

ISSUES

The issues are: (1) whether OWCP met its burden of proof to reduce appellant's monetary benefits based on her capacity to earn wages in the constructed position of customer complaint clerk; and (2) whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On appeal appellant asserts that she was not sufficiently notified that a February 2015 medical appointment would be determinative of her workers' compensation rights, that her rehabilitative training was inadequate, and that, based on an October 23, 2011 letter from OWCP, she is entitled to continue to receive periodic wage-loss compensation.

FACTUAL HISTORY

On March 18, 2011 appellant, then a 51-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she injured the fifth toe of her left foot the previous day when a patient in a wheelchair ran over her foot. The employing establishment removed her from employment on March 30, 2011, when her temporary appointment ended.³

On April 5, 2011 Dr. Justin Franson, a podiatrist, performed open reduction, internal fixation of the left fifth metatarsal. On May 10, 2011 OWCP accepted left foot fracture. Appellant received wage-loss compensation benefits and was placed on the periodic compensation rolls. An October 4, 2011 letter informing appellant of her periodic compensation payments notified her that she would receive periodic payments "for the period from [October 23, 2011] until you have been placed in suitable modified work."

In October 2011, OWCP referred appellant to Dr. Richard P. Pollis, a Board-certified orthopedic surgeon, for a second-opinion evaluation to determine her work capacity. In a November 7, 2011 report, he diagnosed left foot pain status post left fifth metatarsal surgery. Dr. Pollis advised that, upon recovery from the surgery in approximately six months, appellant could resume gainful employment. He provided six-month restrictions of no walking or standing.⁴

In April 2012, appellant was referred to Dr. John F. Lawrence, Board-certified in orthopedic surgery, for a second-opinion evaluation. In a May 2, 2012 report, Dr. Lawrence noted her complaint of continued left foot pain and a history of back pain resulting from a 2000 nonemployment-related motor vehicle accident. Following physical examination, he diagnosed status post crushing injury to the left foot with complex regional pain syndrome. Dr. Lawrence recommended pain management and advised that appellant had not reached maximum medical improvement. He advised that she could not return to a nursing assistant position, but was a

³ The temporary appointment was made effective January 30, 2011, to run until March 1, 2011. It was extended on March 2, 2011, to run through March 31, 2011. The employing establishment indicated that appellant worked eight-hour shifts.

⁴ Appellant filed a schedule award claim on July 19, 2011. On March 1, 2012 OWCP informed her that, because her condition was not permanent and stationary, it was premature to develop a schedule award. Appellant was informed that she should file another schedule award claim when her condition became permanent.

candidate for vocational rehabilitation. Dr. Lawrence provided restrictions including no walking or standing.

On September 18, 2012 OWCP expanded the accepted conditions to include fracture of other tarsal and metatarsal bones, closed, left, and other mononeuritis of the left fifth metatarsal (sural nerve). Surgical sural nerve resection was authorized on September 25, 2012. On February 4, 2012 Dr. Justin J. Franson, a podiatrist, noted that appellant was scheduled for ambulatory surgery the next day. A copy of the operative report is not in the case record. In a follow-up treatment note, dated February 12, 2013, a medical student noted that appellant was doing well, ambulating on crutches.

On April 11, 2013 the employing establishment informed OWCP that at the time appellant was temporarily appointed in 2011, it was and continued to be a requirement that a nursing assistant be a United States citizen. It stated that she had recently been forwarded a new application, and that it had been discovered that she was not a United States citizen. Therefore, appellant would not be offered a modified position.

A May 8, 2013 functional capacity evaluation demonstrated that appellant could perform sedentary work with her physician's approval. On June 14, 2013 Dr. Jeffrey Spina, a Board-certified internist and chief of employee health at the employing establishment, advised that appellant was permanent and stationary with regard to her employment injury and did not meet the strength requirements to return to full-time work as a nursing assistant.

