



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts follow.

On September 24, 2005 appellant, then a 48-year-old transportation security screener, sustained injury when his elbow popped while moving a bag to a table while in the performance of duty. OWCP accepted the claim for right elbow and forearm sprains/strains, right shoulder superior glenoid labrum lesion, right shoulder/upper arm sprain, right shoulder adhesive capsulitis, and right lateral epicondylitis. Appellant stopped work and received disability compensation on the daily rolls beginning February 2, 2006 and on the periodic rolls beginning January 20, 2008. He was terminated from the employing establishment effective April 7, 2007 for reasons unrelated to the accepted work injuries, but he continued to receive wage-loss compensation and medical benefits. On January 10, 2008 appellant underwent OWCP-authorized arthroscopic surgery of his right shoulder in the form of an anterior capsulorrhaphy, Bankart repair, biceps tendonesis and rotator cuff repair.

In a May 9, 2009 report, Dr. H. Graeme French, an attending Board-certified orthopedic surgeon, determined that appellant's accepted work injuries prevented him from working eight hours per day. He listed various work activities which appellant could only perform between one and three hours per day.

In a July 14, 2009 report, Dr. George R. Harper, a Board-certified orthopedic serving as an OWCP second opinion physician, determined that appellant could work eight hours per day with some restrictions due to his accepted work injuries.

Based on the conflicting medical opinions of Dr. French and Dr. Harper, OWCP referred appellant for an impartial medical examination with Dr. Lance C. Brigham, a Board-certified orthopedic surgeon. In a report dated April 16, 2010, Dr. Brigham determined that appellant could work eight hours per day, but that he had various work restrictions. In a supplemental report dated May 17, 2010, he indicated that appellant did not have any restrictions preventing him from performing his usual job.

In an August 9, 2010 decision, OWCP terminated appellant's wage-loss compensation effective August 10, 2010 because he had no disability due to accepted work injuries after that date. It found that the special weight of the medical evidence rested with the opinion of Dr. Brigham.

Appellant appealed to the Board on September 21, 2010. By decision dated July 5, 2011,<sup>3</sup> the Board reversed OWCP's August 9, 2010 decision noting that OWCP had not met its burden of proof to terminate appellant's wage-loss compensation. The Board found that the opinion of Dr. Brigham was insufficiently well rationalized to represent the weight of the

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<sup>2</sup> Docket No. 10-2334 (issued July 5, 2011).

<sup>3</sup> *Id.*

medical opinion and to resolve the conflict in the medical opinion regarding whether appellant continued to have wage loss due to his accepted work injuries.<sup>4</sup>

OWCP referred appellant for a second opinion examination to Dr. Aleksander Curcin, a Board-certified orthopedic surgeon. In a report dated July 10, 2015, Dr. Curcin discussed appellant's factual and medical history and noted that he reported soreness in his right shoulder with any type of exertional activity. He indicated that, upon examination, appellant had full range of right elbow motion, but that he exhibited what he was felt to be self-restricted right shoulder motion. Dr. Curcin determined that appellant had fully recovered from the effects of the accepted work injuries stemming from the September 24, 2005 work incident. He indicated that appellant was not restricted from performing his regular work as a transportation security screener on a full-time basis.

In a report dated August 7, 2015, Dr. French discussed appellant's factual and medical history and reported the findings of his physical examination on that date. He indicated that he had reviewed the July 10, 2015 report of Dr. Curcin and provided an opinion that he disagreed with Dr. Curcin's opinion that appellant could perform his regular work as a transportation security screener. Dr. French posited that appellant could not perform any repetitive lifting with his right arm.

OWCP found that there was a conflict in the medical opinion evidence between Dr. French and Dr. Curcin regarding appellant's work-related residuals and ability to work. In order to resolve the conflict, it referred appellant for an impartial medical examination and opinion on the matter to Dr. St. Elmo Newton, III, a Board-certified orthopedic surgeon.

In a report dated October 8, 2015, Dr. Newton discussed appellant's factual and medical history and reported the findings of his physical examination of appellant on that date. He discussed diagnostic testing of record, including a December 15, 2006 magnetic resonance imaging (MRI) scan showing mild degenerative changes of the lumbar spine.<sup>5</sup> Dr. Newton indicated that appellant's chief complaint was aching pain in his upper right arm and noted that examination showed that he still had some adhesive capsulitis of the right shoulder, but that the right elbow lateral epicondylitis had resolved. He noted that appellant's right shoulder condition was fixed and stable. Appellant could not perform his regular work as a transportation security screener, but his medical condition allowed him to perform jobs of a sedentary nature.<sup>6</sup> In a form entitled "Work Capacity Evaluation Musculoskeletal Condition" (Form OWCP-5c) dated

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<sup>4</sup> Appellant continued to be off work and his wage-loss compensation payments were restored effective back to August 10, 2010.

