

On appeal counsel asserts that the decision is contrary to law and fact.

FACTUAL HISTORY

On July 26, 2006 appellant, then a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that his employment duties caused pain in his left heel.³ Following an initial denial on November 16, 2006, in a decision dated June 8, 2007 an OWCP hearing representative reversed the November 16, 2006 decision and accepted the claim for left foot plantar fasciitis and calcaneal stress fracture.

Dr. Richard Zirm, a podiatrist, performed external neurolysis of Baxter's nerve of the left heel and subtotal plantar fasciotomy of the left foot on October 29, 2007. Appellant did not return to work after the surgery and was placed on the periodic compensation rolls.

In October 2008, OWCP determined that a conflict in medical evidence had been created between Dr. Karl V. Metz, a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant continued to have residuals of the accepted condition and, while he was not capable of returning to a letter carrier position, he could perform restricted duty for eight hours per day and the opinion of Dr. Zirm, who found that appellant was totally disabled. It referred appellant to Dr. Robert D. Zaas, Board-certified in orthopedic surgery, for an impartial medical evaluation. In an October 28, 2008 report, Dr. Zaas advised that appellant continued to have residuals from the accepted conditions and should remain off all work.

On August 17, 2009 OWCP expanded the accepted conditions to include phlebitis and edema of the right leg and pulmonary embolism.

Dr. Zirm excised a left plantar heel spur on November 16, 2009. He continued to follow appellant.⁴ In an April 11, 2013 report, Dr. Zirm reported that he had not seen appellant since April 25, 2011. He noted appellant's report that his left heel pain had not significantly changed. Dr. Zirm diagnosed recalcitrant left heel spur syndrome. He also noted that appellant was being treated for bilateral deep vein thromboses (DVT). Dr. Zirm advised that appellant could not return to work as a mail carrier.

In May 2013, OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon and second opinion physician. In a June 3, 2013 report, Dr. Ghanma noted his review of the medical record, appellant's recitation of his medical condition, including his right upper extremity injury,⁵ and his complaint of difficulty standing, walking, riding, and sleeping. He described examination findings. Dr. Ghanma advised that appellant had no residuals of the accepted right lateral epicondylitis and right ulnar nerve entrapment conditions. With regard to the left lower extremity, he advised that there was no current evidence of a

³ In a claim adjudicated by OWCP under File No. xxxxxx865, OWCP accepted right lateral epicondylitis and right ulnar nerve entrapment, for which he had surgery on October 5, 2004. The instant claim was adjudicated by OWCP under File No. xxxxxx401.

⁴ The record also contains a number of form treatment notes with illegible signatures.

⁵ *Supra* note 3.

calcaneal stress fracture, but the plantar fasciitis condition had not resolved. Dr. Ghanma further opined that neither the left calcaneal spur nor the accepted right lower extremity diagnoses of phlebitis and edema and pulmonary embolism were related to the accepted left foot conditions and that appellant had no employment-related diagnoses. He indicated that appellant was not totally disabled and could perform a seated job. On an attached work capacity evaluation (Form 5c), Dr. Ghanma provided restrictions of 2 hours walking, standing, pushing, pulling, lifting, squatting, and kneeling, and 1 hour climbing, with a 25-pound weight restriction.

In June 2013, appellant was referred to Mark Anderson, a rehabilitation specialist, for vocational rehabilitation services who performed vocational testing and a transferable skills analysis on July 19, 2013. He participated in a clerical work adjustment program from August 26 to November 18, 2013. Mr. Anderson identified the positions of customer service representative and order clerk, and completed a labor market survey for each position on November 11, 2013. These included a job description with physical demands for each position, indicating that they were sedentary. Mr. Anderson indicated that each position was available in the local commuting area. He recommended additional computer skills training. A rehabilitation plan was approved. Appellant completed the computer training in March 2014 and began job placement.

In a treatment note dated May 12, 2014, Dr. Zirm reiterated his findings and conclusions. In correspondence dated June 25, 2014, he noted that appellant continued to have daily moderate-to-severe left hind foot pain. Dr. Zirm advised that appellant had three problems: the symptomatic heel, chronic nerve entrapment, and chronic bilateral DVTs. He concluded that appellant's ability to stand, walk, and work on his feet was definitely limited. On July 14, 2014 Dr. Zirm recommended pain management and indicated that appellant could not tolerate standing for long periods. He completed a work capacity evaluation on July 15, 2014 in which he advised that appellant could work eight hours daily with permanent restrictions of sitting four hours, and walking and standing two hours.

On August 6, 2014 Mr. Anderson updated the labor market survey information for the customer service representative and order clerk positions. OWCP again referred appellant to Dr. Ghanma for a second opinion evaluation.

In a September 8, 2014 report, Dr. Ghanma repeated appellant's medical and surgical history. He noted appellant's complaint of difficulty standing, walking, riding, and sleeping. Dr. Ghanma agreed with his prior opinion that appellant had no residuals of his right lateral epicondylitis and right ulnar entrapment, noted no current evidence of calcaneal fracture, and that appellant had no evidence of left plantar fasciitis, noting that his symptoms were related to a medial heel scar not associated with the plantar fascia, but from the October 29, 2007 left foot surgery. He advised that appellant could perform restricted duty for eight hours daily. Dr. Ghanma reviewed the requirements of the order clerk and customer service representative positions and advised that appellant was capable of performing both jobs.

On November 13, 2014 OWCP forwarded a copy of Dr. Ghanma's report to Dr. Zirm for comment.

On March 31, 2015 Mr. Anderson updated the labor market survey information for the customer service and order clerk positions.

