

FACTUAL HISTORY

On April 15, 2008 appellant, then a 48-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained pain in her shoulders as a result of repetitively extending her arms to case mail at work. She stopped work on April 13, 2008 and indicated that she was last exposed to the employment factors she believed contributed to her condition on April 12, 2008. OWCP accepted appellant's claim for bilateral shoulder sprain and other affections of bilateral shoulder region. It paid appellant disability compensation beginning April 15, 2008 and placed her on the periodic rolls, effective August 31, 2008.

On July 6, 2009 appellant retired from federal employment due to disability.

Appellant continued to receive medical treatment for her accepted bilateral shoulder injury. In a November 13, 2014 report, Dr. Marcus Duda, a Board-certified orthopedic surgeon, related appellant's complaints of persistent bilateral shoulder pain and provided findings on physical examination. He diagnosed persistent impingement symptoms bilaterally. Dr. Duda opined that appellant was capable of performing sedentary level work with restrictions of no repetitive work, no overhead work, and no lifting greater than 10 pounds.

OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor identified the positions of hospital admitting clerk and receptionist, described in the Department of Labor, *Dictionary of Occupational Titles* (DOT), as being within appellant's physician limitations. Labor market survey reports dated March 18, 2015 indicated that these positions were reasonably available within appellant's commuting area.

On August 19, 2015 OWCP proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages as a hospital admitting clerk. It applied the principles set forth in *Albert C. Shadrick*,² as codified in section 10.403 of OWCP's regulations,³ to determine that appellant's monthly wage-loss compensation benefits should be reduced by 37 percent. Appellant was advised that, if she disagreed with the proposed decision, she had 30 days to submit additional evidence or argument regarding her capacity to earn wages.

On October 6, 2015 OWCP finalized the reduction in appellant's benefits. It explained that it was reducing appellant's wage-loss compensation, effective October 18, 2015, based on her capacity to earn wages as a hospital admitting clerk at the rate of \$426.00 per week.

The proposed letter was sent to appellant's address, but it was returned to OWCP on October 9, 2015 as undeliverable and unable to forward.

On October 20, 2015 appellant called OWCP regarding the reduction of her wage-loss compensation benefits. She asserted that she had not received the letter proposing to reduce her wage-loss compensation benefits. Appellant noted that her address had not changed and OWCP confirmed that appellant's address on record was correct.

² 5 ECAB 376 (1953).

³ 20 C.F.R. § 10.403.

On November 13, 2015 OWCP received appellant's appeal request form dated November 5, 2015, which requested an oral hearing. In an attached narrative statement, appellant explained that she had not worked for the employing establishment since April 12, 2008 due to an on-the-job injury to her shoulders. She related that she continued to seek and receive treatment for both shoulders. Appellant contended that the job requirements of a hospital admitting clerk exceeded her abilities because the position required repetitive reaching in and out, back and forth, and from side to side to give and receive forms for patients to fill out. She further contended that the position required the possibility of moving a human body, which weighed more than her weight restriction of 10 pounds, and handling a wheelchair to assist patients, which weighed more than 10 pounds. She believed the repetitive work using both arms and shoulders would put stress, strain, and pressure on her already injured shoulders. Appellant noted that although the August 19, 2015 Proposed Notice of Reduction of Benefits was properly addressed to her current mailing address, she never received it. She had only received the Final Notice of Reduction of Benefits, dated October 6, 2015, which included a copy of the August 19, 2015 proposed notice. On or around October 15, 2015, appellant received a voice mail from the claims examiner concerning a returned letter. She questioned why it took OWCP so long to notify her of the returned letter.

A termination of compensation worksheet dated December 9, 2015 indicated that on November 14 and December 12, 2015 OWCP issued checks in the amount of \$2,919.84.

Beginning December 13, 2015 appellant began to receive wage-loss compensation at the reduced amount of \$1,786.14.

On February 25, 2016 OWCP issued a preliminary finding of an overpayment of compensation in the amount of \$2,330.00 for the period October 18 to December 12, 2015 because she continued to receive compensation at the full rate until December 12, 2015 despite the reduction of her wage-loss compensation on October 18, 2015. It determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known were incorrect. OWCP provided appellant with an attached overpayment action request form and financial information questionnaire to complete and submit if she challenged the preliminary finding of overpayment.

In an attached memorandum, OWCP noted that a decision was issued on October 18, 2015 notifying appellant that her compensation benefits would be reduced, effective October 18, 2015. It related that appellant's compensation benefits were not reduced until December 13, 2015, which resulted in an overpayment for the period October 18 through December 12, 2015. OWCP calculated that during the period October 18 through December 12, 2015, appellant received \$5,903.47 in compensation benefits, but she should have only received \$3,573.47 in wage-loss compensation benefits, resulting in an overpayment of compensation in the amount of \$2,330.00. It attached overpayment worksheets and adjustment forms, which confirmed these amounts. OWCP further determined that appellant was at fault in the creation of the overpayment because she knew or reasonably should have known that she was not entitled to compensation for total wage loss, after October 18, 2015, due to the reduction of benefits.

