

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

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**E.E., Appellant**

**and**

**DEPARTMENT OF THE TREASURY, U.S.  
MINT, San Francisco, CA, Employer**

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**Docket No. 15-1072  
Issued: February 23, 2016**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 9, 2015 appellant filed a timely appeal of an October 8, 2014 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 benefits based on her capacity to earn wages in the constructed position of call-out operator.

**FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> On September 29, 1993 appellant, then a 38-year-old coin checker, filed an occupational disease claim (Form CA-2) alleging that she injured

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Docket No. 98-1983 (issued July 18, 2000).

her right thumb, arm, shoulder, and back as a result of her federal employment duties. OWCP accepted the claim for tendinitis of the right hand, wrist, and arm. Appellant was placed on the periodic rolls effective May 27, 1994. She was involved in OWCP vocational rehabilitation services and received a diploma as an ophthalmic technician on December 29, 1995. On January 7, 1997 OWCP reduced appellant's wage-loss compensation based on her ability to earn wages in the selected position of ophthalmic assistant. On March 18, 1998 a hearing representative affirmed OWCP's decision. By decision dated July 18, 2000, the Board reversed the March 18, 1998 decision finding that appellant did not have sufficient training to perform the duties of the selected position. The facts of the case, as set forth in the prior decision, are incorporated herein by reference.

In a November 9, 2006 letter, OWCP referred appellant to Dr. Arthur Auerbach, a Board-certified orthopedic surgeon, to obtain an assessment of her employment-related condition, the extent of disability, and appropriate treatment. In his December 7, 2006 report, Dr. Auerbach reviewed a statement of accepted facts and appellant's medical history. He conducted a physical examination and concluded that she had reached maximum medical improvement. Dr. Auerbach concluded that appellant continued to suffer residuals of her work-related injury and opined that she was capable of light-duty work with the following restrictions: no repetitive movements with the wrists and elbows; no reaching with the right arm; no reaching above the shoulder with the right arm; no pushing, pulling, or lifting greater than 10 pounds occasionally with the right arm.

On April 18, 2007 OWCP determined that the weight of the medical evidence rested with Dr. Auerbach and requested a job offer from the employing establishment that complied with his work restrictions.

By letter dated April 23, 2007, OWCP again referred appellant to vocational rehabilitation services to assist her in returning to work. On December 27, 2007 it closed appellant's file for vocational rehabilitation services as medical issues were being clarified.

In an April 3, 2008 letter, OWCP notified the employing establishment that appellant's vocational rehabilitation services had been closed in December 2007 as there were new medical issues that needed to be addressed. It advised that it was arranging for a new second opinion examination.

OWCP referred appellant to Dr. Joseph McCoy, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of her employment-related conditions. In an April 28, 2008 report, Dr. McCoy reviewed a statement of accepted facts, her medical history, and conducted a physical examination. He opined that appellant was capable of working as an optometric technician for eight hours per day. In a July 7, 2008 addendum report, Dr. McCoy opined that she was capable of participating in vocational rehabilitation.

In a July 15, 2008 report, Dr. David LaRochelle, an attending orthopedic surgeon, disagreed with Dr. McCoy's assessment as appellant had an underlying rheumatologic condition. He opined that she was not capable of reaching above the shoulder or lifting more than 10 pounds.

In a December 4, 2008 letter, OWCP notified appellant that it had found a conflict in the medical opinions of Drs. McCoy and LaRochelle and referred her to an impartial medical examiner to resolve the conflict. On October 6, 2009 Dr. Mathias Masem, an orthopedic surgeon, reviewed a statement of accepted facts, reviewed the medical record, and conducted a physical examination. He diagnosed right wrist tendinitis, right carpal tunnel syndrome, right elbow tendinitis, and right shoulder impingement syndrome. Dr. Masem opined that appellant had a chronic right upper extremity repetitive strain injury, which arose out of her federal employment. He disagreed with Dr. McCoy and concurred with Dr. LaRochelle that her right shoulder injury was causally related to her federal employment. Dr. Masem found no evidence of an underlying systemic inflammatory disease process or a cervical spine problem. He restricted appellant from pushing, pulling, reaching above the shoulder, and lifting more than five pounds. In a June 7, 2010 addendum report, Dr. Masem increased her lifting capacity to 10 pounds occasionally.

