

where she was pinned by a heavy equipment cage. Appellant returned to limited-duty work. Her casual term ended on January 13, 2012. On March 5, 2012 OWCP accepted the claim for contusion of the right elbow and shoulder. On July 31, 2012 it expanded the claim to include cervical strain, thoracic strain, and lumbar strain. On September 5, 2012 appellant underwent a left L5-S1 laminectomy/discectomy. On November 9, 2012 she began receiving total disability compensation on the periodic rolls.

On December 14, 2012 OWCP referred appellant for a second opinion to Dr. Stanley W. Collis, a Board-certified orthopedic surgeon, to determine the extent of work-related conditions and her work ability.

In a February 5, 2013 report, Dr. Collis described appellant's history and provided results on examination. Appellant complained of pain in the lower back and right shoulder. She did not complain of neck pain but Dr. Collis obtained neck x-rays because he noticed that the original x-rays following the injury of the neck indicated a reversal of the cervical curvature. Dr. Collis explained that at this time there is no reversal and a minimal decrease of the cervical curvature only. He diagnosed postlaminectomy and disc removal of L5-S1 on the left and minimal traumatic synovitis of the right shoulder. Dr. Collis opined that the cervical strain had resolved. Appellant did not complain of any problem in the thoracic area and he concluded that the thoracic strain had resolved. Dr. Collis further determined that the right elbow contusion had completely resolved as she had no complaints in that area. He explained that appellant continued to have some right shoulder discomfort due to the contusion. Dr. Collis opined that her lumbar strain and herniated disc had resolved but that she still had some back problems due to the surgery for the disc protrusion of L5-S1. He opined that appellant continued with some residual pain in the back off and on due to the surgery and the herniation. Dr. Collis determined that she had not reached maximum medical improvement and that, generally, she would need about 10 months after surgery to reach maximum medical improvement. He explained that appellant was not able to do all the activities that she was doing prior to the date of injury but noted that she was not totally disabled.

Dr. Collis advised that appellant could work with restrictions with regard to her back. He provided restrictions to include avoiding excessive bending and lifting over 20 pounds until about May 15, 2013. Dr. Collis opined that at that point, appellant could return to her regular work. He also indicated that she would have difficulty performing activities that required lifting or working above right shoulder level with the right arm. Dr. Collis noted that appellant was progressing satisfactorily with her back. He recommended that she keep using her back, but abstain from excessive bending and lifting over 20 pounds until about May 2013. Dr. Collis also recommended that appellant try to avoid working or lifting above shoulder level. He explained that, if she had to do that, she "ought to use a ladder or some platform." Dr. Collis completed a work capacity form.

In a February 20, 2013 letter, OWCP requested that appellant's treating physician, Dr. William Ante, a Board-certified internist, review the report of Dr. Collis and comment on whether he concurred with his findings related to ongoing residuals and work restrictions.

In a February 28, 2013 report, Dr. Ante advised that appellant had not reached maximum medical improvement. He concurred with Dr. Collis with regard to appellant not being totally

disabled for work and recommended restrictions of no repetitive bending, no lifting over 20 pounds, and no overhead work. Dr. Ante noted that he did not necessarily believe the time frame for maximum medical improvement would be May. He continued to treat appellant and recommended physical therapy and restrictions.

OWCP referred the claim to vocational rehabilitation services. On April 2, 2013 the vocational rehabilitation counselor noted meeting with appellant and discussed her experience and education, which included a high school diploma and some college. Appellant was one year away from achieving a medical assistant certificate, and being one semester away from a two-year criminal justice degree. Additionally, the vocational rehabilitation counselor indicated that she had previously worked as a night auditor and desk clerk at a hotel/motel. He determined that appellant should adopt a goal of employment as a night auditor and a desk clerk for hotel/motels.

The night auditor position Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 210.382-054, was classified as a sedentary light position. The duties included verifying and balancing entries and records of financial transactions reported by various hotel departments during day, using basic math skills, such as adding, bookkeeping, and calculating machines. It was noted that appellant might perform the duties of a hotel clerk. DOT No. 238.367-038 in smaller establishments. The duties of that position included compiling and maintaining records, recording data, performing performance reviews or evaluations, processing employment applications, assisting in other employment activities, preparing reports using typewriter or computer, and administer and score aptitude, personality, and interest tests. The physical requirements were described as light and included lifting up to 20 pounds, rare stooping, occasional balancing, crouching, reaching, frequent handling, occasional fingering and feeling, and frequent talking and hearing. No climbing, kneeling, or crawling was required.