In June 2013, appellant was referred to a rehabilitation specialist for vocational rehabilitation services. A second functional capacity evaluation was done on July 16, 2013. The report demonstrated that appellant could perform sedentary duties and advised that it would be beneficial for her to begin working four hours a day and gradually increase to eight hours a day as her left foot continued to heal.⁵ On a work capacity evaluation (OWCP Form 5c) dated August 1, 2013, Dr. Spina advised that appellant could no longer perform her usual position due to permanent limited ambulation and standing, but could work eight hours of restricted duty daily. He noted that she could walk for four hours, stand for six hours, twist, bend, and stoop for four hours, reach above the shoulder, push, pull, and kneel for two hours, climb for one hour' and had a 50-pound restriction on pushing and pulling. Dr. Spina further found that appellant should not walk distances greater than 150 feet at a time with no fast-paced walking, no crawling, and could lift and carry 11 to 15 pounds intermittently, and 0 to 10 pounds continuously.

In her initial intake report, the rehabilitation specialist noted that appellant had worked as a certified nurse assistant for at least 10 years. Appellant had vocational testing on August 21, 2013 and a transferable skills analysis on August 30, 2013. The rehabilitation specialist identified the positions of customer complaint clerk and receptionist, and completed a labor market survey for each position on September 16, 2013. These included a job description for

⁵ In an undated report, Dr. Spina advised that, as appellant was no longer an employee at the employing establishment and was a nonveteran, she was no longer eligible for continued care at the employing facility. On August 1, 2013 the employing establishment forwarded his report to her and advised that she should seek private treatment.

each position. The rehabilitation specialist indicated that each position was within the physical restrictions provided by Dr. Spina and were available in the local commuting area. A vocational rehabilitation plan for computer and customer service skills training for these positions was approved on September 27, 2013. Appellant began training on September 30, 2013 and completed training on March 27, 2014.

A telephone conference was held on May 21, 2014 with appellant, the vocational rehabilitation specialist, and an OWCP claims examiner participating. The placement phase of vocational rehabilitation and appellant's responsibilities for seeking employment were discussed. Appellant indicated that she was having thyroid surgery on May 29, 2014. Job development and search activity continued.

On August 5, 2014 OWCP forwarded an OWCP Form CA-1032 to appellant for completion. It also asked her to provide a narrative medical report within 30 days. On September 29, 2014 OWCP noted that appellant had been last seen for her foot condition at the employing establishment health clinic on June 12, 2013.

Rehabilitation services were closed on October 16, 2014. The rehabilitation specialist submitted extensive labor market surveys for the positions of customer complaint clerk and receptionist and provided updated job classification reports with updated salary information reflecting a starting salary ranging from \$10.00 to \$17.00 per hour for the customer complaint clerk and \$10.00 to \$16.00 per hour for the receptionist position.

In a January 14, 2015 letter, OWCP informed appellant that a second-opinion evaluation was being made. Appellant was informed that the purpose of the examination was to "provide us with additional evidence on the nature of your condition, the extent of disability, and appropriate treatment." On January 16, 2015 she was notified that an appointment was made with Dr. Ghol Bahman Ha-Eri, a Board-certified orthopedic surgeon.

In a February 20, 2015 report, Dr. Ha-Eri noted his review of the statement of accepted facts and medical record. He described appellant's work injury, her subsequent medical care, and her complaint of mild pain in the outer border of the left foot. Dr. Ha-Eri indicated that she wore regular shoes, had a normal gait, and walked without assistance. Physical examination demonstrated mild tenderness over surgical scars on the left foot, with normal ankle range of motion and satisfactory peripheral circulation in the left foot. Neurological examination demonstrated decreased sensation in the outer border of the left foot. Strength was 5/5 in the left ankle and foot. Dr. Ha-Eri diagnosed soft tissue contusion secondary to being run over with an electric wheelchair, and two prior surgical procedures on the left fifth metatarsal. In response to OWCP questions, he reported that appellant had only subjective mild pain and, objectively, she had scar of prior surgery and decreased sensation in the outer border of the left foot. Dr. Ha-Eri advised that she did not need further medical care for her accepted left foot condition. He reported that appellant could work an eight-hour day for 40 hours a week, but she could not perform the duties of a nursing assistant, mainly due to the residual subjective pain and left foot scarring. Dr. Ha-Eri reviewed descriptions of the receptionist and customer complaint clerk positions and advised that she could perform both. In an attached work capacity evaluation (OWCP Form 5c), he advised that appellant had indefinite restrictions of four hours of walking and standing with no squatting and one hour of climbing.

