

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 office clerk, general.

On appeal, counsel asserts that the selected position was not medically suitable. He also requests that the Board address whether the vocational rehabilitation specialist, an independent contractor, could be subpoenaed.

FACTUAL HISTORY

On December 19, 2003 appellant, then a 48-year-old transportation security screener, injured her back when she leaned forward in a broken chair and almost fell. She stopped work on December 15, 2003 and did not return. OWCP accepted disc protrusion at L5-S1, lumbosacral strain, and chronic pain syndrome. Appellant received continuation of pay and compensation for appropriate periods of disability and was placed on the periodic compensation rolls.

On October 13, 2010 appellant underwent lumbar surgery. She was referred to pain management in November 2011. In a pain management discharge summary dated January 11, 2012, Dr. John R. Reichle, Board-certified in occupational medicine, advised that appellant reached maximum medical improvement on January 11, 2012 and could return to light work that day.

In reports dated January 18, 2012, Dr. Derrick H. Yoshinaga, a Board-certified osteopath specializing in occupational and preventive medicine, noted that appellant had been discharged from pain management. He discussed physical examination findings and diagnosed lumbar intervertebral disc disorder, previous surgery, chronic nonmalignant pain, and opiate therapy. Dr. Yoshinaga advised that appellant could perform modified light-duty work per pain management recommendations, indicating that he was awaiting their discharge summary for specific restrictions. On February 7, 2012 he stated that she was released to work "in the light category as defined by the U.S. Department of Labor [DOL]." Dr. Yoshinaga described restrictions of lifting and carrying 15 pounds occasionally, 8 pounds frequently (average 10 pounds); push and pull 19 pounds of force occasionally, 10 pounds frequently; sit 60 minutes at a time for 6 hours in an 8-hour day; stand and walk 90 minutes at a time for 6 hours in an 8-hour day; and occasionally bend, 1/2 squat, kneel, crawl, reach, and stairs. On May 3, 2012 he reported that Dr. Reichle advised that appellant had the physical capacity to perform physical demands in the light category as defined by DOL. Dr. Yoshinaga reiterated the restrictions described above, noting that they were permanent.

In May 2012, appellant was referred for vocational rehabilitation. On July 10, 2012 Bradley R. Simpson, the rehabilitation counselor, completed a transferable skills analysis. He advised that appellant had vocational testing done on June 15, 2012. Mr. Simpson indicated that she was released to work in the sedentary/light range, had previous work experience in sales, customer service, and information giving, and had transferable skills in several areas, including sales, customer service, and security services. He advised that appellant needed additional vocational training to be competitively employable.

On July 19, 2012 Mr. Simpson sent Dr. Yoshinaga specific job descriptions for a position of receptionist at ProBuild and for an office clerk position at Subaru of America. Both position descriptions included educational requirements, work schedules, and typical job duties. The physical demands for each position included occasional lifting of 10 to 15 pounds. Dr. Yoshinaga was to indicate by a check mark whether appellant could perform each position. He was additionally asked to provide comments including whether any modifications were needed for her to perform each position and, if her condition was no longer stable, he was asked to provide current diagnoses.

On July 19, 2012 Dr. Yoshinaga indicated by a check mark “yes” that appellant could perform each of the positions. He provided no comments. In reports dated August 9, 2012, Dr. Yoshinaga advised that appellant had been medically stable since February 7, 2012. He described physical examination findings and reiterated the permanent restrictions described in his May 3, 2012 report.

At that time, Mr. Simpson identified the positions of office clerk, general, and receptionist. He completed a labor market survey for each position on August 6, 2012. These included a job description and the physical demands for each position and indicated that the strength level was light for the office clerk position and was sedentary for the receptionist position. A vocational rehabilitation plan for computer skills training for these positions was approved on August 20, 2012. Training was to begin on August 27, 2012. Appellant and counsel were notified that the training was mandatory. She refused to sign the rehabilitation plan. Appellant did not begin computer training. On September 5, 2012 she informed Mr. Simpson that she could not participate in the training either physically or mentally.

In a September 10, 2012 letter, OWCP proposed to suspend appellant’s monetary compensation because she failed to cooperate with rehabilitation efforts. It notified her of the penalty provisions of section 8113(b) of FECA and informed her that it was assumed that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and, accordingly, her compensation would be reduced to zero. Appellant was directed to comply with the approved training program within 30 days or show good cause for her failure to participate in the training program. She was informed that if she did not comply, her compensation would be reduced to reflect the wage-earning capacity had she completed the training as a receptionist or office clerk.

