



## ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective January 12, 2014 based on her capacity to earn wages in the constructed position of file clerk.

## FACTUAL HISTORY

On August 25, 1995 appellant, then a 39-year-old food safety inspector, filed a claim for occupational disease, alleging allergies to dust, mold, and other irritants while performing her inspection duties. She stopped work on August 21, 1995 and did not return. On January 10, 1996 OWCP accepted the conditions of allergic rhinitis and asthma. It paid appellant compensation for total disability from August 21, 1995 onward. By decision dated July 23, 1997, appellant received a schedule award for 25 percent permanent impairment to each lung from July 20, 1997 to January 16, 1999.

Since 2004 appellant has seen Dr. Curtis L. Hedberg, a Board-certified allergist, for treatment. In a December 14, 2010 report, Dr. Hedberg reported that appellant did well with her symptoms so long as she avoided exposures to smoke, strong odors, strong house cleaning agents and perfumes. He indicated that her response to allergy shots has been very good over the last few years and that her asthma and lung functions were stable. Dr. Hedberg noted that appellant has occasional residual symptoms that seem to be triggered by weather changes and accidental exposures to smoke or strong fragrances. He opined that she would not be able to keep gainful employment due to the severity of her sensitivity and hyperresponsiveness of her airways to irritants, such as weather changes, temperature changes, fumes, fragrances, and allergens. Dr. Hedberg indicated that the current treatment plan was to reduce the number of antigens she gets in her allergy shots to correlate with the loss of sensitivities shown by skin testing.

Dr. Waqas Chishti, a Board-certified pulmonologist and OWCP referral physician, reviewed the statement of accepted facts (SOAF), and appellant's medical record and set forth examination findings. In his May 5, 2011 report, he diagnosed atopic/allergic/extrinsic asthma which he opined was work related. Dr. Chishti noted that appellant would require ongoing therapy with medications, but could work so long as she was not exposed to her asthma triggers.

On August 2, 2011 OWCP found a conflict in the medical opinion evidence between Dr. Chishti and Dr. Hedberg regarding appellant's work capacity and arranged for an impartial medical examination with Dr. Sitaraman Subramanian, a Board-certified pulmonologist, to resolve the medical conflict. In a September 6, 2011 report, Dr. Subramanian reviewed the SOAF, a list of questions, and appellant's medical record, and noted the history of appellant's illness and that she had not worked in 16 years secondary to asthma. He also noted that she was involved in a serious car accident in 1983, with broken ribs and other fractures, and was unconscious for three days. Dr. Subramanian set forth examination findings and diagnosed bronchial asthma on medication and mild obesity. He opined, "[t]he patient seems to be in good health with adequate control of her asthma with the current medication. Appellant should be able to work eight hours a day with proper precaution including avoiding any trigger factor for her asthma." Dr. Subramanian recommended that appellant continue her current medications including allergy shots. In a September 13, 2011 work capacity evaluation form, he noted that she was not capable of performing her usual job, but was able to work full-time regular work

which precluded exposure to temperature extremes, airborne particles, gas, and fumes. Dr. Subramanian noted that prevention of possible future injury was the only reason for work limitations.

On January 23, 2012 appellant was referred to vocational rehabilitation services based on Dr. Subramanian's work restrictions. Following a vocational assessment and interview, the vocational rehabilitation counselor identified the position of file clerk and payroll clerk as being within appellant's physical limitations, vocational skills, and geographical area. The file clerk position, as it appeared in the Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 206-367-014, was classified as a light-duty position. The position required occasional stooping and crouching, as well as frequent reaching, handling, and fingering. No tasting or smelling was required. The position required appellant to file correspondence, cards, invoices, receipts, and other records, search for and investigate information contained in files, insert additional data on file records, complete reports, keep files current, and supply information from file data. It also required appellant to dispose of obsolete files in accordance with established procedures, and possible copying of records on photocopy or microfilm machines, possible typing of labels or reports and possible use of calculations to keep files current. Vocational preparation for the constructed position required 30 days to 3 months. The vocational rehabilitation counselor stated that appellant would receive basic computer skills training to make her competitive for this type of work. The position had no exposure to weather, extreme cold/extreme hot, wet/humid, atmospheric conditions, or other environmental conditions.