<sup>5</sup> Dr. Newton inadvertently listed the date of the testing as December 16, 2006.

<sup>6</sup> Dr. Newton mentioned appellant's low back problems noting that they played a part in inability to work as a transportation security screener. He did not provide any indication that these problems prevented him from performing sedentary work.

October 8, 2015, Dr. Newton indicated that appellant could not perform his usual job, but that he was capable of working eight hours per day with restrictions.<sup>7</sup>

OWCP requested that Dr. Newton provide a supplemental opinion regarding appellant's ability to work. In a December 3, 2015 addendum to his October 8, 2015 report, Dr. Newton clarified, "[Appellant] can use both arms to push, pull, and lift up to 20 pounds. The reaching would be no reaching overhead repeatedly." He indicated that a new Form OWCP-5c had been completed. In this new Form OWCP-5c completed on December 3, 2015, Dr. Newton indicated that appellant could not perform his usual job, but that he was capable of working eight hours per day with restrictions. He noted that appellant was capable of performing work at the sedentary and light levels, but that he was not able to perform work at the medium, heavy, or very heavy level.<sup>8</sup>

In January 2016, appellant was referred for participation in OWCP-sponsored vocational rehabilitation services designed to return him to work. It was indicated in the referral letter that the weight of the medical evidence with respect to work restrictions rested with the October 8 and December 3, 2015 reports of Dr. Newton. Appellant's vocational rehabilitation counselor conducted formal vocational testing on appellant which showed above average verbal and mathematical skills. She noted that he had obtained an associate business degree from Spokane Community College in 2003. The counselor discussed Dr. Newton's reports and noted that appellant had the medical and vocational ability to perform various sedentary jobs, including various jobs in the administrative and financial detail fields.<sup>9</sup> Appellant's efforts to be placed in a position were unsuccessful.

In May 2016, appellant's vocational rehabilitation counselor determined that he was able to earn wages in the constructed position of customer service representative, designated under the U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) as DOT #239.362.014. She found that a current Washington State labor survey showed that this position was reasonably available in appellant's commuting area at an average weekly salary of \$507.70. The position involved communicating with customers over the telephone or in person, entering information into a computer regarding such communications, and addressing concerns about water, gas, electric, telephone, or cable television system services. The physical requirements of the customer service representative position were defined as sedentary in nature. Sedentary work, according to the DOT, involves exerting up to 10 pounds of force occasionally and sitting most of the time, but may involve walking or standing for brief periods of time. Occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday. The position also required appellant to occasionally engage in reaching and handling.

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<sup>7</sup> Dr. Newton noted that appellant was capable of performing work at the sedentary, light, and medium work levels, but that he was not able to perform work at the heavy or very heavy level. Appellant could lift, push, or pull up to 20 pounds. He further noted that appellant could not reach or reach above his shoulder level with his right arm.

<sup>8</sup> The Form OWCP-5c advised Dr. Newton regarding the definitions of these work levels.

<sup>9</sup> These jobs included customer service representative.

In an October 27, 2016 letter, OWCP advised appellant that it proposed to reduce his compensation based on his capacity to earn wages in the constructed position of customer service representative. It provided him 30 days to submit evidence and argument challenging the proposed action.

Appellant submitted a November 4, 2016 letter in which he argued that his right shoulder and low back conditions prevented him from working as a customer service representative. He indicated that he had filed a workers' compensation claim for his back in December 2006 but, that the claim had been denied.

By decision dated December 1, 2016, OWCP reduced appellant's compensation effective December 1, 2016 based on his capacity to earn wages as a customer service representative. It noted that the weight of the medical evidence with respect to appellant's physical ability to work rested with the opinion of Dr. Newton, the impartial medical specialist. OWCP indicated that the opinion of appellant's vocational rehabilitation counselor showed that he was vocationally able to perform the job which was reasonably available in his commuting area. It applied the principles set forth in the *Albert C. Shadrick* decision<sup>10</sup> to derive appellant's loss of wage-earning capacity.