On May 6, 2013 the vocational rehabilitation counselor found that appellant met the specific vocational preparation for the night clerk/auditor position. He listed the average weekly earnings of a night clerk/auditor as \$400.00 a week based wage data from the state of Indiana, determined that appellant was educationally qualified for the job, and found that the position was available in sufficient numbers on a full-time basis in appellant's commuting area based on her placement service, labor market research, and the state employment service. In a June 27, 2013 status report, the vocational rehabilitation counselor noted that the vocational rehabilitation plan was approved and the job search would proceed.

In a letter dated June 27, 2013, OWCP advised appellant that the vocational rehabilitation counselor had found her able to work as a night auditor. Appellant was informed that the selected position was suitable to her restrictions and that she would receive 90 days of placement assistance to help her locate such a position. OWCP noted that based on the vocational rehabilitation counselor's evaluation and a survey of the local labor market, appellant had or would have had a wage-earning capacity of up to \$400.00 a week. Appellant was notified that, at the end of the rehabilitation program, her compensation would likely be reduced, whether she was actually employed or not.

In a November 21, 2013 report, Dr. Ante noted that an October 29, 2013 functional capacity evaluation (FCE) supported appellant's ability to perform medium physical demand work including lifting/pushing/pulling up to 30 pounds, occasional walking, stairs, balancing,

bending, stooping, crouching, squatting, twisting, and work above the shoulder and at level. He also indicated that appellant was capable of frequent sitting, standing, and finger grasping along with prolonged neck position, fine finger manipulation, light grasping, pinching, and reaching forward. Dr. Ante advised that she reached maximum medical improvement.

On December 11, 2013 the vocational rehabilitation counselor concluded placement services on behalf of appellant. It was noted that appellant had been provided with 90 days, plus an additional 70 plus days of placement assistance, but did not obtain employment. The vocational rehabilitation noted that the position of night auditor at the rate of \$400 a week was performed in sufficient numbers within the commuting area to make it reasonably available.

In a December 17, 2013 telephone call memorandum, OWCP confirmed that the current hourly rate for a casual mail handler at level 7 was \$12.00 a hour and had not changed since the date of injury.

On January 21, 2014 OWCP proposed to reduce appellant's wage-loss compensation because the medical and factual evidence of record established that she had the capacity to earn the wages of a night auditor, DOT No. 210.382-054. The physical requirements of the night auditor were described as light work with lifting up to 20 pounds, occasional balancing, crouching, reaching, fingering, and feeling with frequent handling and hearing/seeing. It was noted that the physical requirements did not exceed the work restrictions provided by Dr. Collis in his February 5, 2013 report, and Dr. Ante in his November 21, 2013 report. OWCP noted that appellant's wage-earning capacity was less than the current rate of pay of the job she held when injured and they proposed to reduce her wage loss to \$386.00 every four weeks. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

In a memorandum of telephone call dated January 27, 2014, appellant discussed the proposed reductions and related that she had never been informed that her compensation would be reduced. However, OWCP explained that the June 2013 letter clearly explained the process. Appellant was given an additional 30 days to submit any arguments.

In a letter dated February 19, 2014, appellant disagreed with OWCP's proposal to reduce her compensation. She indicated that despite six months of vocational rehabilitation, she was unable to find a job. Appellant stated that the proposed job of night auditor was not available in her area. She indicated that her vocational rehabilitation counselor's business address was an empty cornfield in Illinois and they were not even looking at the night auditor position during her vocational rehabilitation. Appellant argued that the night auditor duties were outside her restrictions. She noted that she previously worked a night audit or position at a hotel and she was required to help guests with their luggage and to deliver packages to guest rooms. Appellant also questioned the wage of a night auditor.

In a March 5, 2014 decision, OWCP reduced appellant's compensation benefits effective that date, based upon her ability to earn wages in the constructed position of night auditor. Using the formula in *Albert C. Shadrick*,² it noted that appellant's salary on the date her disability

² 5 ECAB 376 (1953).

began, on December 19, 2011, was \$527.55 a week and the current adjusted pay rate for her job on the date of injury was the same as of January 15, 2014. Appellant was found currently capable of earning \$400.00 a week, the pay rate of a night auditor.³ OWCP determined that she had a 76 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$400.85 a week. This yielded a new compensation rate equal to \$392.00 every four weeks.

By letter dated May 12, 2014, counsel requested reconsideration. He argued that the Department of Labor's *Dictionary of Occupational Titles* was outdated, no longer used, and had not been updated for many years. Counsel argued that the failure to update the Department of Labor's *Dictionary of Occupational Titles* was being used as a basis to deny claimants their basic rights and that reliance upon a defunct and outdated publication meant the injured workers were having their compensation payments reduced based on a fiction. Additionally, he argued that the Department of Labor's *Dictionary of Occupational Titles* was no longer relevant and had been replaced by the Occupational Information Network (O*Net). Counsel argued that the decision to reduce her compensation should be vacated. OWCP also received a copy of the October 29, 2013 FCE and physical therapy notes.

