

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation based on her wage-earning capacity in the selected position of customer complaint clerk.

FACTUAL HISTORY

On May 30, 2006 appellant, then a 42-year-old asylum officer, filed an occupational disease claim (Form CA-2) alleging that she sustained left carpal tunnel syndrome (CTS) as a result of using office equipment on a daily basis (OWCP File No. xxxxxx136). The record indicates that appellant underwent left carpal tunnel release surgery on December 12, 2005. OWCP accepted the claim for left CTS and left trigger finger on July 31, 2006. She received intermittent wage-loss compensation through July 11, 2006.

On July 31, 2006 appellant filed a (Form CA-2) claiming that she had sustained additional injuries, including right CTS, as a result of using office equipment (OWCP File No. xxxxxx762). OWCP accepted the claim for right CTS, right wrist sprain, and right elbow and forearm sprains. It administratively combined the two claims, with the right arm claim, OWCP File No. xxxxxx762, serving as the master file.

Appellant worked light duty with no repetitive hand movement, and no pushing or pulling. OWCP further developed the medical record with respect to whether appellant continued to have employment-related residuals or disability. A second opinion physician, Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon, opined in a June 15, 2011 report that appellant did not have any employment-related residuals and could return to regular duty. The attending physician, Dr. Badi Jeffers, an osteopath, opined in a July 12, 2011 report that he disagreed with Dr. Conaty, and indicated that appellant had permanent work restrictions.

OWCP found a conflict in medical opinion between Drs. Conaty and Jeffers, pursuant to 5 U.S.C. § 8123(a), and selected Dr. Alan Roberts, a Board-certified orthopedic surgeon, as a referee physician to resolve the conflict. In a report dated November 8, 2011, Dr. Roberts opined that she continued to have employment-related residuals. With respect to work restrictions, Dr. Roberts opined that appellant could work as an asylum officer, if she did not exceed 30 minutes of typing without a 5-minute break.

The record indicates that on December 14, 2012, the employing establishment terminated appellant's employment due to an inability to perform her employment duties as a result of a medical condition.³ Appellant began receiving wage-loss compensation as of December 15, 2012.

OWCP referred appellant for vocational rehabilitation services in June 2013. In an August 26, 2013 letter, the rehabilitation counselor indicated the plan was to have appellant complete a training course to update her computer software skills. She noted that appellant wanted more training with the Dragon voice recognition software, which would be provided in

³ The employing establishment indicated that it had made accommodations, including providing Dragon voice recognition software used with word processing and other programs.

the training course. According to the counselor, two selected positions would be suitable after completing training: customer complaint clerk and administrative assistant. In a job classification (Form CA-66) dated August 22, 2013, she identified the customer complaint clerk position as Department of Labor, *Dictionary of Occupational Titles*, No. 241.367-014.⁴ The position was sedentary, with 10 pounds lifting, and occasional reaching, handling, and fingering. The rehabilitation counselor indicated that the position was available in appellant's area with wages from \$360.00 to \$560.00 per week.

Appellant completed the training course as of January 30, 2014. The rehabilitation counselor indicated in a May 23, 2014 memorandum that the position of customer complaint clerk remained suitable for appellant.

OWCP referred appellant for a second opinion examination with Dr. Michael Einbund, a Board-certified orthopedic surgeon. In a report dated February 17, 2015, Dr. Einbund provided a history, results on examination, and review of medical records. He opined that appellant could perform the customer complaint clerk position. Dr. Einbund noted that it involved only occasional reaching, handling, and fingering.

In a report dated February 27, 2015, Dr. Jeffers provided results on examination and indicated that x-rays were ordered. He noted in a May 29, 2015 report that he had a copy of Dr. Einbund's report, and he was "essentially in agreement with" Dr. Einbund with respect to residuals, treatment, and work restrictions.

In a letter dated May 15, 2015, OWCP advised appellant that it proposed to reduce her compensation because she had the capacity to earn wages of \$360.00 per week as a customer complaint clerk. It advised appellant that she had 30 days to submit additional evidence if she disagreed with the proposed action.

By decision dated June 19, 2015, OWCP reduced appellant's wage-loss compensation, finding she had the capacity to earn \$360.00 per week. It provided a worksheet indicating that appellant's net compensation every 28 days would be \$3,891.92, based on a loss of wage-earning capacity of \$1,493.57 per week.

⁴ The duties of the customer complaint clerk (DOT No. 241.367-014) were 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.)

