



would hire a cashier with his limitations and further contended that all cashier positions in his commuting area were limited to 32 hours a week.

### **FACTUAL HISTORY**

On March 30, 2004 appellant, then a 59-year-old Foreman II, filed a traumatic injury claim alleging that on March 29, 2004 he was a passenger involved in an employment-related automobile accident in which he struck his head and shoulder on the door and window. On May 18, 2004 OWCP accepted appellant's claim for low back strain and right hand strain. It later accepted appellant's claim for aggravation of right shoulder impingement syndrome, aggravation of right acromioclavicular (AC) joint arthritis, aggravation of cervicgia, right cubital tunnel syndrome, and bilateral ulnar mononeuritis.<sup>2</sup> OWCP paid appropriate compensation benefits.

In an August 25, 2008 report, Dr. Randy Webb, appellant's treating family practitioner,<sup>3</sup> noted that appellant has chronic right shoulder pain and dysfunction due to an employment-related injury. He noted that appellant underwent surgery of the right shoulder without significant improvement and was now unable to work due to this injury. Dr. Webb noted that appellant has limited range of motion with pain on abduction, internal and external rotation of the right shoulder, and decreased strength in the right arm. He noted that appellant was tender in the trapezium and supraspinatus muscles around the right scapula. Dr. Webb noted that his work injury effect persists and that his prognosis is poor for recovery. He noted that appellant was unable to use his right arm for his previous occupation. Dr. Webb did not believe that appellant will be able to return to work and did not believe that work hardening would be of benefit, although he did note that retraining for a job not requiring use of his right upper extremity would be acceptable.

On July 28, 2009 OWCP referred appellant to Dr. Aimee V. Hachigian-Gould, a Board-certified orthopedic surgeon, for a second opinion. In an opinion dated September 24, 2009, Dr. Hachigian-Gould listed impressions of status post right subacromial decompression and distal clavicle resection with residual rotator cuff tendinitis, probable right cubital tunnel syndrome with ulnar neuropathy in right upper extremity, rule out diabetic neuropathy, multilevel cervical degenerative disc disease, depression by history, and possible mild adhesive capsulitis right shoulder. She opined that appellant should avoid any work that required the right upper extremity to be in a position above chest level. Dr. Hachigian-Gould noted that appellant should avoid pushing and pulling more than 5 pounds with the right upper extremity and should not do any lifting of more than 5 to 10 pounds with the right upper extremity. She also noted that he should avoid activities that require repetitive gripping with the right upper extremity, along with fingering of small objects such as coins or nails and screws. Dr. Hachigian-Gould also recommended that appellant avoid sitting in a head-forward position for more than 30 minutes at a time without a position change due to strain on the trapezius muscle of the right

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<sup>2</sup> OWCP previously accepted appellant's claim for an April 1, 1992 injury while operating equipment in his capacity as an equipment operator that resulted in right median and ulnar nerve entrapment. OWCP File No. xxxxxx100.

<sup>3</sup> Dr. Webb is not Board-certified.

shoulder. She further indicated that appellant should have a 15-minute break every 2 hours and limit operating a motor vehicle to 30 minutes at a time. On January 6, 2010 Dr. Hachigian-Gould reviewed electromyogram of the bilateral upper extremities and noted that it was an abnormal study consistent with bilateral nonlocalizing ulnar mononeuropathy and additionally mild-to-moderate axonal sensory polyneuropathy. She opined that appellant suffered from a bilateral nonlocalizing ulnar mononeuropathy, which is more likely than not a combination of his April 1, 1992 occupational injury and also the disease of life. Dr. Hachigian-Gould also noted that, given the fact that appellant has been required to perform repetitive motions with the bilateral upper extremities, there may also be an element of cumulative trauma injury in the bilateral upper extremities in addition to his specific occupational injuries. Additionally, she noted that, given the fact that appellant had a polyneuropathy of the bilateral ulnar nerves and the left radial and left median sensory nerves, he in all likelihood has a component of diabetic neuropathy present. She recommended that appellant be evaluated by a neurologist.

