified basis, due to the various head positioning that would be required that would aggravate her cervical issues.” He noted that appellant continued to have symptoms of cubital tunnel syndrome. Dr. Tauber opined, “It would be my recommendation that [she] be maintained on temporary total disability. [Appellant] should also not be carrying out repetitive reaching, handling, and fingering, which would include up to 2½ hours of typing or repetitive use of her hands, due to her cubital tunnel syndrome.”

By letter dated April 17, 2013, appellant, through her attorney, challenged the proposed reduction of compensation based on the April 2, 2013 report of Dr. Tauber.

³ The record contains progress reports from Dr. Tauber dated 2007 through 2014.

By decision dated August 1, 2013, OWCP reduced appellant's compensation effective July 28, 2013 based on its determination that she could earn wages in the selected position of information clerk. It found that the opinions of Dr. Boeck and Dr. Pollis represented the weight of the evidence and established that she had the physical capacity to perform the identified position. OWCP applied the formula set forth in *Albert C. Shadrick*⁴ to determine her wage-earning capacity.

On April 7, 2014 appellant, through her attorney, requested reconsideration. Counsel argued that OWCP had not considered her preexisting cervical condition in determining her wage-earning capacity. He also noted that neither Dr. Boeck nor Dr. Pollis addressed appellant's cervical condition. Counsel maintained that O*Net should apply rather than the outdated Department of Labor's *Dictionary of Occupational Titles* and that O*Net provides a job description for information clerk that requires repetitive work activities. He also noted that as provided by the rehabilitation counselor, the job requires occasional fingering up to one-third of the time. Counsel maintained that a conflict in medical opinion exists and that the opinions of Dr. Boeck and Dr. Pollis were stale.

Appellant submitted a description of the position of receptionist and information clerk on O*Net and a July 23, 1992 medical report from Dr. Patrick S. Zaccalini, a Board-certified orthopedic surgeon, who diagnosed bulging discs at C3-4 and C4-5 by MRI scan study and left carpal tunnel syndrome.

By decision dated June 26, 2014, OWCP denied modification of its June 1, 2013 decision.

On appeal appellant's attorney argues that OWCP relied on stale medical evidence from 2009 and 2011 in reaching its August 1, 2013 loss of wage-earning capacity determination. He notes that the burden was on OWCP to produce a medical report with a description of her current condition. Counsel maintains that the subsequently obtained report from Dr. Edward O. Leventen, a Board-certified orthopedic surgeon, would not retroactively justify the reduction of compensation. He further argues that a conflict existed between Dr. Tauber and OWCP referral physicians. Counsel notes that the position of information clerk, which requires fingering, reaching, and handling for one third of the time exceeded Dr. Tauber's restrictions on repetitive hand motion for 2.5 hours per day. He also contends that OWCP did not consider appellant's preexisting cervical condition and erred in relying on the Department of Labor's *Dictionary of Occupational Titles* instead of O*Net. Counsel finally argues that OWCP should have used entry level pay rather than the median salary for information clerks in determining her wage-earning capacity.

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 justifying a subsequent reduction of benefits.⁵ Under section 8115(a), wage-earning capacity is determined by the actual

⁴ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

⁵ *T.O.*, 58 ECAB 377 (2007).

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 his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect 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 *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.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 employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*⁸ will result in the percentage of the employee's loss of wage-earning capacity.

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and a bilateral ulnar nerve lesion causally related to factors of her federal employment. She had a previously accepted claim for cervical strain and left carpal tunnel syndrome under file number xxxxxx646 and a closed claim for bilateral carpal tunnel syndrome under file number xxxxxx324. Appellant received compensation for total disability beginning May 15, 2009. OWCP reduced her compensation effective July 28, 2013 based on its determination that the position of information clerk represented her wage-earning capacity. It found that the opinions of Dr. Boeck and Dr. Pollis represented the weight of the evidence and established that appellant had the capacity to work as an information clerk.

In order to be an appropriate position for a wage-earning capacity determination under section 8115(a), the position must be medically and vocationally suitable.¹⁰ The Board finds, however, that OWCP has not met its burden of proof to establish that the position of information

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁷ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

⁸ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

⁹ 5 U.S.C. § 8123(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816 (June 2013).

clerk was medically suitable due to a conflict in medical evidence between Dr. Tauber, appellant's attending physician, and Dr. Pollis, an OWCP referral physician, regarding the extent of her work limitations.

According to the Department of Labor's *Dictionary of Occupational Titles*, the position of information clerk is sedentary and requires occasional lifting up to 10 pounds and occasional reaching, handling, and fingering. Initially, the Board notes that OWCP relied in part on the opinion of Dr. Boeck, an OWCP referral physician, in finding the position within appellant's limitations. In a report dated December 4, 2009, Dr. Boeck provided work restrictions of performing repetitive wrist and elbow movements for two hours per day and pushing, pulling, and lifting up to 20 pounds for two hours per day.¹¹ The position of information clerk, however, requires occasional fingering and handling, which is defined by the Department of Labor's *Dictionary of Occupational Titles* as up to one-third of the time, or 2.66 hours in an 8-hour day. Consequently, as Dr. Boeck found that appellant could perform repetitive wrist and elbow motion for only two hours per day, his opinion does not support that she could perform the position of information clerk

In a report dated June 3, 2011, Dr. Pollis found that appellant could work as an information clerk performing repetitive wrist and elbow movements for six hours a day and lifting, pushing, and pulling up to 20 pounds. In a report dated April 2, 2013, Dr. Tauber advised that she could only perform repetitive reaching, handing, and fingering for 2.5 hours per day, and thus the selected position of information clerk is also not within his work restrictions.¹² While the position of information clerk is within the work restrictions set forth by Dr. Pollis, it is not within the work restrictions of Dr. Tauber.¹³ Due to this unresolved conflict of medical opinion, OWCP did not meet its burden of proof.¹⁴

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation based on its finding that she had the capacity to earn wages in the selected position of information clerk.

¹¹ On August 9, 2011 Dr. Tauber, appellant's attending physician, concurred with the finding of Dr. Boeck.

¹² Dr. Tauber also found that another physician had recommended cervical surgery and that a person with a cervical condition might have difficulty working as an information clerk. The Board notes that preexisting conditions are considered in determining the medical suitability of a position. *See supra* note 10 at Chapter 2.816.4(b) (June 2013).

¹³ FECA provides that, if there is a disagreement between an OWCP-designated examining physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309 (1994).

¹⁴ Subsequent to OWCP's August 1, 2013 loss of wage-earning capacity determination, it referred appellant to Dr. Leventen for another referral examination. Dr. Leventen determined that she could perform repetitive elbow and wrist movements for two to four hours per day and lift up to 10 pounds for one to two hours per day. His opinion is insufficient to resolve the conflict in medical opinion and, additionally, was not part of the record at the time OWCP issued its initial wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 8, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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