

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation, effective October 29, 2015, based on her capacity to earn wages in the constructed position of customer service representative.

FACTUAL HISTORY

On August 24, 2004 appellant, then a 47-year-old consumer safety inspector, filed an occupational disease claim (Form CA-2) alleging that her asthma attacks were caused or aggravated by the chemicals in the plant at work. She stopped work on February 14, 2004 and returned to work on August 26, 2004 with restrictions of not entering chiller/rehang room. OWCP initially accepted the claim for precipitation of asthma (asthma attacks) due to chlorine exposure. Appellant intermittently stopped work. She stopped work on November 11, 2005 and has not returned. OWCP paid appellant wage-loss compensation benefits on the periodic rolls as of December 25, 2005. On February 21, 2008 it expanded acceptance of the claim to include consequential right carpal tunnel syndrome, for which she underwent right carpal tunnel release on January 9, 2008.

Appellant continued to submit medical reports from Dr. Timothy B. Gibson, a Board-certified family practitioner. In a report dated October 30, 2009, Dr. Gibson related that her asthma flare-ups did not cease when she was no longer exposed to chemicals or temperature changes. He related that appellant could return to work, but not in the job she performed at the time that her asthma flared up.

OWCP referred appellant for second opinion evaluations to determine her disability status. In an August 16, 2010 report, Dr. Wesley R. Bray, Board-certified in internal medicine and pulmonary disease, related that she had been exposed to chlorine gas in 2004 and, after that time, her asthma was harder to control, and she was more sensitive to exposures. He explained that this was consistent with reactive airways dysfunction syndrome. Dr. Bray opined that appellant could return to work in some capacity, but that she should not be exposed to inhaled chemicals or irritants.

In a January 24, 2013 report, Dr. Gibson stated that appellant's asthma was stable and that her January 23, 2013 pulmonary function test was unchanged from the prior year. He opined that she could return to gainful employment as long as she was not exposed to chemicals, fumes, irritants, and/or extreme changes in temperature.

On April 11, 2013 OWCP referred appellant for vocational rehabilitation services. On August 30, 2013 appellant tripped and fell, breaking her left small finger and spraining her right ankle. She underwent surgery on her left small finger on September 24, 2013. On November 22, 2013 appellant was placed in medical rehabilitation status while recovering from the August 30, 2013 fall. She subsequently completed computer classes and earned certificates in Microsoft Word Access, Excel, and PowerPoint.

In a June 24, 2014 report, Dr. Eric S. Furie, a Board-certified orthopedic surgeon, acting as an OWCP second opinion physician, related that appellant no longer required treatment for her

carpal tunnel syndrome. He opined that she could be gainfully employed and recommended work hardening. Appellant subsequently attended a work hardening program.

A March 25, 2015 functional capacity evaluation (FCE) demonstrated that appellant could perform a job in the light physical demand category with some ability in the medium category. It noted that she was able to perform safe lifting in the following capacity: 30 pounds, floor to waist (occasional); 20 pounds, floor to waist (frequent); 25 pounds, waist to shoulder (occasional); 20 pounds, waist to shoulder (frequent); 25 pounds overhead (occasional); and 10 pounds, overhead (frequent). Appellant was also cable of frequent reaching, constant sitting, and frequent walking/standing with intermittent sitting due to asthma symptoms with sustained physical activity.

In a May 12, 2015 work-capacity evaluation (OWCP-5c), Dr. Gibson opined that appellant could return to work full-time limited duty. He also concurred with the March 25, 2015 FCE findings.

In a June 11, 2015 report, a vocational rehabilitation specialist recommended positions of customer service representative and receptionist. The position of customer service representative, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 239.3621-014, is sedentary, and has physical demands of occasional reaching and handling and frequent fingering. The vocational rehabilitation specialist indicated that appellant met the specific vocational preparation level as she had been provided training in Word, Excel, PowerPoint, and Access which qualified her for the job. In a June 10, 2015 labor market survey, the vocational rehabilitation specialist confirmed that there were sufficient openings for those positions in appellant's commuting area.

