

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective September 20, 2015, based on his capacity to earn wages in the selected position of a quality assurance manager.

FACTUAL HISTORY

On January 29, 1997 appellant, then a 45-year-old lock and dam equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that, while at work on that date, he was pushing a pipe wrench to tighten a section of pipe that was being replaced when he felt a pop in his back and pain from his right arm to his neck.³ OWCP accepted the claim for right shoulder acromioclavicular strain, closed acromioclavicular dislocation, cervical strain, aggravation of cervical radiculopathy, aggravation of cervical degenerative disc disease, and adjustment disorder with depressed mood. Following his injury, appellant returned to work on February 3, 1997, but stopped work again on February 13, 1997. He returned to a full-time limited-duty position on August 18, 1997, but sustained a recurrence of total disability, effective November 5, 1997. Appellant returned to a full-time limited-duty position on January 12, 1998.

On December 1, 1998 appellant filed another traumatic injury claim (Form CA-1) alleging that on August 6, 1998 he injured his right shoulder when he grabbed an electrical cable that was falling out of the cable tray. OWCP assigned that claim File No. xxxxxx262 and accepted it for right shoulder acromioclavicular (AC) separation.⁴ On January 20, 1999 a Mumford procedure was performed on appellant's right shoulder. Appellant had two previous right shoulder surgeries in June and November 1997. OWCP later expanded the acceptance of appellant's claim to include depression and aggravation of cervical radiculopathy. Appellant was totally disabled from work from August 6, 1998 to February 28, 2000 when he resumed work in a modified capacity as a construction inspector.⁵

In a January 14, 2013 report, Dr. Oliver C. James, III, a Board-certified internist, indicated that appellant did not work despite being released to work.

In a March 1, 2013 work capacity evaluation (OWCP-5c), Dr. Jeffery Campbell, a Board-certified family practitioner, opined that appellant was unable to ascend or descend heights called for in his job. However, he explained that appellant was able to work for eight hours per day with restrictions, which included no reaching above the shoulder, and no repetitive movements of the elbows or wrists for zero hours, not to use his right arm and carry

³ OWCP assigned the claim File No. xxxxxx777.

⁴ OWCP File Nos. xxxxxx262 and xxxxxx777 have been administratively combined, with File No. xxxxxx777 serving as the master file.

⁵ On June 2, 2002 OWCP granted appellant a schedule award for 30 percent permanent impairment of the right arm.

or lift any loads. Dr. Campbell also advised against pushing, pulling, and lifting. He also indicated that these restrictions were permanent.

In a March 25, 2013 report, Dr. James indicated that appellant was functioning at a high level with the use of the medicine.

On March 28, 2013 OWCP referred appellant for a second opinion, along with a statement of accepted facts (SOAF), a set of questions and the medical record to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon.

In an April 18, 2013 report, Dr. Fisher noted appellant's history of injury and treatment, examined appellant, and provided findings. He determined that appellant was capable of working eight hours a day in a light-duty job avoiding reaching overhead with his right upper extremity. Dr. Fisher provided a weight limitation of lifting/pushing pulling/carrying 10 pounds frequently and 20 pounds occasionally. He opined that the restrictions were permanent in duration and were due to the AC joint separation and the cervical radiculopathy."

On May 22, 2013 a second opinion psychiatric examination was completed by Dr. Gary S. Weinstein, a Board-certified psychiatrist. Dr. Weinstein indicated that appellant denied symptoms of depression and had no dysphoria or significant anxiety. He found no evidence of a thought disorder, with no hallucinations or delusions. Furthermore, appellant was forward thinking with no suicidal or homicidal ideation or plans and his cognitions were entirely intact. Dr. Weinstein opined, "[t]here is no psychological problem that would interfere with his performance of the regular duties of a lock and dam equipment mechanic. [Appellant] does not want any mental health treatment now and, based on my evaluation, does not need treatment."