### **LEGAL PRECEDENT**

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.<sup>11</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>12</sup>

Under section 8115(a) of FECA (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, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.<sup>13</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>14</sup> 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.<sup>15</sup> The

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<sup>10</sup> See *infra* note 19.

<sup>11</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>12</sup> *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>13</sup> *E.W.*, Docket No. 14-0584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

<sup>14</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>15</sup> *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.<sup>16</sup>

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.<sup>17</sup> In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.<sup>18</sup>

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 or 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 labor market, that fits that employee's capabilities with regard to his 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. Finally, application of the principles set forth in the *Albert C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>19</sup>

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>20</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>21</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>22</sup>

### ANALYSIS

The Board finds that OWCP properly reduced appellant's compensation effective December 1, 2016 based on his capacity to earn wages as a customer service representative.

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<sup>16</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

<sup>17</sup> See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

<sup>18</sup> *N.J.*, 59 ECAB 397 (2008).

<sup>19</sup> See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>20</sup> 5 U.S.C. § 8123(a).

<sup>21</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>22</sup> *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

OWCP accepted that, due to a September 24, 2005 work injury, appellant sustained right elbow and forearm sprains/strains, right shoulder superior glenoid labrum lesion, right shoulder/upper arm sprain, right shoulder adhesive capsulitis, and right lateral epicondylitis. Appellant last worked in 2007 and he was referred for participation in OWCP-sponsored vocational rehabilitation services designed to return him to work. By decision dated December 1, 2016, OWCP reduced appellant's compensation effective December 1, 2016 based on his capacity to earn wages as a customer service representative.

With respect to appellant's ability to work, OWCP properly determined that there was a conflict in the medical opinion evidence between appellant's attending physician, Dr. French, and OWCP's referral physician, Dr. Curcin and referred appellant for an impartial medical examination and opinion on the matter to Dr. Newton. The Board finds that the special weight of the medical evidence with respect to work restrictions rests with the well-rationalized opinion of Dr. Newton.<sup>23</sup>

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of customer service representative and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on her opinion regarding reasonable availability and vocational suitability.<sup>24</sup>

A review of the medical evidence of record reveals that appellant is physically capable of performing the position. As noted above, the special weight of the medical evidence with respect to work restrictions rests with the opinion of Dr. Newton. In his October 8, 2015 report, Dr. Newton indicated that appellant could perform sedentary work. In a December 3, 2015 addendum to his October 8, 2015 report, Dr. Newton noted that appellant could use both arms to push, pull, and lift up to 20 pounds. In a December 3, 2015 form report,<sup>25</sup> Dr. Newton determined that appellant was capable of working eight hours per day with restrictions. He noted that appellant was capable of performing work at the sedentary and light work levels.<sup>26</sup> The Board notes that these restrictions would allow appellant to perform the physical requirements of the position of customer service representative, a position which is defined under the DOT as being sedentary in its physical work requirements.<sup>27</sup> Appellant did not submit any evidence or

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<sup>23</sup> See *supra* notes 20 through 22.

<sup>24</sup> G.A., Docket No. 13-1351 (issued January 10, 2014).

<sup>25</sup> In this Form OWCP-5c, Dr. Newton clarified work restrictions he had listed in a previous Form OWCP-5c he had completed on October 8, 2015.

<sup>26</sup> According to the Department of Labor, *Dictionary of Occupational Titles*, the sedentary work level requires occasionally exerting force up to 10 pounds and the light work level requires occasionally exerting force up to 20 pounds. In his reports, Dr. Newton mentioned appellant's low back problems, but he did not provide any indication that these problems prevented him from performing sedentary work. Moreover, there is no clear evidence in the record that appellant's back condition preexisted his September 24, 2005 work injury such that this condition must be considered in the wage-earning capacity determination. See *supra* notes 17 and 18.

<sup>27</sup> Dr. Newton indicated that appellant could occasionally reach overhead and the Board notes that the customer service representative position only requires occasional reaching.

argument showing that he could not vocationally or physically perform the customer service representative position.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age, and employment qualifications, in determining that the position of customer service representative represented his wage-earning capacity.<sup>28</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of customer service representative and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, OWCP properly reduced appellant's compensation effective December 1, 2016 based on his capacity to earn wages as a customer service representative.

### **CONCLUSION**

The Board finds that OWCP properly reduced appellant's compensation effective December 1, 2016 based on his capacity to earn wages as a customer service representative.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2018  
Washington, DC

Christopher J. Godfrey, 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

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<sup>28</sup> See *Clayton Varner*, 37 ECAB 248, 256 (1985).