



## **FACTUAL HISTORY**

On January 8, 2008 appellant, then a 52-year-old letter carrier, slipped and fell on ice while delivering mail. The claim was accepted for right elbow strain, right shoulder strain, traumatic osteoarthritis of the right knee, and degenerative osteoarthritis of the right knee. Appellant returned to modified duty. On September 3, 2008 she filed an occupational disease claim alleging that her continued work duties aggravated her right knee condition. OWCP accepted aggravation of degenerative osteoarthritis of the right knee under this claim, and the claims were doubled on March 13, 2009.

Appellant stopped work in January 2009 and missed intermittent periods thereafter. On December 1, 2009 she underwent right knee replacement surgery that was revised on June 29, 2010. Appellant underwent a third right knee surgical procedure on November 9, 2010. She has not worked since the December 1, 2009 knee replacement surgery, and she was placed on the periodic compensation rolls.

In June 2012 appellant relocated to Arizona. In October 2012 OWCP referred her to Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 24, 2012 report, Dr. Lampert noted appellant's injury and medical history, his review of medical records, and her report that she had walked with a cane since knee surgery. Examination demonstrated that without a cane she walked with a right antalgic gait and had difficulty standing on her heels and toes. The right knee lacked 15 degrees of complete extension and 25 degrees of flexion. There was no effusion, ligamentous instability, or areas of point tenderness. Dr. Lampert reported that as a residual of the employment injury, appellant had difficulty regarding how much she was able to be on her feet. He indicated that she had no limitations regarding her upper extremities and could be on her feet for 30 minutes, then off for one hour and could do no repeated bending, stooping, squatting, pushing, pulling, or kneeling and had no lifting restriction of what she could do from a sitting position. Dr. Lampert concluded that she could participate in vocational rehabilitation with the above limitations for an eight-hour day, 40 hours a week and that she was at maximum medical improvement.

In November 2012 OWCP referred appellant to a rehabilitation counselor, for vocational rehabilitation services.<sup>2</sup> Appellant underwent vocational testing on November 26, 2012. This indicated that she had post high school vocabulary and reading skills and eighth grade spelling and mathematic skills. Short-term training was recommended. The counselor identified the positions of medical secretary, receptionist, and information clerk as described in the Department of Labor, *Dictionary of Occupational Titles*, as vocational goals. He noted that these were within appellant's physical limitations and recommended training at the Maricopa Skills Center. The recommended training was approved.

By letter dated March 8, 2013, OWCP informed appellant that the job duties of information clerk/receptionist were within her physical limitations as described by Dr. Lampert and advised appellant to cooperate fully with the scheduled training. It noted that, based on the rehabilitation counselor's evaluation and survey of the local labor market, she had the wage-

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<sup>2</sup> On April 30, 2012 OWCP suspended appellant's compensation because she had not submitted a required Form EN1032. Appellant submitted the form and periodic rolls compensation was resumed.

earning capacity of \$10.00 to \$12.50 an hour, and at the end of the rehabilitation program, whether she was actually employed or not, OWCP would in all likelihood reduce her compensation based on this amount. In March 2013, appellant began training in computer, keyboarding, and business skills.

Dr. Demitri A. Adarmes, Board-certified in internal medical and physical medicine and rehabilitation, provided a new patient evaluation dated April 24, 2013. He noted appellant's employment and medical history and provided physical examination findings, noting that she ambulated with a right limp and used a cane. On a work capacity evaluation dated May 6, 2013 Dr. Adarmes indicated that appellant had permanent restrictions of a maximum of two hours sitting at a time, one-half hour walking at a time, no squatting, crawling, or kneeling, and occasional climbing stairs but no ladders. He provided a 20-pound restriction on pushing, pulling, and lifting, and indicated that appellant should not operate a motor vehicle while under the influence of pain medication and should be allowed 10-minute breaks every one to two hours. In a treatment note dated May 7, 2013 Dr. Adarmes indicated that appellant should continue her current medications.

On May 6, 2013 appellant informed the rehabilitation counselor that she believed she possessed the skills needed for an information clerk/receptionist and was ready to seek employment. She was advised that she would receive 90 days of placement services, with an extension given if she fully cooperated with the placement effort. Appellant signed an agreement to the placement plan on May 20, 2013.

On June 5, 2013 the rehabilitation counselor informed OWCP that appellant was obstructing the rehabilitation effort, noting that she had not followed through with instructions given to her and had not appeared at a scheduled meeting. In reports that covered the period May 1 to June 6, 2013, he documented a difficult relationship with appellant, noting that she did not participate in any of the "job readiness" activities. Placement services ended on June 6, 2013.

Rehabilitation services were closed on June 17, 2013. The closure memorandum indicated that the jobs identified were vocationally and medically appropriate and that the entry level weekly pay rate for the information clerk position ranged from \$9.00 to \$12.50 per hour and that position was readily available in the local labor market.<sup>3</sup>

On July 30, 2013 OWCP proposed to reduce appellant's compensation based on her capacity to earn wages as an information clerk. It noted that the evidence established that she had discontinued cooperation with the placement effort. OWCP indicated, as the medical and factual evidence established that appellant was no longer totally disabled, she could return to

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<sup>3</sup> The duties of the information clerk position were described in the Department of Labor's *Dictionary of Occupational Titles* as: answers inquiries from persons entering establishment; provides information regarding activities conducted at establishment, and location of departments, offices, and employees within organization; informs customer of location of store merchandise in retail establishment; provides information concerning services, such as laundry and valet services, in hotel; receives and answers requests for information from company officials and employees; may call employees or officials to information desk to answer inquiries; and may keep record of questions asked. It has a sedentary strength level.

work, and advised that she had the capacity to earn wages as an information clerk at a weekly rate of \$408.00. Appellant was given 30 days to submit evidence in writing.

