

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

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**L.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 15-788  
Issued: June 15, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 23, 2015 appellant filed a timely appeal from the January 9, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 met its burden of proof to reduce appellant's compensation effective January 11, 2015 based on her capacity to earn wages in the constructed position of customer complaint clerk.

**FACTUAL HISTORY**

On June 11, 2007 appellant, then a 46-year-old mail handler, filed an occupational disease claim alleging that she sustained injury to her feet due to the standing and walking required by her job over time. OWCP accepted her claim for bilateral plantar fibromatosis and

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

tarsal tunnel syndrome, and authorized multiple surgeries including right foot plantar fascial release in January 2009, left foot fascial release in April 2009, right foot tarsal tunnel release in August 2009, left tarsal tunnel release in December 2009, and right scar revision surgery in February 2012. Appellant received disability compensation on the periodic rolls.<sup>2</sup>

Under file number xxxxxx927, appellant's claim was accepted in 2009 for left medial epicondylitis, lesion of left ulnar nerve, left shoulder tendinitis, and left cubital syndrome. She underwent left carpal tunnel release surgery on April 23, 2012 which was authorized by OWCP. File number xxxxxx673, concerning the claim filed in June 2007, is the master file for all of appellant's claims.

In a report dated March 26, 2013, appellant's attending Board-certified foot and ankle surgeon, Dr. Domenic Signorelli, determined that she could perform modified work on a full-time basis.

In early 2013, appellant was referred to an OWCP-sponsored vocational rehabilitation program. Appellant's vocational rehabilitation counselor determined that she was capable of working as a customer complaint clerk, as identified under number 241.267-014 in the Department of Labor's *Dictionary of Occupational Titles* (DOT). According to the Department of Labor's *Dictionary of Occupational Titles*, the customer complaint clerk position involves investigating complaints about merchandise, service, billing, or credit ratings. It requires examining records, such as bills, computer printouts, bills of lading, and related documents and correspondence, and communicating or corresponding with customers and other company employees to evaluate customer complaints. The customer complaint clerk position is sedentary in nature. Sedentary work, according to the Department of Labor's *Dictionary of Occupational Titles*, involves exerting up to 10 pounds of force occasionally and sitting most of the time, but may involve walking or standing for brief periods of time. Occasionally performing an activity means that the activity is performed up to one third of the time during the workday. The customer complaint clerk position does not involve climbing, balancing, stooping, kneeling, crouching, or crawling. It does involve occasional reaching, handling, and fingering.

Appellant's vocational rehabilitation counselor determined that state labor market surveys showed that the customer complaint clerk position was reasonably available in appellant's commuting area. In conjunction with the vocational rehabilitation program, appellant successfully engaged in training for this position at the Caledonia School from April 8 to July 30, 2013. This training was designed to improve appellant's computer skills so that she had the skills to work as a customer complaint clerk.

In a July 22, 2013 report, Dr. Hovsep Babayan, an attending osteopath, determined that appellant could work on a full-time basis with restrictions including continuous lifting of up to 10 pounds and intermittent lifting of up to 15 pounds. Appellant could sit for eight hours per day, stand for two hours per day, and walk for two hours per day. She could engage in simple grasping and fine manipulation with her hands for eight hours per day and reach above shoulder height for eight hours per day.

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<sup>2</sup> Under file number xxxxxx437, appellant filed a claim that was accepted in 2002 for bilateral carpal tunnel syndrome and bilateral lateral epicondylitis.

In a September 20, 2013 report, Dr. Wayman D. Merrill, an attending Board-certified family practitioner, discussed appellant's physical condition, including her multiple upper extremity conditions. He indicated that she could perform modified work on a full-time basis with restrictions including lifting no more than 15 pounds. Appellant could engage in fine manipulation and simple grasping with her hands for four hours per day and could reach above shoulder height for four hours per day. Dr. Merrill did not put any restrictions on sitting or standing.

In early 2014, appellant's vocational rehabilitation counselor reconfirmed that the customer complaint clerk position was reasonably available in appellant's commuting area. Appellant however was not successful in finding work as a customer complaint clerk.

In a July 9, 2014 report, Dr. Merrill reported the findings of his physical examination of appellant. He indicated that she had some pain complaints in her upper extremities and stated with regard to her work restrictions, "She is to limit simple grasping and fine manipulation on the right to four hours per day due to residual right carpal tunnel symptoms; otherwise, there will be no change from September 20, 2013."