On July 11, 2013 the employing establishment offered appellant the position of construction control representative which was permanent and claimed to accommodate his medical conditions. On July 26, 2013 appellant declined the offered position, asserting that he lived too far away and would not be able to stay awake on the ride home, as he was on medication. On July 30, 2013 OWCP referred him to a vocational rehabilitation counselor.

By letter dated August 9, 2013, OWCP informed the employing establishment that the offered position was not suitable.

On February 7, 2014 the employing establishment rescinded the construction control position and proposed to separate appellant from his federal employment. It explained that the reason for this proposed separation was appellant's physical inability to perform the duties of his position.

Upon completion of rehabilitation services and based upon appellant's age, experience, education, medical restrictions, and a labor market survey, the rehabilitation counselor concluded that appellant was capable of reemployment as a quality assurance manager, listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT# 012167014). The quality assurance manager position was classified as a sedentary light position. The duties included:

planning; coordinating; and directing quality control program designed to ensure continuous production of products, consistent with embellished standards. The physical requirements were described as sedentary and included lifting up to 10 pounds occasionally, and some light lifting up to 20 pounds. No climbing, balancing, stooping, kneeling, crouching, or crawling was required. Additionally, it required some occasional reaching, handling, and fingering. The average weekly earnings of a quality assurance manager were listed as \$956.00 per week within a 50-mile radius of the Milton, Kentucky area based on wage data from the Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2010-2011. The hourly wage was \$23.91 with an annual rate of \$49,720.00. The vocational rehabilitation counselor determined that the position was available in sufficient numbers on a full-time basis in appellant's commuting area based on a labor market survey.

In a November 4, 2014 memorandum, OWCP determined that vocational rehabilitation was interrupted as clarification was needed regarding the reaching restriction.

A December 4, 2014 functional capacity evaluation (FCE), revealed that appellant was capable of sedentary work.

On January 7, 2015 OWCP referred appellant for a second opinion, along with a SOAF, a set of questions, and the medical record to Dr. John William Wolf, Jr., a Board-certified orthopedic surgeon.

In a January 28, 2015 report, Dr. Jonathan D. Cole, a Board-certified clinical health psychologist, recommended that appellant be weaned off Valium "as it increases depression, decreases deep sleep, [and] decreases efficacy of opioids."

In a report dated January 30, 2015, Dr. Wolf described appellant's history of injury and treatment, examined appellant, and provided his findings. He found that appellant had a noticeable tremor in both hands, which appellant indicated that he had since childhood. Dr. Wolf found excellent range of motion of his lumbar spine and that appellant was able to touch his toes with his knees in full extension. Furthermore, he was able to reassume the erect position without apparent pain. Regarding the cervical spine, Dr. Wolf found decreased range of motion in rotation with slight asymmetry and that appellant was able to rotate 35 degrees to his right, but 45 degrees to his left. He determined that attempted further rotation caused pain. Dr. Wolf determined that appellant was able to flex comfortably until his chin rested on his chest and that extension was painful beyond 5 to 10 degrees. Furthermore, there was tenderness to palpation over the entire posterior aspect of the cervical spine. Dr. Wolf found no obvious muscle atrophy in the shoulder girdle muscles and two deep pigmented areas of scarring over his left scapula. He explained that both shoulders showed a full, pain-free range of passive motion. Dr. Wolf conducted muscle testing and found no pain or weakness demonstrable with anterior flexion against resistance on either side. However, he determined that there was tenderness to palpation over the anterior aspect of the right shoulder. Dr. Wolf found sensory examination in the right upper extremity was abnormal. He also noted appellant's complaints of decreased sensation to light touch over the entire brachium. Dr. Wolf found that the only area of relatively normal sensation to light touch was a strip approximately two to three centimeters wide down the dorsal aspect of appellant's forearm. He explained that all other areas elicited a description that the area was either numb and