By decision dated October 18, 2012, OWCP noted that appellant did not comply with the September 10, 2012 letter, or show good cause for not complying. It advised her that her failure to undergo the essential preparatory effort of vocational testing precluded a determination of what her wage-earning capacity would have been had she in fact undergone the testing and rehabilitation effort. In the absence of evidence to the contrary, it was assumed that the vocational rehabilitation effort would have resulted in appellant’s return to work at the same or higher wages than for the position held when injured. Thus, under the provisions of section 8113(b) of FECA and section 10.519 of its regulations, OWCP reduced appellant’s compensation to zero, effective October 21, 2012, because she failed to undergo the directed vocational testing or show good cause for not complying.

In an undated letter mailed to the employing establishment on October 8, 2012 and received by OWCP on November 13, 2012 appellant disagreed with the reduction. She maintained that she was physically incapable of performing either position.

On November 26, 2012 OWCP rescinded the October 18, 2012 decision because appellant's counsel had not been informed of the termination of benefits effective October 21, 2012. It then reissued the decision, that same day notifying her that her compensation was reduced to zero effective October 27, 2012, for failure to comply in the essential preparatory effort of vocational testing.

In correspondence received by OWCP on June 3, 2013 appellant, through counsel, requested reconsideration. Counsel maintained that OWCP erred in reducing her compensation to zero and should have reduced her compensation based on what her wage-earning capacity would have been had there not been a failure to cooperate. Counsel argued that the reasoning used by OWCP to reduce appellant's compensation to zero did not apply because she had participated in the plan development phase and, therefore, OWCP had sufficient information to determine her appropriate wage-earning capacity.

By decision dated August 30, 2013, OWCP vacated the November 26, 2012 decision. It determined that appellant's counsel identified error, finding that, when a suitable job has been identified, the reduction in compensation is to be based upon the selected job and not reduced to zero. Appellant received appropriate retroactive compensation and was returned to the periodic compensation rolls.

Dr. Yoshinaga continued to provide reports describing appellant's condition and treatment. In each report he reiterated the findings and conclusions regarding her permanent restrictions.

On November 8, 2013 Deborah Smith, an OWCP rehabilitation specialist, obtained updated employment outlook and wage information for the positions of receptionist and clerk. She indicated that appellant had five years' experience as a clerk and receptionist and advised, that, after training to update her computer skills, she would have a specific vocational preparation of eight, or above entry-level wages. OWCP obtained current pay rate information from the employing establishment.

By notice of proposed reduction dated December 3, 2013, OWCP proposed to reduce appellant's compensation, based on her capacity to earn wages as an office clerk, general, Department of Labor, *Dictionary of Occupational Titles*, DOT No. 209.562-010. It noted the accepted conditions and that Dr. Yoshinaga had agreed that she could perform the duties of the office clerk position on July 19, 2012 and had advised that her condition had been medically stationary since February 7, 2012. OWCP indicated that, based on the opinion, appellant was referred for vocational rehabilitation, and a rehabilitation plan for computer training was authorized, but that she did not appear for the training and declined to participate. The December 3, 2013 notice indicated that the office clerk, general, position was selected as being the most appropriate, based

upon the rehabilitation counselor's review of appellant's work history and transferrable skills analysis. It included the Department of Labor, *Dictionary of Occupational Titles*, position description, as follows:

“Performs any combination of following and similar clerical duties requiring limited knowledge of systems and procedures: writes, types, or enters information into a computer, using keyboard, to prepare correspondence, bills, statements, receipts, checks, or other documents, copying information from one record to another. Proofreads records or forms. Counts, weighs, or measures material. Sorts and files records, receives money from customers and deposits money in bank. Addresses envelopes or packages by hand or typewriter or addressograph machine. Stuffs envelopes by hand or with envelope stuffing machine. Answers telephone, conveys messages, and runs errands. Stamps, sorts and distributes mail. Stamps or numbers forms by hand or machine. Photocopies documents, using photocopier.”