In order to resolve the conflict in the medical opinion evidence between Drs. Webb and Hachigian-Gould, on January 19, 2010 OWCP referred appellant to Dr. Catherine Capps, a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 1, 2010 report, Dr. Capps listed the following diagnoses: (1) adult onset diabetes mellitus, with likely concurrent diabetic neuropathy; (2) status post right shoulder decompression and distal clavicle excision, with ongoing painful loss of range of motion and ongoing weakness, cannot rule out subsequent rotator cuff tear versus cuff tendinitis; (3) no evidence of cubital tunnel syndrome or carpal tunnel syndrome on multiple nerve conduction velocity tests; and (4) multilevel degenerative disc disease of the cervical spine, age related. She noted that appellant did not wish to return to work unless he can perform his prior job as foreman, and that he indicated that he was not physically capable of performing that job. Dr. Capps noted that appellant should not perform any above shoulder reaching or lifting with his right upper extremity. She noted that he can lift, push and pull 10 pounds occasionally and 5 pounds frequently with both arms together, but is limited to lifting of 5 pounds below shoulder level with the right upper extremity. Dr. Capps indicated that appellant can work an eight-hour day with these restrictions at a sedentary job.

In reports dated July 20, 2010 and July 22, 2011, Dr. Webb continued to opine that appellant was unable to work due to his employment injury. He noted that appellant has limited range of motion with pain on abduction, internal and external rotation of the right shoulder, and decreased strength in the right arm. Dr. Webb also noted tenderness in lower cervical spine and scalene muscles on the left side as well as decrease grip strength on the right side. He noted that the effects of the employment injury persist unabated. Dr. Webb opined that appellant was unable to use his right arm for his previous occupation. He also noted that appellant had limited range of motion in his neck. Dr. Webb noted that appellant would be unable to use his right upper extremity for any kind of work and that he was on chronic medication and intermittent physical therapy. In the July 22, 2011 report, he opined that appellant was currently unable to return to work part time or limited duty, but that a vocational rehabilitation evaluation would be suitable, with a workplace evaluation by a qualified occupational therapist to assist in determining his work capacity and job elements required.

On August 23, 2011 OWCP referred appellant for vocational rehabilitation services. The vocational rehabilitation counselor found that appellant was able to work as a cashier. He noted

that according to the Department of Labor's *Dictionary of Occupational Titles* (DOT), the duties of a cashier are as follows:

“Receives cash from customer or employees for payment of goods or service and records amount of money received. Operates cash register with peripheral data processing equipment by passing individual price coded items across scanner to record price and display cost of customer purchase, tax, and rebates on monitor screen. Sells candy, gum, cigarettes, and gift certificates, etc.

“Within the occupation of Cashier there are a sub-set of Cashier positions that exist that are Sedentary Positions requiring (occasional lift/carry up to 10 [pounds].)”

The vocational rehabilitation counselor found numerous cashier positions in appellant's commuting area. In an April 30, 2012 report, the vocational counselor indicated that, based on the market contacts he completed for cashiers in the Shelby, Cut Bank, and Browning, Montana area, it was his professional opinion that this occupation is sedentary work requiring occasional lifting/carrying up to 10 pounds. He also listed positions at self-service gas station cashiers and a casino. The vocational rehabilitation counselor opined that appellant's age of 67 years old would not be a barrier in his ability to be employed as a cashier. He further stated that it was his professional opinion that the labor market contacts determined that cashier positions exist, in significant numbers, within the injured employees' commuting area, and that it is reasonable to expect a person with appellant's age, level of education, and permanent residual physical capabilities to have reasonable prospects for employment as a cashier. The vocational rehabilitation counselor indicated that cashier positions were available in part-time and full-time assignments. He noted that appellant had obtained part-time work but had been unable to obtain a full-time position. The vocational rehabilitation counselor opined that appellant's part-time job cannot be accepted as a fair and reasonable representation of his earning capacity. He indicated that appellant's wages as a full-time cashier would be \$355.60 per week, which represented entry level wages.

On August 2, 2012 OWCP proposed reduction of appellant's compensation benefits to reflect appellant's ability to earn entry level wages as a cashier in a sedentary position which required occasional lifting/carrying up to 10 pounds. It determined that the physical requirements of this position did not exceed appellant's accepted work tolerance limitations and that appellant was capable of earning \$355.60 per week as a cashier. OWCP recommended reduction of compensation for the reason that the position of cashier is medically and vocationally suitable for appellant, and fairly and reasonably represented his wage-earning capacity. Appellant was given 30 days to submit evidence contesting the proposed benefits reduction.