By letter dated September 24, 2015, OWCP proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages in the constructed position of customer service representative, DOT No. 239.3621-014, at the rate of \$393.20 per week. It determined that the selected position was medically and vocationally suitable for her and represented her wage-earning capacity. As appellant's wage-earning capacity was less than the current pay of the job she held when injured, 34 percent, OWCP proposed to reduce her wage-loss compensation benefits to \$2,155.00 every four weeks. She was afforded 30 days in which to submit contrary evidence.

In response, appellant submitted additional medical evidence. In an October 20, 2015 letter, Dr. Gibson advised that while she had occasional exacerbations of her asthma, her condition had been stable overall. He further stated "unfortunately, due to [appellant's] past problems, she has now developed [chronic obstructive pulmonary disease] COPD and is on continuous oxygen." Dr. Gibson opined that appellant was totally disabled from work and could not be gainfully employed.

By decision dated October 29, 2015, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as a customer service representative earning \$393.20 per week.

On November 4, 2015 counsel requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing was held on July 12, 2016. Appellant testified that she has had rheumatoid arthritis for a number of years, which has gotten worse in recent years, and that she used a walker to assist in ambulation. She stated that she was on 24-hour oxygen and has to

carry around an oxygen canister during the day. Appellant indicated that her bilateral carpal tunnel syndrome, for which she underwent surgery on both hands, limited her ability to type. She noted that her left carpal tunnel surgery occurred in the 1990s and was covered by workers' compensation. Appellant further stated that she was on multiple medications for diabetes, depression, carpal tunnel syndrome, rheumatoid arthritis, and her breathing conditions, which limited her ability to drive. She alleged that she did not have the vocational background for office work. Counsel argued that appellant was not capable of performing the selected position due to her accepted conditions and preexisting rheumatoid arthritis condition, which required her to use a walker to get around.

OWCP also received a November 12, 2015 x-ray report of appellant's hands which noted unremarkable findings.

In a January 22, 2016 letter, Dr. Gibson reiterated that appellant's asthma condition was stable overall. He also reiterated that, due to her past problems, she developed COPD and was on continuous oxygen.

Treatment notes dated October 22, 2015 to March 31, 2016 from Dr. Alok Sachdeva, a rheumatologist, were also received. In the November 19, 2015 treatment note, he reviewed laboratory results and stated that appellant "likely has seronegative rheumatoid arthritis." Dr. Sachdeva assessed rheumatoid arthritis of multiple sites with negative rheumatoid factor. He noted that "symptoms are suggestive of rheumatoid arthritis despite negative serologies." In a March 31, 2016 note, Dr. Sachdeva noted that appellant reported pain in hands, swelling and stiffness pain in legs. On examination, appellant's hands, wrists, elbows, shoulders, and knees were tender, but no synovitis or effusion was noted.

By decision dated September 23, 2016, OWCP's hearing representative affirmed OWCP's October 29, 2015 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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 (LWEC).⁴

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

³ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ 20 C.F.R. §§ 10.402 and 10.403.

employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect her wage-earning capacity in his or her 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 fit the employee's capabilities with regard to 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*⁶ and codified by regulations at 20 C.F.R. § 10.403⁷ 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 rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.⁸

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.⁹ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the LWEC 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.¹⁰

ANALYSIS

OWCP accepted appellant's claim for precipitation of asthma (asthma attacks) due to chlorine exposure and later expanded the claim to include consequential right carpal tunnel syndrome and surgery. Appellant was placed on the periodic compensation rolls for total disability resulting from this injury and eventually referred for vocational rehabilitation services. OWCP based its October 29, 2015 LWEC determination on her capacity to earn wages as a customer service representative.

⁵ 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).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

⁸ *Id.* at § 10.403(d).