tingling, or had decreased sensation. Dr. Wolf found the same with the digits of appellant's right hand with varying degrees of decreased sensation. He concluded that appellant had essentially full range of motion of his shoulder with decreased sensation in areas of his right upper extremity. Dr. Wolf opined that these sensory changes in his right upper extremity were due to his cervical spine problems rather than to his right shoulder problems. Regarding whether appellant's cervical degenerative disc disease and stenosis was caused or aggravated by his 1997 and 1998 work injuries, he opined that it was likely that his cervical degenerative disc disease and cervical spinal stenosis was aggravated by his 1997 and 1998 work injuries. Dr. Wolf opined that it was probable that some of the symptoms that appellant exhibited after his two accepted work injuries were manifestations of cervical disease. Regarding residuals and work ability, he explained that appellant was "certainly qualified for a sedentary type of job without question. Dr. Wolf noted that appellant can also do a job which is not physically demanding. He is unsuited, however, for work overhead due to a combination of complaints of right shoulder pain and inability to extend his cervical spine for any prolonged length of time as might be required if he were to be doing work overhead." Dr. Wolf also noted in the work capacity evaluation form that appellant was able to perform four hours of reaching and reaching above the shoulder. Additionally, he could lift 20 to 25 pounds for eight hours per day.

By letter dated March 12, 2015, OWCP advised appellant that the selected position of a quality assurance manager, DOT #012167014 in the amount of \$956.00 per week, was suitable to his restrictions and that he would receive 90 days of placement assistance to help him locate such a position. It further advised appellant that his compensation would likely be reduced by the end of this period to reflect his wage-earning capacity based upon a position that OWCP determined to be within his restrictions and abilities.

In a May 5, 2015 cognitive behavioral therapy session note, Dr. Susan Snyder, a Board-certified family practitioner, advised that Dr. James weaned appellant off opioids and Valium and appellant would consider being medically treated for depression.

In a July 7, 2015 closure report, the vocational rehabilitation counselor noted that the quality assurance manager position was reasonably available in appellant's commuting area with wages of \$605.00 to \$956.00 per week.

On July 7, 2015 OWCP proposed to reduce appellant's wage-loss compensation because the medical and factual evidence of record established that he was no longer totally disabled. It found that he had the capacity to earn the wage of a quality assurance manager, DOT #012167014, at the rate of \$956.00 per week. OWCP provided appellant 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

In a letter dated August 8, 2015, appellant indicated that he was unable to find employment due to lack of experience, training, and education. He indicated that most of the positions required special education and training. Appellant further argued that he would be precluded from these positions as he would not be able to pass the drug testing due to his pain medications. He indicated that he believed he was not qualified for the position. Additionally, there were no jobs with the listed salary of \$956.00.

In an August 6, 2015 report, Dr. James noted that appellant was seen for complaints of neck pain and a significant peripheral neuropathy. He diagnosed: cervical disc disease; status post anterior cervical discectomy and fusion; history of cervical radiculitis; and peripheral neuropathy. Dr. James determined that appellant was clinically stable and doing well. He recommended maintaining his medications.

By decision dated September 10, 2015, OWCP reduced appellant's compensation benefits, effective September 20, 2015, based on his ability to earn wages in the selected position of quality assurance manager. Using the formula in *Albert C. Shadrick*,⁶ it noted that appellant's salary on the date his disability began on July 18, 2005 was \$1,230.23 a week and the current adjusted pay rate for his job on the date of injury was \$1,179.16 a week as of June 30, 2015. Appellant was found currently capable of earning \$956.00 per week, the pay rate of a quality assurance manager. OWCP determined that he had an 81 percent wage-earning capacity or 19 percent loss of wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$996.49 per week, or a loss of wage-earning capacity of \$233.74 per week, reduced by the basic, two thirds, compensation rate to equal \$155.83, and increased by cost-of-living adjustments of \$186.75 per week. This yielded a new compensation rate of \$747.00 every four weeks. After subtracting insurance and retirement premiums, OWCP concluded that the net compensation was equivalent to \$211.44 every four weeks.