Appellant underwent vocational training and entered placement services, which were unsuccessful. On September 10, 2013 the target positions were found to be vocationally suitable and available in appellant's commuting area. The starting wage for the file clerk was \$427.00 per week in appellant's commuting area.

In a November 4, 2013 notice, OWCP advised appellant that it proposed to reduce her compensation for wage loss because the medical and factual evidence of record established that she was no longer totally disabled. It found that she had the capacity to earn the wages of a file clerk. OWCP requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

Dr. Hedberg, in his November 11, 2013 report, noted that appellant had extrinsic asthma with many different triggers, most of which are triggered by fragrances, tobacco, smoke, and sometimes even natural odors. He noted that while appellant's asthma and allergies have improved over the years with avoidance measures, such as learning coping mechanisms of avoidance and allergy shots, her ability to lead a normal life and be a productive citizen by gainful employment was not possible in most situations. Dr. Hedberg opined that in order for appellant to be gainfully employed, she had to be placed in the perfect work condition where there would be no possibility of any triggers for her asthma. He felt that she could only work in her home as the likelihood that an employer would cater to her long list of avoidances would be impossible.

In a December 3, 2013 letter, counsel challenged the proposed reduction on the grounds that office environments provided exposure to triggers and were therefore medically unsuitable. He argued that the record supported limited exposure to triggers. Counsel referenced that the

vocational rehabilitation counselor had expressed concerns of finding an environment that was free of triggers, and he described an event where appellant had an exacerbation of her condition during a job interview. He contended that, since there was no guarantee of a trigger-free environment, suitable work could not be found in an office environment and OWCP's attempt to find office positions suitable was tantamount to fraud. Counsel noted that appellant was not able to work in a classroom environment so the majority of her vocational training was performed in the home, which attested to her inability to work in an office environment. He argued that unless OWCP could guarantee a trigger-free target environment, it could not issue a constructed wage-earning decision as appellant could suffer a medical emergency.

By decision dated January 2, 2014, OWCP finalized the wage-earning capacity determination effective January 12, 2014, based on appellant's capacity to earn wages as a file clerk. It found that the record supported that appellant was capable of functioning in an environment other than the environment at home as demonstrated by her attendance of classes at school and her routine filing of Rehab 17 forms claiming reimbursement for expenses of attending classes outside the home. OWCP noted that, while appellant appeared to have an exacerbation of her condition during a job interview, the cause of the event was due to the cologne worn by the hiring person. It determined that the weight of the medical evidence rested with Dr. Subramanian's impartial opinion expressed in his September 6, 2011 report. Dr. Hedberg's November 11, 2013 medical opinion was highly speculative and prophylactic in nature and insufficient to overcome the weight of Dr. Subramanian's opinion. Based on the formula developed in *Albert C. Shadrick*,<sup>3</sup> OWCP determined appellant's weekly pay rate in the former position to be \$878.77, her adjusted earning capacity in the file clerk position was \$266.06 per week which resulted in loss in earning capacity of \$276.92 per week. Appellant's compensation rate every four weeks was found to be \$1,251.00 with a net compensation every four weeks of \$865.60 based on applicable cost-of-living adjustments of \$312.75 and deductions of \$300.96 for a health insurance premium, \$9.30 for basic life insurance premium, and \$75.14 for optional life insurance premium.

On January 7, 2014 counsel requested a telephonic hearing, which was held on September 10, 2014. He reargued the points set forth in his December 3, 2013 letter that the constructed position was not medically suitable. Counsel also argued that the medical evidence establishing the work tolerances was stale as it was dated September 2011. He argued that many triggers have been documented and appellant was not employable due to her asthma condition. No new medical evidence was received.

