

**United States Department of Labor
Employees' Compensation Appeals Board**

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Zanesville, OH, Employer)

**Docket No. 17-0496
Issued: May 25, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 3, 2017 appellant filed a timely appeal from a July 18, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation effective July 19, 2016 based on his capacity to earn wages in the selected position of cashier.

FACTUAL HISTORY

On February 10, 2010 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2010 he strained his left knee falling on icy steps. OWCP accepted the claim for a left knee contusion, lumbosacral sprain, left hip sprain,

¹ 5 U.S.C. § 8101 *et seq.*

and an aggravation of preexisting localized left hip osteoarthritis. It paid wage-loss compensation for total disability beginning April 4, 2010. On June 8, 2010 appellant underwent an authorized total left hip arthroplasty.

Appellant returned to modified employment on December 13, 2010, but stopped on December 31, 2010. OWCP again paid wage-loss compensation for total disability. On March 29, 2012 it referred appellant for vocational rehabilitation. The rehabilitation counselor advised in July 2013 that appellant was obstructing vocational rehabilitation. OWCP closed vocational rehabilitation in December 2014 after the death of the rehabilitation counselor. It noted that there was no recent medical evidence in the record.

By letter dated September 13, 2015, appellant advised that in May 2014 he had a total right hip replacement and would need back surgery in the future.

On December 30, 2015 OWCP referred appellant to Dr. James Rutherford, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated January 13, 2016, Dr. Rutherford discussed appellant's history of injury and current complaints of low back and left hip pain and numbness in the left buttocks, leg, and foot. On examination he found a loss of sensation in the left buttock and tenderness over the lateral left hip area with reduced motion. Dr. Rutherford advised that appellant had continued tenderness and loss of motion after an authorized left hip replacement and back tenderness and reduced motion due to his accepted lumbosacral sprain. He related, "Because of these residual symptoms and clinical findings related to the left hip arthroplasty which was done under the industrial claim, [appellant] can do only intermittent standing and walking, meaning a total of four hours out of an eight[-]hour day. He can lift and carry only up to 15 pounds occasionally. Appellant can do no stooping, climbing, or crawling for work activity." In a January 13, 2016 work restriction evaluation, Dr. Rutherford indicated that appellant could not resume his usual employment, but could perform full-time sedentary work walking and standing up to four hours per day, pushing and pulling up to 20 pounds for two and a half hours per day, and lifting up to 15 pounds for two and a half hours per day.

OWCP, on February 19, 2016, again referred appellant for vocational rehabilitation. It advised that Dr. Rutherford's report was the only medical evidence addressing his injury-related condition in over three years and established that he was able to resume work with restrictions.

On February 24, 2016 the rehabilitation counselor advised that appellant told him that he did not want to be "rushed" into vocational rehabilitation and might need back surgery in the future.

In a letter dated February 25, 2016, appellant advised OWCP that he might need surgery and requested information about a schedule award.

By letter dated February 25, 2016, OWCP notified appellant that he was impeding vocational rehabilitation. It informed him of the penalty for refusing to cooperate with vocational rehabilitation and provided him 30 days to contact both OWCP and the rehabilitation counselor and agree to participate with good effort. OWCP advised appellant that if he believed that he had good cause for not participating he should provide such reasons in writing with

supporting documentation. If he did not cooperate with vocational rehabilitation or show good cause, it would reduce his compensation based on what it would have been had he participated with vocational rehabilitation.

In a vocational rehabilitation report dated February 28, 2016, the rehabilitation counselor noted that appellant related that he was unable to look at a computer screen without becoming nauseated. Appellant told her by telephone that he did not think a company would hire him and noted that he could retire at any time. On March 2, 2016 the rehabilitation counselor advised OWCP that he wanted to obtain retirement benefits from the Office of Personnel Management (OPM) rather than participate with vocational rehabilitation.

OWCP, by letter dated March 3, 2016, requested that appellant formally elect between OPM benefits and workers' compensation. In another letter dated March 3, 2016, appellant was advised to cooperate with vocational rehabilitation until he underwent back surgery or until his retirement with OPM became effective.

The rehabilitation counselor, on March 9, 2016, related that appellant had the physical ability and experience necessary to work as a receptionist and cashier. In a March 16, 2016 job classification, he indicated that the position of cashier 1 was sedentary and required occasional lifting of up to 10 pounds.² The Department of Labor, *Dictionary of Occupational Titles* described the duties of a cashier 1 as sedentary with a specific vocational preparation of six months to a year. The rehabilitation counselor found that appellant met the specific vocational preparation for the position based on his work as a supply clerk in the military for 4 years and his 32 years of work experience. He indicated that the position was reasonably available within his commuting area with weekly wages of \$362.40 according to state labor market information.