On May 28, 2015 appellant informed OWCP that she had been performing volunteer work at a private-sector employing establishment for three days a week.

By letter dated June 5, 2015, OWCP proposed to reduce appellant's compensation, based on her capacity to earn wages as a customer complaint clerk, DOT No. 241.367-014. It noted that on June 14, 2013 Dr. Spina had advised that her condition was medically stationary and, based on his opinion, she was referred for vocational rehabilitation and completed authorized training. The June 5, 2015 notice also described Dr. Ha-Eri's restrictions and indicated that the customer complaint clerk 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 described the physical requirements of the position as sedentary with occasional handling of items weighing up to 10 pounds and noted that the job did not involve climbing, balancing, stooping, kneeling, crouching, or crawling.⁶ OWCP indicated that, based on recent wage and position information, the customer complaint clerk position was reasonably available at an entry pay level of \$400.00 per week. It recommended that appellant's wage-loss compensation be reduced to zero because the pay rate of the selected position was equal to or greater than the current pay rate of the job held when injured.

In a telephone call on June 30, 2015 appellant disagreed with the proposed reduction.

By decision dated July 7, 2015, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as a customer complaint clerk. It reduced her compensation to zero because the pay rate of the selected position was equal to or greater than the current pay rate of the job held when injured.

On an OWCP Appeal Request Form dated July 22, 2015, received by OWCP on July 27, 2015, appellant requested reconsideration. She submitted nothing further.

In a nonmerit decision dated August 14, 2015, OWCP denied further review of the merits of the claim. It noted that appellant did not submit a statement, or factual or medical evidence to support this request.

⁶ The duties of the customer complaint clerk (DOT No. 241.367-014) were described in the Department of Labor's *Dictionary of Occupational Titles* (DOT) as: Investigates customer complaints about merchandise, service, billing, or credit rating: Examines records, such as bills, computer printouts, microfilm, meter readings, bills of lading, and related documents and correspondence, and converses or corresponds with customer and other company personnel, such as billing, credit, sales, service, or shipping, to obtain facts regarding customer complaint. Examines pertinent information to determine accuracy of customer complaint and to determine responsibility for errors. Notifies customer and designated personnel of findings, adjustments, and recommendations, such as exchange of merchandise, refund of money, credit of customer's account, or adjustment of customer's bill. May recommend to management improvements in product, packaging, shipping methods, service, or billing methods and procedures to prevent future complaints of similar nature. May examine merchandise to determine accuracy of complaint. May follow up on recommended adjustments to ensure customer satisfaction. May key information into computer to obtain computerized records. May trace missing merchandise and be designated tracer clerk (clerical). May investigate overdue and damaged shipments or shortages in shipments for common carrier and be designated over-short-and-damage clerk (clerical). May be designated according to type of complaint adjusted as bill adjuster (clerical); merchandise-adjustment clerk (retail trade); service investigator (utilities, tel. & tel.). The position was classified as sedentary.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁷ 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.⁸

Section 8115 of FECA and section 10.520 of 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.⁹

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.¹⁰ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹¹

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 DOT 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.¹² Finally, application of the principles set forth in *Albert C. Shadrick*,¹³ as codified in section 10.403 of OWCP regulations,¹⁴ will result in the percentage of the employee's loss of wage-earning capacity.¹⁵

⁷ *James M. Frasher*, 53 ECAB 794 (2002).

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

⁹ 5 U.S.C. § 8115; *Id.* at § 10.520; *John D. Jackson, id.*

¹⁰ *William H. Woods*, 51 ECAB 619 (2000).

¹¹ *John D. Jackson, supra* note 8.

¹² *Supra* note 7.

¹³ 5 ECAB 376 (1953).

¹⁴ 20 C.F.R. § 10.403.

¹⁵ *Supra* note 7.