Appellant did not respond to the preliminary notice. In a treatment note dated August 13, 2013, Dr. Adarmes reported that appellant had little pain when sedentary but that standing or walking increased the pain. He diagnosed right knee degenerative osteoarthritis, right elbow strain, and right shoulder strain.

On September 5, 2013 OWCP finalized the reduction of appellant's compensation. It noted that the medical evidence established that she was no longer totally disabled and had the capacity to earn the wages of an information clerk, with a 62 percent loss of wage-earning capacity. Appellant's compensation was reduced accordingly.

Appellant, through her attorney, timely requested a hearing. She was not present at the hearing, held on March 21, 2014. Counsel maintained that appellant could not perform the information clerk position because she could not drive to work. The record was left open for 30 days for appellant to submit additional medical evidence. Nothing further was submitted, and by decision dated June 10, 2014 an OWCP hearing representative affirmed the September 5, 2013 decision. The hearing representative noted that there was no medical evidence that explained how the requirements of the selected position were beyond appellant's abilities and found that the evidence was sufficient to show that OWCP met its burden of proof to reduce appellant's compensation based on her capacity to earn wages as an information clerk.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> 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.<sup>5</sup>

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.<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

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<sup>4</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>5</sup> 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

<sup>6</sup> 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

medical evidence upon which OWCP relies 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>

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.<sup>9</sup> Finally, application of the principles set forth in *Albert C. Shadrick*,<sup>10</sup> as codified in section 10.403 of OWCP's regulations,<sup>11</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>12</sup>

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.<sup>13</sup>

OWCP procedures provide that noncooperation during the placement stage does not generally result in a sanction decision under section 8113(b) of FECA. In that instance, the rehabilitation counselor should be asked to submit a final report and list the jobs for which placement has been attempted, provide updated labor market surveys, including pay information. Continuing placement services for the full 90-day period is not required if the claimant has not cooperated. Upon receipt of the requested information, OWCP should prepare a prereduction notice determining the injured worker's wage-earning capacity prospectively in accordance with section 8115 of FECA, based on one of the selected positions. After considering any response to the prereduction notice, OWCP should issue a final decision, if appropriate.<sup>14</sup>

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

<sup>8</sup> *John D. Jackson*, *supra* note 5.

<sup>9</sup> *Supra* note 4.

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

<sup>11</sup> 20 C.F.R. § 10.403.

<sup>12</sup> *Supra* note 4.

<sup>13</sup> *John D. Jackson*, *supra* note 5.

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17.d (February 2011).

## ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation on September 5, 2013 based on her capacity to earn wages in the constructed position of information clerk.

The medical evidence as characterized by the second opinion evaluation of Dr. Lampert's October 24, 2012 report established that she was no longer disabled from all work. Dr. Adarmes, the attending physiatrist, also indicated that appellant was not totally disabled. OWCP then properly referred her for vocational rehabilitation counseling in November 2012.<sup>15</sup> In March 2013, the vocational rehabilitation counselor identified positions that met appellant's physical and vocational capabilities. OWCP determined that she had the capacity to earn wages as an information clerk, based on the medical and vocational evidence of record.

Dr. Lambert indicated that appellant had no limitations regarding her upper extremities and could be on her feet for 30 minutes, then off for one hour, and could do no repeated bending, stooping, squatting, pushing, pulling, or kneeling and had no lifting restriction of what she could do from a sitting position. He concluded that she could participate in vocational rehabilitation with the above limitations for an 8-hour day, 40 hours a week and that she was at maximum medical improvement and provided no restrictions regarding appellant's ability to drive. Dr. Adarmes provided permanent restrictions of a maximum of two hours sitting at a time, one-half hour walking at a time, no squatting, crawling, or kneeling, and occasional climbing stairs but no ladders. He provided a 20-pound restriction on pushing, pulling, and lifting, and indicated that appellant should not operate a motor vehicle while under the influence of pain medication and should be allowed 10-minute breaks every one to two hours.

The information clerk position was classified as within the sedentary strength category.<sup>16</sup> The physical demands of this position therefore comported with the restrictions provided by both physicians. The vocational rehabilitation counselor, advised that the position was reasonably available in the local labor market with an entry-level hourly wage of \$9.00 to \$12.50 or \$360.00 to \$500.00 a week.

As to appellant's argument before OWCP that the position was unsuitable because she could not drive to work, Dr. Lambert provided no restrictions on appellant's ability to drive. While Dr. Adarmes indicated that appellant should not operate a motor vehicle while under the influence of pain medication, the selected position does not require driving. Moreover, appellant has not explained why appropriate public transportation would not be available.<sup>17</sup>

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment

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<sup>15</sup> 5 U.S.C. § 8104(a); see *Ruth E. Leavy*, 55 ECAB 294 (2004).

<sup>16</sup> *Supra* note 3. The *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.

<sup>17</sup> See *P.M.*, Docket No. 12-1451 (issued February 19, 2013).

qualifications, in determining that the position of information clerk represented her wage-earning capacity.<sup>18</sup> 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 information clerk reflected appellant's wage-earning capacity and, using the *Shadrick* formula,<sup>19</sup> properly reduced her compensation on September 5, 2013.<sup>20</sup>

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 information clerk.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> *Supra* note 4.

<sup>19</sup> *Supra* note 11.

<sup>20</sup> *Supra* note 14.