In a response dated August 10, 2012, appellant contended that cashiers in his area only hire for a 32-hour week or less, that the vocational rehabilitation counselor based his wage calculations on larger cities and not where appellant lives where they pay minimum wage, that cashiers in his area have to stock shelves and perform other jobs that require lifting and reaching beyond his medical restrictions, and that he did two work searches without success because he

could not meet the physical requirements of the job. He noted that the employment accident was not his fault as he was a passenger. Appellant noted that he was still in physical therapy.

In an August 23, 2012 letter, appellant further argued that he attempted to find employment as a cashier, but was unsuccessful. He also noted that Dr. Hachigian-Gould indicated that he could not perform activities that require repetitive gripping with the right upper extremities, along with finger small objects, and that this would include coins.

In support of his objections, appellant submitted an August 6, 2012 response wherein Dr. Webb noted that he last examined appellant on July 20, 2010, reiterated that appellant had chronic right shoulder pain and dysfunction due to an employment-related injury, and opined that appellant was unable to work due to that injury. He indicated that a work hardening program would not be helpful.

By decision dated September 19, 2012, OWCP finalized the proposed reduction of benefits effective September 23, 2012.

On September 27, 2012 appellant requested review of the written record by an OWCP hearing representative. By letter dated October 24, 2012, he indicated that he would like to rescind his request for a review of the written record and instead ask for an oral hearing. By letter dated April 7, 2014, appellant indicated that he had not received a reply about his request for a hearing.

Appellant submitted several notes from employers in his area in support of his contention that he was able to work as a cashier in his commuting area. For example, in a June 19, 2014 note, Elaine Peterson, the manager at Lucky Lil's, indicated that the lifting limit for a cashier was about 25 to 30 pounds to be carried over an eight-hour shift. In a November 7, 2012 note, Tanner Drabbels, an assistant store director for Albertsons' in Cut Bank, Montana, indicated that Albertson's requires the cashier position to be able to lift up to 40 pounds, bend and stoop, and stand for long periods of time. Le Coe, a manager of Cut Bank Super 8, indicated that workers are often required to perform substantial lifting tasks. Anita Allderdice, an employee from the Palace Casino, indicated that an employee must be able to lift more than 20 pounds when needed. Roberta Burtness, a manager at Crossroads Inn, stated that employees were often required to perform substantial lifting tasks, and it was not prudent to hire individuals with known limits on lifting capacities. Tammy Salois, a manager for an unnamed place, indicated that the job required a floor runner to be able to lift 30 to 40 pounds. A cage cashier job description for Glacier Peaks Casino indicated that the applicant must be able to lift and carry 50 pounds.

By decision dated August 20, 2014, an OWCP hearing representative affirmed the September 19, 2012 OWCP decision after conducting a review of the written record.

### **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 proving that the disability has ceased or lessened in order to justify termination or modification of compensation

benefits.<sup>4</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on proper factual and medical background.<sup>5</sup>

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 wage-earning capacity or if an employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her 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.<sup>6</sup>

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 relied upon must provide a detailed description of the condition.<sup>7</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>8</sup>

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation specialist will submit a final summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have provided the report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.<sup>9</sup> 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 employee service or other applicable service. Finally, application of the principles set forth in the *Albert C. Shadrick*,<sup>10</sup> decision will result in the percentage of the employee's loss of wage-earning capacity.

In determining an employee's wage-earning capacity based on a position defined 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 postinjury or subsequently acquired conditions. Any incapacity to perform the

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<sup>4</sup> *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

<sup>5</sup> *See Del K. Rykert*, 40 ECAB 284 (1988).

<sup>6</sup> 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

<sup>7</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>8</sup> *John D. Jackson*, 55 ECAB 465 (2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4a. (June 2013).

<sup>10</sup> 5 ECAB 376 (1953).

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.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's monetary compensation based on his capacity to earn wages as an entry level cashier.