By decision dated August 6, 2014, OWCP denied modification of the March 5, 2014 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴

Section 8115(a) of FECA,⁵ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶ 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 regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in his disabled condition.⁷ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

³ OWCP also noted that appellant had prior experience as a front desk clerk and night auditor in the hotel industry.

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ 5 U.S.C. § 8115.

⁶ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁷ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.⁸ 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.⁹ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.¹⁰

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 or 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 labor market, that fits that employee's capabilities with regard to physical limitation, 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.¹¹ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.¹²

ANALYSIS

OWCP accepted appellant's claim for contusion of the right elbow and shoulder. On July 31, 2012 it expanded the claim to include cervical strain, thoracic strain, and lumbar strain. Appellant received compensation and medical benefits. On September 5, 2012 she underwent lumbar surgery consisting of a left L5-S1 laminectomy/discectomy, and she was placed on the periodic rolls on November 9, 2012.

On February 5, 2013 Dr. Collis, the second opinion physician, found that appellant was no longer totally disabled and could work full-time subject to work restrictions. He provided restrictions to include avoiding excessive bending of her back and no lifting over 20 pounds until about May 15, 2013. On February 28, 2013 Dr. Ante concurred with Dr. Collis and recommended similar restrictions of no repetitive bending, no lifting over 20 pounds, and no overhead work.

The vocational rehabilitation counselor determined that appellant was able to perform the position of a night auditor. He noted her education, advised that she had prior experience as a night auditor and hotel clerk, and determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The position was sedentary/light. The physical requirements were described as light and included lifting up to 20 pounds, rare stooping, occasional balancing, crouching, reaching, frequent handling, occasional fingering and feeling, and frequent talking and hearing. No climbing, kneeling, or crawling was required. The Board notes that both the second opinion physician, Dr. Collis, and

⁸ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁹ *Id.*

¹⁰ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹¹ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹² *Id.* See *Shadrick*, 5 ECAB 376 (1953).

the treating physician, Dr. Ante, confirmed that appellant could work in the light/sedentary physical demand category. The Board finds that OWCP properly determined this position met appellant's physical restrictions

The vocational rehabilitation counselor noted the duties of a night auditor and explained that appellant had a high school education and some college coursework and prior experience in this type of position. The Board finds that OWCP properly found that appellant was vocationally capable of performing the night auditor position and that the position was reasonably available in her commuting area at an average wage of \$400.00 a week. The Board finds that it considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of night auditor represented her wage-earning capacity.¹³ Therefore, OWCP properly reduced her compensation effective March 5, 2014 based on her capacity to earn wages as a night auditor.

Appellant argued in a letter dated February 19, 2014, that, despite six months of vocational rehabilitation, she was unable to find a job. She indicated that the proposed jobs of night auditor were not available in her area. Appellant indicated that her vocational rehabilitation counselor's business address was an empty cornfield in Illinois and they were not even looking at the night auditor positions during her vocational rehabilitation. She argued that night auditor duties were outside her restrictions. Appellant noted that she had previously worked a night auditor position at a hotel and was required to carry luggage and packages to guest rooms. She also questioned the wage of a night auditor. Appellant requested that the proposed reduction of compensation be vacated and that she be approved for appropriate compensation. The Board, as noted above, finds that the night auditor position comported with her restrictions. Regarding her arguments about availability of jobs, the counselor is an expert in the field of vocational rehabilitation; OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.¹⁴ The fact that appellant was unable to secure a position does not mean that the position is not reasonably available to him in the open labor market.¹⁵

Counsel argued on reconsideration and on appeal that the Department of Labor's *Dictionary of Occupational Titles* was obsolete and no longer described positions performed in the current labor market. However, despite the criticism of the Department of Labor's *Dictionary of Occupational Titles*, the dispositive question is whether the selected position met appellant's requirements and was reasonable available to appellant.¹⁶ The position met appellant's physical limitation and was reasonably available in her commuting area. Counsel has not failed to provide a compelling argument that the night auditor position was not appropriate.

¹³ *James M. Frasher*, 53 ECAB 794 (2002).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6(b) (June 2013). See also *B.H.*, Docket No. 13-583 (issued September 10, 2013).

¹⁵ *Lawrence D. Price*, 54 ECAB 590 (2003).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 14. See *M.B.*, Docket No. 15-76 (issued March 9, 2015).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation, based on its determination that the constructed position of a night auditor represented her wage-earning capacity effective March 5, 2014.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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