The notice further indicated that the office clerk, general, had a sedentary strength level with occasional lifting of 10 pounds. OWCP noted, based on recent wage and position information, the office clerk position was reasonably available. It advised that appellant was capable of earning greater than the entry level wage based on her prior experience and skills, and it thus determined that she was capable of earning \$12.69 per hour or \$509.31 per week. OWCP also advised that, under section 10.519(a) of its regulations, when an employee without good cause did not participate in vocational rehabilitation and a suitable job had been identified, the reduction in compensation was to be based upon the identified suitable job which, in her case, was as a general office clerk with a gross compensation of \$509.31 per week. It recommended that appellant's wage-loss compensation be reduced on the basis that she was no longer totally disabled and found that the general office clerk position was medically and vocationally suitable, and represented her wage-earning capacity.

In a December 10, 2013 report, Dr. Yoshinaga described appellant's physical examination findings and treatment. He reiterated his findings and conclusions.

By decision dated January 3, 2014, OWCP finalized the proposed reduction of appellant's compensation, based on her capacity to earn wages as an office clerk, general, effective January 12, 2014. By utilizing the *Shadrick* formula,³ it found that she had a 16 percent loss of wage-earning capacity.

In correspondence dated December 27, 2013, received by OWCP on January 13, 2014 appellant's counsel maintained that the office clerk position had a strength level of light, which required lifting up to 20 pounds, and that the issue of whether the strength position was sedentary or light could only be resolved by OWCP's Branch of Hearings and Review by issuing a subpoena for Mr. Simpson.

Appellant timely requested a hearing before a hearing representative. On February 10, 2014 counsel requested that a subpoena be issued for Mr. Simpson to explain whether the office

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403.

clerk position was light or sedentary and to describe the different strength levels identified in the Department of Labor, *Dictionary of Occupational Titles*. Counsel maintained that, based on Dr. Yoshinaga's reports, appellant could not lift in excess of 15 pounds.

In reports dated March 11 and June 10, 2014, Dr. Yoshinaga described appellant's physical findings and treatment and reiterated his findings and conclusions regarding her physical restrictions.

An OWCP hearing representative on August 6, 2014 denied counsel's subpoena request. The hearing representative advised that, in accordance with section 10.619 of OWCP procedures, "no subpoena will be issued for the attendance of OWCP employees acting in their official capacities as decision-makers or policy administrators." She found that Mr. Simpson was a contract employee of DOL and, as such, could not be subpoenaed.

At the hearing, held on September 10, 2014, counsel maintained that, because Dr. Yoshinaga restricted appellant to lifting 15 pounds, the constructed position, in the light strength category with lifting of up to 20 pounds, was not acceptable. He further asserted that, because an entry level pay rate was not used, the calculation of appellant's wage-earning capacity was incorrect. Appellant testified that she had never done any of the tasks listed in the office clerk Department of Labor, *Dictionary of Occupational Titles*, description, and that she had no computer training.⁴

In correspondence dated September 22, 2014, counsel reiterated his position that the constructed office clerk position was not medically suitable because it was not consistent with the restrictions provided by Dr. Yoshinaga.

By decision dated December 3, 2014, the hearing representative acknowledged that the constructed office clerk position was in the light strength category. She found that OWCP considered the proper factors in determining that the position reflected appellant's wage-earning capacity and that it properly reduced her wage-loss compensation, effective January 12, 2014. The hearing representative found that, because Dr. Yoshinaga had advised that appellant could perform the position, it was medically suitable. The hearing representative further found that, since the rehabilitation counselor reported that appellant had previously performed clerical job duties, and because appellant chose not to attend authorized training, OWCP permissibly found that she qualified for greater than entry level salary.

LEGAL PRECEDENT

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

⁴ Counsel also stated that he would submit copies of Board decisions that supported his position. These, however, are not found in the case record.

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶

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.⁷

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.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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

OWCP regulations and procedures provide that if a claimant refuses or impedes rehabilitation training, the claims examiner shall notify the injured worker in writing, of the provisions of section 8113(b) of FECA¹³ and direct the injured worker to apply for, participate in, or resume participation in the training program. If the injured worker fails to comply or provide a written explanation of his or her failure to comply within 30 days, section 8113(b) will

⁶ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁷ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, *supra* note 6.

¹⁰ *Supra* note 5.

¹¹ *Supra* note 3.

¹² *Supra* note 5.