⁹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁰ *Id.*

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹¹ In a May 12, 2015 work capacity evaluation, Dr. Gibson advised that appellant could work full-time limited duty and concurred with the March 25, 2015 FCE findings that she could perform light-to-medium work. The position selected was sedentary, and its physical demands of occasional reaching and handling and frequent fingering are within the restrictions provided by the FCE and which Dr. Gibson concurred. Dr. Furie, OWCP's second opinion physician also reported on June 24, 2014 that appellant no longer required medical treatment for her carpal tunnel syndrome, and he opined that she could be gainfully employed. Appellant, thus, has the physical capacity to perform the duties of the selected position of customer service representative.¹²

The Board also finds that appellant had the necessary vocational and educational preparation for the selected position of customer service representative. Appellant successfully completed and obtained certificates in Microsoft Word, Excel, PowerPoint, and Access.¹³

The vocational rehabilitation specialist also found that the position of customer service representative was reasonably available in appellant's local labor market with an entry level weekly wage of \$393.20.¹⁴

The Board finds that OWCP considered the appropriate factors in determining that the customer service representative position represented appellant's wage-earning capacity.¹⁵ These factors included availability of suitable employment and her physical limitations, usual employment, age, and employment qualifications.¹⁶ 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. Counsel argued that she was not capable of performing the selected position due to the additional conditions of COPD and rheumatoid arthritis.¹⁷ Appellant claimed that the medications she takes for multiple medical conditions limit her ability to drive. However, there is no medical evidence of record which addresses the effect of any medications that she takes for her work-related and preexisting conditions on her ability to drive. While Dr. Gibson indicated that appellant was on continuous oxygen due to COPD, he did not provide an opinion which related her COPD to the accepted asthma condition or indicated whether COPD was a preexisting condition. He merely noted that "due to [appellant's] past problems, she has now developed COPD." As noted, in determining an

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

¹² *Id.*

¹³ *See J.E.*, Docket No. 16-0006 (issued November 16, 2016).

¹⁴ *Id.*

¹⁵ *John D. Jackson*, 55 ECAB 465 (2004).

¹⁶ *Id.*

¹⁷ Appellant alleged her left carpal tunnel syndrome was previously accepted by OWCP. This is supported under case File No. xxxxxx596, which was retired to the Federal Records Center in July 1999.

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.¹⁸ With regard to appellant's rheumatoid arthritis, there is no evidence that this condition preexisted her injury or that it limits her ability to perform the duties of the selected position. Dr. Sachdeva merely noted that she had a several-year history of joint pain. OWCP, therefore, properly determined that the position of customer service representative reflected her wage-earning capacity.¹⁹

OWCP also properly reduced her compensation pursuant to the principles set forth under *Shadrick* to \$2,155.00 every four weeks, effective October 29, 2015, because the pay rate of the selected position was less than her date-of-injury salary. The wages in the selected position were reported as \$393.20 per week. OWCP applied the *Shadrick* formula to determine the LWEC. The earnings of \$393.20 are divided by the current pay rate for appellant's date-of-injury job, to determine the wage-earning capacity of 34 percent.²⁰ The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage.²¹ This amount is subtracted from the pay rate for compensation purposes to determine the LWEC.²² OWCP found that appellant's LWEC was \$629.19 per week or \$2,155.00 every four weeks. The record does not contain any evidence of error with respect to these calculations.²³

On appeal, counsel alleges that the decision ignored appellant's physical conditions. However, as explained above, OWCP discussed and properly considered both her preexisting and subsequently acquired conditions.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

¹⁸ *Supra* note 9.

¹⁹ *James Smith*, 53 ECAB 188 (2001).

²⁰ 20 C.F.R. § 10.403(d).

²¹ *Id.* at § 10.403(e).

²² *Id.*

²³ *See T.D.*, Docket No. 16-0028 (issued November 28, 2016).

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation, effective October 29, 2015 based on her capacity to earn wages in the constructed position of customer service representative.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board