In a July 29, 2014 report, Dr. Signorelli, an attending Board-certified foot and ankle surgeon, reported his findings on physical examination of appellant. He stated that she reported only having mild tingling in her feet. The muscle strength examination of appellant's lower extremities was normal and all epicritic sensations were intact. Dr. Signorelli indicated that her work restrictions were "per primary attending physician," *i.e.*, per Dr. Merrill.

In an October 16, 2014 letter, OWCP advised appellant that it proposed to reduce her compensation based on her capacity to earn wages in the constructed position of customer complaint clerk. It provided her 30 days to submit evidence and argument challenging the proposed action.

In a November 11, 2014 statement, appellant argued that she was not physically capable of working as a customer complaint clerk. She submitted several medical reports, but none indicated that she was unable to perform the duties of the customer complaint clerk position.

In a decision dated January 9, 2015, OWCP reduced appellant's compensation effective January 11, 2015 based on her capacity to earn wages in the constructed position of customer complaint clerk.<sup>3</sup>

### **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.<sup>4</sup> Its burden of

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<sup>3</sup> The first page of the decision actually indicates that the reduction was effective on January 11, 2014. This is a typographical error. An accompanying computation sheet reflects that the new rate was effective January 11, 2015.

<sup>4</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

proof includes the necessity of furnishing rationalized medical opinion evidence based on a 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 the employee has no actual earnings, 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 her disabled condition.<sup>6</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>7</sup> 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>8</sup> The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.<sup>9</sup>

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.<sup>10</sup> In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.<sup>11</sup>

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 his 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>12</sup>

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<sup>5</sup> *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

<sup>7</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>8</sup> *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

<sup>9</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

<sup>10</sup> See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

<sup>11</sup> *N.J.*, 59 ECAB 397 (2008).

<sup>12</sup> See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

## ANALYSIS

In 2007 OWCP accepted appellant's occupational disease claim for bilateral plantar fibromatosis and tarsal tunnel syndrome, and authorized multiple surgeries between 2009 and 2012 including right foot plantar fascial, left foot fascial release, right foot tarsal tunnel release, left tarsal tunnel release, and right scar revision surgery. Appellant received disability compensation on the periodic rolls.<sup>13</sup> She also had a claim accepted in 2009 for left medial epicondylitis, lesion of left ulnar nerve, left shoulder tendonitis, and left cubital syndrome. Appellant underwent left carpal tunnel release surgery in April 2012 which was authorized by OWCP.

In early 2013, OWCP received information from an attending physician who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day. Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of customer complaint clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. According to the Department of Labor's *Dictionary of Occupational Titles*, the job duties of a customer complaint clerk involve investigating complaints about merchandise, service, billing, or credit ratings. It requires examining bills, computer printouts, bills of lading, and related documents and correspondence. It requires communicating or corresponding with customers and other company employees to evaluate those customer complaints. The customer complaint clerk position is sedentary and involves exerting up to 10 pounds of force occasionally and sitting most of the time, but may involve walking or standing for brief periods of time.<sup>14</sup> The customer complaint clerk position does not involve climbing, balancing, stooping, kneeling, crouching, or crawling. It does involve occasional reaching, handling, and fingering.

Appellant's vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on her opinion regarding reasonable availability and vocational suitability.<sup>15</sup> A review of the medical evidence of record reveals that appellant is physically capable of performing the position. The work restriction reports of attending physicians from 2014, including Dr. Merrill, a Board-certified family practitioner, show that appellant was capable of physically working as a customer complaint clerk. For example, Dr. Merrill indicated that appellant could engage in simple grasping and fine manipulation for up to four hours per day and could lift up to 15 pounds.<sup>16</sup> Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the customer complaint clerk position.

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<sup>13</sup> Appellant also filed a claim that was accepted in 2002 for bilateral carpal tunnel syndrome and bilateral lateral epicondylitis.

<sup>14</sup> Occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday.

<sup>15</sup> G.A., Docket No. 13-1351 (issued January 10, 2014).

<sup>16</sup> In late 2014, Dr. Signorelli, an attending Board-certified foot and ankle surgeon, indicated that appellant's work restrictions were accurately described by Dr. Merrill.

OWCP adequately considered factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age, and employment qualifications, in determining that the position of customer complaint clerk represented her wage-earning capacity.<sup>17</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of customer complaint clerk and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly reduced her compensation effective January 9, 2015 based on her capacity to earn wages as a customer complaint clerk.

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 effective January 11, 2015 based on her capacity to earn wages in the constructed position of customer complaint clerk.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 9, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 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

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<sup>17</sup> See *Clayton Varner*, 37 ECAB 248, 256 (1985).