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.¹⁶

ANALYSIS -- ISSUE 1

OWCP based its July 7, 2015 wage-earning capacity decision on appellant's capacity to earn wages as a customer complaint clerk. It must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹⁷ In a February 20, 2015 report, Dr. Ha-Eri noted his review of the position description for the customer complaint clerk job and advised that appellant could perform the job duties described. While he provided restrictions of no more than four hours standing and walking, the position selected was sedentary, and its physical requirements were within his restrictions. Moreover, they are also within the restrictions provided by Dr. Spina, an attending physician, who advised on August 1, 2013 that appellant could work eight hours of modified duty daily. Appellant, thus, has the physical capacity to perform the duties of the selected position.¹⁸

The Board also finds that appellant had the necessary vocational and educational preparation for the selected position of customer complaint clerk. Appellant successfully completed computer and customer service training in March 2014, and has a substantial employment history as a certified nursing assistant.

The vocational rehabilitation counselor advised that the position of customer complaint clerk was reasonably available in the local labor market with an entry-level weekly wage of \$400.00.

The Board finds that OWCP considered the appropriate factors in determining that the customer complaint clerk position represented appellant's wage-earning capacity.¹⁹ These factors included availability of suitable employment and her physical limitations, usual employment, age and employment qualifications.²⁰ The evidence established that appellant 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.

¹⁶ *John D. Jackson, supra* note 8.

¹⁷ *Supra* note 10.

¹⁸ *Id.*

¹⁹ *John D. Jackson, supra* note 8.

²⁰ *Id.*

OWCP, therefore, properly determined that the position of customer complaint clerk reflected her wage-earning capacity, and properly reduced her compensation to zero on July 7, 2015 because the pay rate of the selected position was greater than her date-of-injury salary.²¹

On appeal, appellant maintained that she was not informed that a February 2015 second-opinion evaluation would be determinative of her workers' compensation rights. However, the January 14, 2015 letter OWCP sent her notifying her of the examination clearly stated that "this evaluation will provide us with additional evidence on the nature of your condition, the extent of disability, and appropriate treatment."

Regarding her assertion that she received insufficient vocational rehabilitation training, appellant was referred to the vocational rehabilitation specialist in June 2013. A rehabilitation plan for computer and customer service skills was approved on September 27, 2013. Appellant began training on September 30, 2013 completed it successfully on March 27, 2014 and began job development and search activity that continued until October 14, 2014 when rehabilitation services were closed. The fact that a claimant is unable to secure employment does not establish that the constructed position is not vocationally suitable.²²

Finally, appellant's insistence that she is entitled to continue to receive periodic wage-loss compensation based on an OWCP letter is without merit. While the October 4, 2011 OWCP letter advised that she would receive periodic wage-loss compensation payments for the period from October 23, 2011 "until [appellant has] been placed in suitable modified work," the letter further states that "a partially disabled employee shall be paid compensation based on the difference between the monthly pay and the employee's wage-earning capacity, as determined by the employee's actual earnings or by OWCP." In this case, as appellant had no actual earnings, OWCP properly determined that the customer complaint clerk position reflected her wage-earning capacity and properly reduced her compensation to zero on July 7, 2015 because the pay rate of the selected position was greater than her date-of-injury salary.²³

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.²⁴ Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards enumerated in section

²¹ *James Smith*, 53 ECAB 188 (2001).

²² *Lawrence D. Price*, 54 ECAB 590 (2003).

²³ *Supra* note 21.

²⁴ 5 U.S.C. § 8128(a).

10.606(b)(3).²⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁶ Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²⁷

ANALYSIS -- ISSUE 2

With her July 22, 2015, 2015 reconsideration request, appellant did not submit any documentation, but merely checked on an OWCP form that she was requesting reconsideration. She, therefore, did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b).²⁸ As to the third above-noted requirement under section 10.606(b)(2), she submitted no additional evidence.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied her reconsideration request.

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 customer complaint clerk, and that OWCP properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

²⁵ 20 C.F.R. § 10.608(a).

²⁶ *Id.* at § 10.608(b)(3).

²⁷ *Id.* at § 10.608(b).

²⁸ *Id.* at § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the August 14 and July 7, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 16, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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