On March 15, 2016 appellant elected retirement benefits with OPM effective April 3, 2016.

In a March 28, 2016 vocational rehabilitation report, the rehabilitation counselor noted that appellant had advised that he was retiring and did not want to participate in vocational rehabilitation.

An OWCP rehabilitation specialist closed vocational rehabilitation on April 6, 2016 as appellant had elected OPM benefits. Nonetheless, the specialist noted that he should be rated based on the approved job goal. On April 22, 2016 the employing establishment provided OWCP with updated pay rate information.

OWCP, on June 9, 2016, notified appellant of its proposed reduction of his compensation based on his capacity to earn wages as a cashier at a rate of \$362.40 per week. It provided him 30 days to submit additional evidence or argument regarding its proposed reduction.

In telephone calls dated June 13 and July 13, 2016, appellant requested a referral for an impairment rating.

² In an initial job classification dated March 8, 2016, the rehabilitation counselor mistakenly indicated that the position required light rather than sedentary physical ability.

By decision dated July 18, 2016, OWCP reduced appellant's compensation effective July 19, 2016 as he had the capacity to earn wages as a cashier. It applied the formula set forth in *Albert C. Shadrick*³ in determining his loss of wage-earning capacity.

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 of benefits.⁴ Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect wage-earning capacity in his disabled condition.⁵

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience.⁶ 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. Finally, application of the principles set forth in *Shadrick*⁷ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

Appellant received compensation for total disability beginning April 4, 2010 due to his accepted left knee contusion, lumbosacral sprain, left hip sprain, and aggravation of preexisting localized left hip arthritis. He underwent a left total hip arthroplasty in June 2010.

OWCP initially referred appellant for vocational rehabilitation in March 2012, but closed rehabilitation in December 2014 after the death of the vocational rehabilitation counselor. As the record did not contain current medical evidence, on December 30, 2015 it referred him to Dr. Rutherford for a second opinion examination.

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

⁴ *T.O.*, 58 ECAB 377 (2007).

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁶ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

⁷ *See supra* note 3.

On January 13, 2016 Dr. Rutherford found that appellant had continued tenderness and reduced motion due to his lumbosacral sprain and left total hip replacement. He found that appellant could not return to his usual employment, but could work full time with restrictions on lifting and carrying up to 15 pounds for two and a half hours per day, walking and standing up to four hours per day, and pushing and pulling up to 20 pounds for two and a half hours per day. Dr. Rutherford opined that appellant could not stoop, climb, or crawl. OWCP properly referred appellant for vocational rehabilitation as Dr. Rutherford's report established that he was no longer totally disabled due to residuals of his employment injury.⁸

OWCP further properly found that appellant had the capacity to perform the duties of a cashier 1. The position is classified as sedentary work requiring occasional lifting of up to 10 pounds, which is within the restrictions set forth by Dr. Rutherford. Following its proposed reduction of his compensation, appellant requested a referral for an impairment evaluation, but did not submit any medical evidence showing that he was unable to perform the sedentary position. The medical evidence, consequently, establishes that he has the requisite physical ability to earn wages as a cashier 1.⁹

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations, but also take into account work experience, age, mental capacity, and educational background.¹⁰ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of cashier 1 based on his work as a supply clerk in the military and 32 years of work experience. He further found that the position was reasonably available within the appropriate geographical area at a wage of \$362.40 per week. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his opinion in determining whether the job is vocationally suitable and reasonably available.¹¹ The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that he had the capacity to perform the position of cashier 1.¹² OWCP further properly determined his loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.¹³ It, therefore, properly found that the position of cashier 1

⁸ See *N.J.*, 59 ECAB 171 (2007).

⁹ See *S.J.*, Docket No. 14-1455 (issued October 23, 2014); *S.S.*, Docket No. 13-0011 (issued March 21, 2013).

¹⁰ *Id.*

¹¹ *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.816.6(c) (June 2013).

¹² See *supra* note 8.

¹³ See *supra* note 3. OWCP divided appellant's employment capacity to earn wages of \$362.40 a week by his current pay rate of the position held when injured of \$1,143.29 per week to find a 32 percent wage-earning capacity. It multiplied the pay rate at the time of injury of \$1,043.30 by the 32 percent wage-earning capacity percentage. The resulting amount of \$333.869 was subtracted from appellant's date-of-injury pay rate of \$1,043.30 which provided a loss of wage-earning capacity of \$709.44 per week. OWCP multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$532.08 or \$2,321.00 every four weeks after adjustments for cost of living.

reflected appellant's wage-earning capacity effective July 18, 2016 despite his prior election of OMP retirement.

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

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective July 19, 2016 based on his capacity to earn wages in the selected position of cashier.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 25, 2017
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