¹³ 5 U.S.C. § 8113(b).

be applied and benefits will be reduced based on the jobs targeted in the approved training plan.¹⁴

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 postinjury 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.¹⁵

ANALYSIS

OWCP accepted disc protrusion at L5-S1, lumbosacral strain, and chronic pain syndrome, caused by the December 19, 2003 employment injury. Appellant stopped work on the date of injury and was placed on the periodic compensation rolls. She completed a course of pain management in December 2011. In May 2012, appellant was referred for vocational rehabilitation services. As described above, she refused to attend recommended computer skills training, and OWCP reduced her compensation effective January 12, 2014, based on its determination that she could earn wages in the selected position of office clerk, general.

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation as the medical evidence does not clearly demonstrate that the selected position of office clerk, general was within her physical limitations. The issue of whether an employee has the physical ability to perform a selected position is a medical question that must be resolved by probative medical evidence.¹⁶

With respect to the issue of medical suitability of the selected position, OWCP indicated that Dr. Yoshinaga, an attending osteopath, had advised on July 19, 2012 that appellant could perform the duties of the selected position. The position of office clerk, general, DOT No. 209.562-010 in the Department of Labor, *Dictionary of Occupational Titles*, is defined as having a light strength level. A light strength level is described as exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. The Department of Labor, *Dictionary of Occupational Titles*, indicates that the physical demand requirements are in excess of those for sedentary work.

Although Dr. Yoshinaga advised that appellant could work in a light-duty capacity, the restrictions he provided do not comport with light-duty strength requirements listed in the Department of Labor, *Dictionary of Occupational Titles*. He did not review the Department of Labor, *Dictionary of Occupational Titles*, description of the selected position of office clerk,

¹⁴ 20 C.F.R. § 10.519(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 1.812.17.c, f (February 2011).

¹⁵ *John D. Jackson*, *supra* note 6.

¹⁶ *See Maurissa Mack*, 50 ECAB 498 (1999).

general. Rather, Dr. Yoshinaga reviewed two specific jobs, a receptionist at ProBuild and an office clerk position at Subaru of America. The physical demands for each job required lifting of 10 to 15 pounds, whereas the light strength category identified in the Department of Labor, *Dictionary of Occupational Titles*, provides that 20 pounds can be lifted occasionally. In multiple reports, beginning on February 7, 2012 to December 10, 2013 and continuing, Dr. Yoshinaga restricted appellant's activity to lifting and carrying 15 pounds occasionally, 8 pounds frequently (average 10 pounds); pushing and pulling 19 pounds of force occasionally, 10 pounds frequently; sitting 60 minutes at a time for 6 hours in an 8-hour day; standing and walking 90 minutes at a time for 6 hours in an 8-hour day; and occasionally bend, 1/2 squat, kneel, crawl, reach, and stairs. These restrictions are outside the light strength level category defined in the Department of Labor, *Dictionary of Occupational Titles*, and are more in line with a sedentary position.

OWCP procedures state that, unless the medical evidence is clear and unequivocal, OWCP should seek the advice of a physician regarding the suitability of the position.¹⁷ The Board finds that the medical evidence is clear and unequivocal in this case, as the selected position of office clerk, general requires lifting of 20 pounds occasionally¹⁸ The jobs reviewed by Dr. Yoshinaga did not require 20 pounds lifting, and the physician clearly limited appellant to lifting of 15 pounds.

As the medical evidence regarding whether appellant can work in the selected position is not clear and unequivocal, OWCP did not meet its burden of proof.¹⁹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of office clerk, general.²⁰

¹⁷ *Supra* note 14, *Determining Wage-Earning Capacity*, Chapter 2.816.4 (June 2013). OWCP procedures further provide that the medical evidence "should indicate that the claimant's condition is stable." *Id.* at Chapter 2.816.4(b) (June 2013).

¹⁸ *F.W.*, Docket No. 14-1772 (issued January 28, 2015).

¹⁹ The Board also notes that, in accordance with section 8113(b) of FECA and section 10.519(b) of OWCP regulations, *supra* notes 13 and 14, where, as here, an employee does not cooperate with vocational rehabilitation efforts, when a suitable job has been identified, OWCP will reduce the employee's compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. *See D.A.*, Docket No. 15-734 (issued June 5, 2015). The medical evidence, however, must establish that appellant can perform the selected position. *See E.H.*, Docket No. 10-1958 (issued July 7, 2011).

²⁰ Counsel requested that the Board address the subpoena issue. The Board concludes that, as OWCP's hearing representative denied the request on August 6, 2014 it has no jurisdiction to review it because the denial was issued more than 180 days from the date of the filing of the appeal. *See* 20 C.F.R. § 501.3(e).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 15, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board