In reports dated January 12, 2011 through November 4, 2013, Dr. Robert Gomez, a Board-certified orthopedic surgeon and appellant's attending physician, restricted her from lifting, pushing, and pulling over 10 pounds with both upper extremities and no repetitive use of both upper extremities.

OWCP referred appellant to Dr. J. Hearst Welborn, Jr., a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of her employment-related condition. In a September 26, 2011 report, Dr. Welborn reviewed a statement of accepted facts, her medical history, and conducted a physical examination. He diagnosed de Quervain's tenosynovitis, shoulder impingement syndrome, bicipital tendinitis, fibromyalgia, and chronic pain syndrome. Dr. Welborn noted that the shoulder impingement and de Quervain's tendinitis were causally related to appellant's federal employment and noted that her fibromyalgia and chronic pain conditions were not employment related. He found that she did not have residuals of her work-related conditions as they had resolved over the past 18 years. Dr. Welborn advised that appellant could work full-time, light duty with a restriction of lifting up to 20 pounds.

On November 2, 2011 Dr. Gomez indicated that he disagreed with Dr. Welborn's evaluation and agreed "with Dr. LaRochelle and Dr. Masem that [appellant had] chronic right shoulder impingement syndrome, chronic right wrist [d]e Quervain's tenosynovitis, intermittent right elbow pathology either tendinitis versus radial tunnel syndrome" and found no evidence for fibromyalgia or chronic pain syndrome. In a September 13, 2013 report, he opined that appellant continued to suffer residuals of her employment-related conditions. On November 4, 2013 Dr. Gomez advised that she could work with restrictions of no lifting, pushing, or pulling over 10 pounds with both arms, and no repetitive use of both arms.

In a November 20, 2013 letter, OWCP referred appellant to vocational rehabilitation services based on Dr. Gomez's November 4, 2013 report indicating that she was capable of performing modified duties with restrictions.

On January 8, 2014 a vocational rehabilitation counselor identified the position of call-out operator, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 237.367-014 as suitable to appellant's work experience, physical restrictions, and education. The call-out operator position was identified as sedentary work which involved compiling credit information,

using the telephone, and copying information. The physical requirements included exerting up to 10 pounds of force occasionally. The vocational rehabilitation counselor stated that appellant had gained attention to detail skills, basic keyboarding, customer service, and filing skills which she could apply towards work as an entry-level call-out operator and indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis as confirmed by the State of California's Employment Development Department.

In a February 3, 2014 report, Dr. Gomez reviewed the call-out operator job description and physical requirements and opined that appellant was capable of performing the job.

On February 19, 2014 OWCP received a rehabilitation plan and award, including the call-out operator position. As of February 24, 2014, it provided 90 days of placement assistance. Placement was unsuccessful. In a July 3, 2014 memorandum, OWCP stated that appellant was offered an extension of placement services, but she did not take advantage of this offer. Appellant also declined an interview for a position with Bay, Inc.

On September 2, 2014 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a call-out operator at the rate of \$400.00 per week. It afforded her 30 days in which to submit evidence or argument regarding her capacity to earn wages in the constructed position.

Appellant submitted a September 30, 2014 narrative statement arguing that she was not capable of performing the call-out operator position and submitted reports dated May 5 through September 17, 2014 from Dr. Gomez who reiterated his opinion that she was capable of performing the job duties of the call-out operator position.

By decision dated October 8, 2014, OWCP finalized the proposed reduction of compensation benefits finding that appellant had the capacity to earn wages as a call-out operator. It determined that she had 58 percent loss of wage-earning capacity and her compensation was reduced to a net compensation of \$868.20 every four weeks.<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>

Section 8115(a) of FECA,<sup>5</sup> 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. If the actual

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<sup>3</sup> By decision dated April 30, 2015, an OWCP hearing representative affirmed the October 8, 2014 decision. The Board and OWCP may not have concurrent jurisdiction over the same issue in a case. Consequently, any decision by OWCP on an issue pending before the Board is null and void. See *Douglas E. Billings*, 41 ECAB 880, 895 (1990). As OWCP issued the April 30, 2015 decision after appellant's appeal to the Board on April 9, 2015 and as it is on the same issue pending before the Board, loss of wage-earning capacity, it is null and void. See 20 C.F.R. § 501.2(c)(3).