According to a Form CA-110, appellant contacted OWCP on February 23, 2016 and advised that she had received the CD-ROM of her case file. She referenced the January 29, 2016

preliminary finding of overpayment and reiterated that she had never received that letter. Appellant requested that another copy be sent to her.

OWCP reissued the Notice of Preliminary Finding of Overpayment in a letter dated February 25, 2016.

In a letter dated March 18, 2016 and received by OWCP on March 21, 2016, appellant informed OWCP of her new address.

By decision dated April 7, 2016, OWCP finalized the finding of overpayment in the amount of \$2,330.00 for the period October 18 to December 12, 2015 because she received wage-loss compensation for total disability after receiving a wage-earning capacity decision reducing her compensation benefits. It incorporated the February 25, 2016 preliminary determination and found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known was incorrect.

LEGAL PRECEDENT -- ISSUE 1

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.⁴ 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.⁵ A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination.⁶

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 wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the 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.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

⁴ *James M. Frasher*, 53 ECAB 794 (2002); *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

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

⁶ *See Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

medical evidence relied upon 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

In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have been received at the mailing address in due course. This is known as the mailbox rule.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral shoulder sprain and other conditions as a result of her federal employment. Appellant received disability compensation beginning April 15, 2008 and was placed on the periodic rolls, effective August 31, 2008. By decision dated October 6, 2015, OWCP reduced her compensation, effective October 18, 2015, based on its determination that the full-time position of hospital admitting clerk represented her wage-earning capacity. Appellant continued to receive full wage-loss compensation, however, until December 12, 2015. OWCP thereafter found an overpayment of compensation in the amount of \$2,330.00 for which she was found at fault.

The Board finds that the case is not in posture for a decision regarding the medical and vocational suitability of the hospital admitting clerk position as OWCP did not provide appellant proper notice of the reduction of her compensation benefits.

OWCP procedures provide that OWCP should provide a claimant with a Notice of Proposed Reduction of the wage-earning capacity determination before a reduction in compensation.¹¹ These procedures provide that such notice, in a loss of wage-earning capacity situation, should generally contain a brief case summary, attached copies of the medical reports upon which the proposed reduction is based, a complete discussion of the job selected and explanation as to why the particular position was selected, confirmation that the job position is reasonably available, identification of the wage selected, and computation of the proposed reduction of compensation.¹² The Notice of Proposed Reduction provides the claimant with 30 days to submit additional evidence.¹³ In this case, the evidence of record establishes that OWCP did not provide appellant with sufficient notice.

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

⁹ *John D. Jackson*, *supra* note 5.

¹⁰ *C.T.*, Docket No. 8-2160 (issued May 7, 2009); *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disability Management: Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.8 (June 2013).

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, *supra* note 11 at *Disallowances*, Chapter 2.1400.7 (February 2013).

OWCP's regulations state that a copy of a decision shall be mailed to the employee's last known address.¹⁴ The evidence of record contains an August 19, 2015 Notice of Proposed Reduction addressed to appellant's last known address. According to the mailbox rule, a rebuttable presumption exists that a notice properly mailed to an individual in the ordinary course of business was received by that individual in the absence of evidence to the contrary.¹⁵ In this case, however, the Board notes that there is direct evidence of nondelivery of the Notice of Proposed Reduction to appellant. Although properly addressed to her last known address, the August 19, 2015 Notice of Proposed Reduction was returned to OWCP on October 9, 2015 marked undeliverable and unable to forward. The Board finds that the returned envelope constitutes evidence of nondelivery and rebuts the presumption of receipt.¹⁶

Because appellant did not receive the August 19, 2015 Proposed Notice of Reduction of Benefits she was not afforded an opportunity to present additional argument or evidence supporting continued total disability before her compensation was reduced. OWCP, therefore, reduced appellant's compensation effective October 18, 2015 without proper notice.¹⁷ Consequently, its October 6, 2015 reduction of compensation was improper and the decision is hereby reversed.¹⁸

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation effective October 18, 2016 based on its determination that the constructed position of hospital admitting clerk represented her wage-earning capacity.¹⁹

¹⁴ 20 C.F.R. § 10.127.

¹⁵ *Supra* note 10.

¹⁶ *See M.U.*, Docket No. 09-529 (issued September 14, 2009) (the Board found that presumption of receipt of a Notice of an Oral Hearing was rebutted when the envelope enclosing the Notice of an Oral Hearing was returned and marked "Return to Sender" and remanded the case for reissuance of the Notice of an Oral Hearing).

¹⁷ *See Vena Lee Vaird*, Docket No. 97-254 (issued February 12, 1999) (the Board reversed OWCP's loss of wage-earning capacity decision dated August 5, 1986 because OWCP's May 30, 1996 letter did not serve as adequate preliminary notice of the proposed reduction of benefits).

¹⁸ *David W. Green*, 43 ECAB 883 (1992).

¹⁹ As OWCP's April 7, 2016 overpayment decision was based on the reduction of appellant's benefits due to her wage-earning capacity as a hospital admitting clerk, the Board finds that the issues regarding fact of overpayment and recovery of overpayment are moot.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 17, 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