In a September 26, 2014 letter, counsel argued that the hearing representative was adversarial in his approach to the proceeding. He again referenced his arguments submitted on December 3, 2013 and argued against the reduction in compensation benefits.

By decision dated December 5, 2014, an OWCP hearing representative affirmed the wage-earning capacity decision. He found Dr. Subramanian's impartial medical opinion on work capacity was properly accorded the weight of the evidence and was not stale as there was no evidence in the record that those restrictions were no longer "reasonably current," given the

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<sup>3</sup> 5 ECAB 376 (1953).

significant passage of time since the injury occurred and the stable nature of the condition. The hearing representative further found that while counsel was arguing OWCP must prove with absolute certainty that a target position would not expose appellant to an asthma trigger, the “true test [wa]s whether there [wa]s any evidence that a particular position will with certainty expose the claimant to an asthma trigger.” He found that appellant offered no evidence that the position of file clerk was incompatible with Dr. Subramanian’s work restrictions.

### **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>

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 the employee’s wage-earning capacity or if the employee has no actual wages, 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 and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>6</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee’s case to an OWCP vocational rehabilitation counselor for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fit the 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 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>7</sup> and codified by regulations at 20 C.F.R. § 10.403<sup>8</sup> should be applied. Subsection(d) of the regulations provide that the employee’s wage-earning capacity in terms of percentage is obtained by dividing the employee’s actual earnings or the pay

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<sup>4</sup> *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>5</sup> 20 C.F.R. §§ 10.402, 10.403.

<sup>6</sup> 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> 20 C.F.R. § 10.403.

rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.<sup>9</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.<sup>10</sup> 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. Additionally, 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>11</sup>

Section 8123(a) of FECA<sup>12</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>13</sup> When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>14</sup>

### ANALYSIS

OWCP accepted that appellant sustained the conditions of allergic rhinitis and asthma as a result of performing her inspection duties as a food safety inspector. Since August 21, 1995, she has been out of work and in receipt of compensation for total disability on OWCP's periodic rolls. On January 23, 2012 OWCP referred appellant to vocational rehabilitation services based on the restrictions set forth in the September 6, 2011 report of Dr. Subramanian, an impartial medical specialist.

The Board finds Dr. Subramanian's impartial medical evaluation is deficient as he does not provide a fully-rationalized opinion to resolve the conflict in medical evidence for the relevant issue in this case. In his brief report, Dr. Subramanian indicated that appellant had an eight-hour per day work capacity and included restrictions that appellant should take "proper precaution including avoiding any trigger factor for her asthma." Dr. Subramanian, however, did not provide much specific discussion regarding appellant's condition nor did he articulate with

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<sup>9</sup> *Id.* at § 10.403(d).

<sup>10</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> 5 U.S.C. §§ 8101-8193.

<sup>13</sup> *Id.* at § 8123(a); *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>14</sup> *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

specificity the work restrictions in either his narrative report or his OWCP-5c form. The Board also notes that OWCP did not send Dr. Subramanian a description of the constructed file clerk position for an opinion as to appellant's ability to perform the duties of this position in an office environment or request that he conduct another medical examination in light of Dr. Hedberg's opinion that she could only work in her home where there was no possibility of any triggers for her asthma. As such the Board finds that his report was not sufficiently rationalized to be considered the weight of the medical evidence.

As Dr. Subramanian's evaluation of appellant was not sufficiently rationalized to resolve the conflict in medical opinion, OWCP has not met its burden of proof to establish the constructed position of file clerk as appellant's wage-earning capacity. The Board will reverse OWCP's hearing representative's December 5, 2014 decision.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to justify the reduction of appellant's compensation based on a capacity to earn wages in the constructed position of file clerk. The medical evidence on which OWCP relied, the report of the impartial medical specialist, Dr. Subramanian, was not sufficiently rationalized to resolve the conflict in medical opinion to establish relevant work limitations.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 5, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 4, 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