Appellant, through counsel, requested a hearing before an OWCP hearing representative on July 10, 2015. A hearing was held on February 17, 2016. Counsel contended that there was no evidence in the record establishing that employers could accommodate someone whose medical restrictions required the use of Dragon voice recognition software. She further argued that there was no evidence in the record that in the market survey the VA rehabilitation counselor asked potential employers if they could accommodate the case of the software.

In a February 11, 2016 report, Dr. Jeffers provided results on examination. He reported appellant had permanent modified work restrictions, without discussing specific restrictions.

By decision dated May 4, 2016, the hearing representative affirmed the June 19, 2015 decision. She found appellant's compensation was properly reduced to reflect her wage-earning capacity as a customer complaint clerk.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.⁵

Under 5 U.S.C. § 8115(a), 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, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect her wage-earning capacity in his disabled condition.⁶

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.⁷ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁸

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist 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 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

⁵ *Carla Letcher*, 46 ECAB 452, (1995).

⁶ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

⁷ *William H. Woods*, 51 ECAB 619 (2000).

⁸ *John D. Jackson*, 55 ECAB 465 (2004).

with the state employment service or other applicable service.⁹ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

ANALYSIS

OWCP based its June 19, 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 his or her wage-earning capacity.¹¹ In a February 17, 2015 report, Dr. Einbund provided a complete report and noted his review of the position description for the customer complaint clerk position. He opined that appellant could perform the job duties described. Dr. Einbund noted that it was a sedentary position with limited reaching, handling, and fingering. There is no probative evidence of record to establish that appellant was unable to perform the selected position. Dr. Jeffers indicated in his May 29, 2015 report that he was essentially in agreement with Dr. Einbund regarding work restrictions. In a February 27, 2016 report, he briefly referred to permanent work restrictions, but he did not identify specific restrictions. The Board finds the weight of the medical evidence establishes appellant had the physical capacity to perform the duties of the selected position.¹²

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 training in January 2014, and the rehabilitation counselor indicated the position was vocationally suitable. In addition, the 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 \$360.00.

The Board finds that OWCP considered the appropriate factors in determining that the customer complaint clerk position represented appellant's wage-earning capacity. These factors included availability of suitable employment and her physical limitations, usual employment, age, and employment qualifications. 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.¹³

The application of the *Shadrick* formula was then made to determine the reduction in compensation. OWCP uses the pay rate for compensation purposes, which in this case was the

⁹ See *Dennis D. Owen*, 44 ECAB 475 (1993).

¹⁰ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

¹¹ See *J.E.*, Docket No. 16-0006 (issued November 16, 2016).

¹² *Id.*

¹³ *Id.*; see also *supra* note 8.

date disability began on December 15, 2012.¹⁴ It found the weekly pay rate when disability began on December 15, 2012 was \$1,866.96 per week. The wage-earning capacity in terms of percentage is determined by dividing the earnings of \$360.00 by the current pay rate for the date of injury job, resulting in a 20 percent wage-earning capacity.¹⁵ Appellant's loss of wage-earning capacity in terms of dollars is determined by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity, and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.¹⁶ The Board finds that OWCP properly reduced appellant's compensation in this case.

On appeal, counsel reiterates the argument that OWCP failed to identify a suitable position, because employers were not asked about use of the Dragon software. She cites *K.S.*¹⁷ in support of her argument. However, the instant case is distinguishable from *K.S.* in that it involved a selected position that was not within the physical restrictions as established by the medical evidence.¹⁸ In the present case, the use of the voice recognition software was never a medical restriction. The medical evidence showed that appellant could perform the duties of the position, without reference to use of any voice recognition software. For the reasons discussed above, the Board finds that OWCP properly reduced appellant's compensation to reflect her wage-earning capacity under 5 U.S.C. § 8115(a).

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation based on her wage-earning capacity in the selected position of customer complaint clerk.

¹⁴ See 20 C.F.R. § 10.5(s), which provides the pay rate for compensation is the pay at time of injury, time disability begins or the time disability recurs, if the recurrence begins more than six months after return to regular full-time work, whichever is greater.

¹⁵ *Id.* at § 10.403(d).

¹⁶ *Id.* at § 10.403(e).

¹⁷ Docket No. 14-0752 (issued July 24, 2014).

¹⁸ The selected position of cashier required lifting of 20 pounds occasionally, which was beyond the claimant's established work restrictions. The assertion of the rehabilitation counselor that special accommodations could be made was not sufficient to make the position medically suitable.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2016 is affirmed.

Issued: April 20, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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