The Board finds that the medical evidence establishes that the physical demands of the constructed position were within appellant's medical restrictions. Dr. Webb, appellant's treating physician, noted, in an August 25, 2008 report, that he did not believe that appellant would be able to return to work, but noted that retraining for a job not requiring the use of appellant's right arm would be acceptable. Dr. Hachigian-Gould, the second opinion physician, opined that appellant should avoid lifting more than 5 to 10 pounds with the right arm and should avoid repetitive gripping with that arm. In order to resolve the conflict between the opinions of Dr. Webb and Dr. Hachigian-Gould, OWCP properly referred appellant to Dr. Capps for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

Dr. Capps opined that appellant should not perform any above-shoulder reaching should be limited to lifting, pushing and pulling 10 pounds occasionally and 5 pounds frequently, and was limited to lifting of 5 pounds with his right arm. She indicated that appellant could work eight hours a day with these restrictions. When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>13</sup> As Dr. Capps submitted a well-rationalized medical report, OWCP properly gave special weight to her report.

The vocational rehabilitation counselor indicated that there was a subset of cashier positions that allow the cashier to lift or carry no more than 10 pounds. Appellant was capable of performing these cashier positions. The vocational rehabilitation counselor conducted a search and determined that the selected job was reasonably available for appellant in his commuting area and that the weekly salary for an entry level position was \$355.60 per week.<sup>14</sup>

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<sup>11</sup> *James Henderson, Jr.*, 51 ECAB 619 (2000).

<sup>12</sup> *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

<sup>13</sup> *Y.M.*, Docket Nos. 14-1050 and 14-1193 (issued December 24, 2014).

<sup>14</sup> Rehabilitation counselors are experts in the field of vocational rehabilitation and OWCP may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable. See *W.B.*, Docket No. 14-1452 (issued December 4, 2014); *Lawrence D. Price*, 54 ECAB 590 (2003); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.816.6b (June 2013).

Appellant alleged that he was unable to secure employment as a cashier due to his lifting restriction, and submitted statements in support of his contention that cashier positions in his commuting area were beyond his lifting restrictions. The Board is not persuaded by appellant's submissions of statements from potential employers indicating that positions with their respective companies required lifting greater than 10 pounds. The positions as a hotel clerk are irrelevant because appellant's wage-earning capacity was based on the position of cashier, rather than a hotel clerk. The Board also notes that most of the statements from potential employers are not submitted on company letterhead, and are therefore of questionable validity. Nevertheless, even had appellant been unable to secure these positions, the fact that appellant was unable to obtain a cashier position does not establish that the work is not reasonably available in his commuting area.<sup>15</sup> The Board gives great weight to the vocational specialist's expert opinion.<sup>16</sup> The vocational counselor found that full-time positions were, in fact, available within appellant's commuting area within his restrictions.

The Board finds that OWCP considered the proper factors, such as availability of suitable work and appellant's physical limitations, usual employment and age, and employment qualifications in determining that the position of cashier represented his wage-earning capacity.<sup>17</sup> OWCP used the vocational rehabilitation counselor's information about wage rate for a cashier and established that jobs were reasonably available in the general labor market in the geographic commuting area where the employee lived. The weight of the evidence of record establishes that appellant had the requisite physical ability, skills, and experience to perform the position of cashier and the position was reasonably available within the general labor market of appellant's commuting area. OWCP, therefore, properly determined that the position of cashier reflected appellant's wage-earning capacity and using the *Shadrick* formula properly reduced appellant's compensation effective September 23, 2012.<sup>18</sup> The vocational counselor is an expert and the Board credits his statements with regard to the applicable wage-earning capacity and the fact that appellant could work in this position full time.

Appellant may request a 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, effective September 23, 2012, based on his capacity to earn wages in the constructed position of cashier.

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<sup>15</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.816.6c (June 2013).

<sup>16</sup> *D.N.*, Docket No. 13-38 (issued August 28, 2013).

<sup>17</sup> *D.W.*, Docket No. 14-347 (issued June 4, 2014).

<sup>18</sup> See *supra* note 10; see also 20 C.F.R. § 10.403(e).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 20, 2014 is affirmed.

Issued: June 1, 2015  
Washington, DC

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

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

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