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

<sup>5</sup> 5 U.S.C. § 8115.

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 his or her 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> 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> 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.<sup>9</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 upon which OWCP relies must provide a detailed description of the condition.<sup>10</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<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 for selection of a position, listed in the DOT or otherwise available in the open market, that fits that employee's capabilities with regard to 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. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>12</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.<sup>13</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

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<sup>6</sup> See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

<sup>7</sup> See *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>8</sup> *Id.*

<sup>9</sup> See *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>10</sup> See *William H. Woods*, 51 ECAB 619 (2000).

<sup>11</sup> See *John D. Jackson*, 55 ECAB 465 (2004).

<sup>12</sup> 5 ECAB 376 (1953).

<sup>13</sup> See *Karen L. Lonon-Jones*, 50 ECAB (1999).

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>14</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of call-out operator.

OWCP accepted appellant's claim for tendinitis of the right hand, wrist, and arm and referred her to vocational rehabilitation. In its October 8, 2014 decision, it reduced her compensation benefits based on her capacity to earn wages as a call-out operator. OWCP determined that this position was medically and vocationally suitable for appellant. It found that she was capable of earning \$400.00 per week and had 58 percent wage-earning capacity. The question is whether appellant had some capacity to earn wages and the Board finds that the weight of the evidence of record establishes that she had the requisite physical ability, skill, and experience to perform the position of call-out operator.

The vocational rehabilitation counselor determined that appellant was able to perform the position of a call-out operator. She provided a job description for the call-out operator position, which was identified as sedentary work which involved compiling credit information, using the telephone, and copying information. The physical requirements included exerting up to 10 pounds of force occasionally. The vocational rehabilitation counselor stated that appellant had gained attention to detail, basic keyboarding, customer service, and filing skills which she could apply towards work as an entry-level call-out operator and indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis as confirmed by the State of California's Employment Development Department.

The call-out operator position was within appellant's medical restrictions. In a July 15, 2008 report, Dr. LaRoche, an attending orthopedic surgeon, restricted appellant from lifting more than 10 pounds. In an October 6, 2009 report, Dr. Masem Mathias, an orthopedic surgeon and OWCP referral physician, restricted appellant from lifting more than 10 pounds occasionally. In a September 26, 2011 report, Dr. Welborn, a Board-certified orthopedic surgeon and OWCP second opinion examiner, found that appellant was capable of full-time, light-duty work with a restriction of lifting up to 20 pounds. In his reports, Dr. Gomez, a Board-certified orthopedic surgeon and appellant's attending physician, restricted appellant from lifting, pushing, and pulling over 10 pounds with both upper extremities and no repetitive use of both upper extremities. In his February 3, 2014 report, he reviewed the call-out operator job description and physical requirements and opined that she was capable of performing the job. In reports dated May 5 through September 17, 2014, Dr. Gomez reiterated his opinion that appellant was capable of performing the job duties of the call-out operator position.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of call-out operator represented her wage-earning capacity.<sup>15</sup> The evidence of record establishes that appellant had the requisite physical ability,

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<sup>14</sup> See *supra* note 11.

<sup>15</sup> See *James M. Frasher*, 53 ECAB 794 (2002).

skill, and experience to perform the duties and that the position was reasonably available within the general labor market of her commuting area.

The information as set forth by the vocational counselor determined that the wages for the position of call-out operator were \$400.00 per week. Applying the *Shadrick*<sup>16</sup> principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of \$400.00 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had 58 percent loss of wage-earning capacity and her compensation was reduced to a net compensation of \$868.20 every four weeks. The Board finds that OWCP met its burden of proof to reduce her compensation.

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 of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of call-out operator.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2016  
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>16</sup> See *supra* note 12.