By letter dated October 1, 2015, appellant, through counsel, requested a telephonic hearing, which was held before an OWCP hearing representative on June 6, 2016. Counsel argued that appellant did not have the requisite skills to obtain the position of a quality assurance manager and thus, he was not qualified for the position. Appellant testified to his experience as a builder, welder, and laborer.

In an October 7, 2015 report, Dr. James repeated his prior findings and diagnoses and continued to recommend follow-up treatment.

In a December 4, 2015 report, Dr. Melanie H. Ledford, a Board-certified physiatrist, saw appellant on follow up. She noted similar findings to Dr. James. Dr. Ledford also saw appellant on April 7 and May 25, 2016, where she provided findings and diagnoses.

By decision dated July 27, 2016, OWCP's hearing representative affirmed the September 10, 2015 decision, finding that the selected position of quality assurance manager "fairly and reasonably" represented appellant's wage-earning capacity.

⁶ 5 ECAB 376 (1953).

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.⁷

Section 8115(a) of FECA,⁸ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁹ 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 regard to the nature of the injury, the degree of physical impairment, their usual employment, their age, their qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.¹⁰ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹¹ 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.¹² In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹³

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's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his or her physical limitation, 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.¹⁴ 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.¹⁵

⁷ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁸ 5 U.S.C. § 8115.

⁹ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

¹⁰ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

¹¹ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹² *Id.*

¹³ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁴ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹⁵ *Id.* *See supra* note 6; codified at 20 C.F.R. § 10.403 (c)-(e).

ANALYSIS

OWCP accepted appellant's claim for right shoulder acromioclavicular strain, closed acromioclavicular dislocation, cervical strain, aggravation of cervical radiculopathy, aggravation of cervical degenerative disc disease, and adjustment disorder with depressed mood. It subsequently expanded the acceptance of the claim to include a right shoulder acromioclavicular (AC) separation. On January 20, 1999 a Mumford procedure was performed on appellant's right shoulder. Appellant had two previous right shoulder surgeries in June 1997 and November 1997. OWCP later expanded the acceptance of appellant's claim to include depression and aggravation of cervical radiculopathy.

An FCE was completed on December 4, 2014, which indicated that appellant could work at a sedentary-to-light level for eight hours per day. On January 30, 2015 Dr. Wolf indicated that appellant was qualified for a sedentary type of job without question. He opined that appellant was unsuited, however, for work overhead due to a combination of complaints of right shoulder pain and inability to extend his cervical spine for any prolonged length of time as might be required if he were to be doing work overhead.

The medical evidence from January 30, 2015 supported that appellant was no longer totally disabled and could perform light-duty work.

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of a quality assurance manager. He noted that appellant had previous experience and determined 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 position was described as light to sedentary and required occasional lifting of up to 10 pounds frequently and 20 pounds occasionally, occasional stooping and crouching, and frequent reaching, handling, fingering, and talking. It did not require climbing, balancing, kneeling, or crawling. The Board notes that the position requires occasional lifting of up to 10 pounds frequently and 20 pounds occasionally, as well as occasional reaching. The Board finds that these physical activities comply with the restrictions imposed by Dr. Wolf, who addressed appellant's work ability and determined that appellant was "certainly qualified for a sedentary type of job without question." Furthermore, Dr. Wolf indicated that appellant could perform a job which was not physically demanding. He explained that appellant was unsuited for work overhead due to a combination of complaints of right shoulder pain and opined that appellant had an "inability to extend his cervical spine for any prolonged length of time as might be required if he were to be doing work overhead." However, the offered position does not indicate that there is any prolonged work overhead. The Board also notes that Dr. Wolf indicated that appellant was able to perform four hours of reaching and reaching above the shoulder. Additionally, appellant could lift 20 to 25 pounds for eight hours per day.

The Board finds that the weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the offered position of quality assurance manager. Therefore, OWCP properly reduced appellant's compensation, effective September 20, 2015, based upon his capacity to earn wages as a quality assurance manager.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective September 20, 2015, based on his capacity to earn wages in the selected position of a quality assurance manager.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2019
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