In a report dated April 30, 2016, Dr. Brant Holtzmeier, an osteopath, noted appellant's complaints of continued leg pain and described his treatment regimen. He diagnosed acute DVT.

By letter dated May 19, 2015, OWCP proposed to reduce appellant's compensation, based on his capacity to earn wages as a customer service representative, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 241.367-014. It noted that on June 3, 2013 Dr. Ghanma had advised that appellant could work with restrictions and, based on his opinion, appellant was referred for vocational rehabilitation and completed authorized training. The May 19, 2015 notice also described Dr. Zirm's restrictions and Dr. Ghanma's findings in his September 8, 2014 report. OWCP noted that Dr. Zirm did not reply to its November 13, 2014 correspondence. It indicated that the customer service representative position was selected as being the most appropriate, based upon the rehabilitation counselor's review of appellant's work history, and transferrable skills analysis. OWCP described the physical requirements of the customer complaint clerk as sedentary and within the restrictions provided by Dr. Ghanma.⁶ It indicated that, based on recent wage and position information, the customer service representative position was reasonably available at an entry pay level of \$643.00 per week.

In response to the proposed reduction, appellant submitted a duplicate of Dr. Holtzmeier's April 30, 2015 report, and patient progress reports dated from March 26 to April 21, 2015 regarding his response to medication.

By decision dated July 21, 2015, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a customer service representative, effective that day. By utilizing the *Shadrick* formula,⁷ it found that appellant had 41 percent loss of wage-earning capacity.

⁶ The duties of position DOT No. 241.367-014, which is identified as an adjustment clerk, customer-relations-complaint clerk, are described in the Department of Labor's *Dictionary of Occupational Titles* 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 is classified as sedentary.

⁷ *Albert C. Shadrick*, 5 ECAB 376 (1953). See discussion *infra*.

In a July 23, 2015 report, Dr. Holtzmeier reiterated his diagnosis and described appellant's medication regimen.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. At the hearing, held on March 7, 2016, appellant testified regarding his employment history and maintained that he did not have the training to perform the duties of customer service representative. Counsel agreed that appellant probably had the physical ability to perform the position, but as he had no training and was 65 years old, the wage-earning capacity determination should be reversed.

In a May 3, 2016 decision, an OWCP hearing representative noted that the physical requirements of the constructed position of customer service representative were within the restrictions provided by Dr. Ghanma, and that, as appellant had six months of vocational training including three months of computer training, he possessed the required training for the position. The hearing representative affirmed the July 21, 2015 wage-earning capacity determination.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁸ 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.⁹

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.¹⁰

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.¹¹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹²

⁸ *James M. Frasher*, 53 ECAB 794 (2002).

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

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

¹¹ *William H. Woods*, 51 ECAB 619 (2000).

¹² *John D. Jackson*, *supra* note 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'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.¹³ Finally, application of the principles set forth in *Albert C. Shadrick*,¹⁴ as codified in section 10.403 of OWCP regulations,¹⁵ will result in the percentage of the employee's loss of wage-earning capacity.¹⁶

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.¹⁷

ANALYSIS

OWCP issued its July 21, 2015 wage-earning capacity determination based on appellant's capacity to earn wages as a customer service representative. As noted above, OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects the claimant's wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹⁸ In a report dated September 8, 2014, Dr. Ghanma agreed with his prior opinion of June 3, 2013 that appellant had no residuals of his right lateral epicondylitis and right ulnar entrapment, noted no current evidence of calcaneal fracture, and no evidence of left plantar fasciitis, and advised that appellant's symptoms were related to a medial heel scar from the October 29, 2007 left foot surgery. After his review of the requirements of the customer service representative position, he advised that appellant was capable of performing the position.

OWCP forwarded a copy of Dr. Ghanma's report to Dr. Zirm on November 13, 2014, but Dr. Zirm did not respond. However, the record does contain a July 24, 2014 work capacity evaluation in which Dr. Zirm advised that appellant could work eight hours daily with permanent restrictions of sitting four hours, and walking and standing two hours. These are within the

¹³ *Supra* note 8.

¹⁴ *Albert C. Shadrick*, *supra* note 7.

¹⁵ 20 C.F.R. § 10.403.

¹⁶ *Supra* note 8.

¹⁷ *John D. Jackson*, *supra* note 9.

¹⁸ *Supra* note 11.

restrictions of the sedentary customer service position. Despite his multiple reports, Dr. Holtzmeier did not comment on appellant's work capabilities. Lastly, the Board notes that, at the hearing, counsel conceded that appellant probably had the physical ability to perform the position. The Board therefore finds that appellant had the physical capacity to perform the duties of the selected position.

The Board also finds that appellant had the necessary vocational and educational preparation for the selected position of customer service representative. Appellant successfully completed vocational and computer training in March 2014. Mr. Anderson, the vocational rehabilitation counselor advised that the customer service position was reasonably available in the local labor market with an entry-level weekly wage of \$643.00.

The Board concludes that OWCP considered the appropriate factors in determining that the position of customer service representative represented appellant's wage-earning capacity.¹⁹ These factors include availability of suitable employment and his physical limitations, usual employment, age, and employment qualifications.²⁰ The evidence of record establishes 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 his commuting area. OWCP therefore properly determined that the position of customer service representative reflected his wage-earning capacity, and properly reduced his compensation.²¹

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 based on his capacity to earn wages in the selected position of customer service representative.

¹⁹ *John D. Jackson, supra* note 9.

²⁰ *Id.*

²¹ *James Smith, 53 ECAB 188 (2001).*

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2017
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