

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation benefits, effective June 18, 2019, based on her capacity to earn wages in the constructed position of order clerk.

FACTUAL HISTORY

On October 12, 1999 appellant, then a 39-year-old manual distribution clerk, filed an occupational disease claim (Form CA-2) alleging that factors of her federal employment, including pushing, throwing, and dispatching bundles of catalogs/magazines, cause a right shoulder injury. She indicated that she initially became aware of the condition on September 1, 1999 and realized its relationship to her federal employment on September 24, 1999. OWCP accepted the claim for right rotator cuff tendinitis and began paying compensation benefits for intermittent periods of employment-related disability.

On October 19, 2008 appellant accepted a rehabilitation position as a modified mail processing clerk. On March 23, 2010 the employing establishment advised that the position was withdrawn due to the National Reassessment Process (NRP). The effective date of the withdrawal was March 24, 2010. OWCP placed appellant on the supplemental rolls, effective March 24, 2010, and the periodic rolls, effective January 16, 2011.

In an April 3, 2017 report, Dr. Pamela Kaiser, a Board-certified medical oncologist, indicated that she treated appellant for breast cancer, that appellant developed chronic peripheral neuropathy and lymphedema, due to her cancer treatment, and that appellant was unable to drive long distances (no more than five miles) due to the numbness and tingling.

In a December 29, 2017 report, Dr. James Bresch, an orthopedic surgeon, noted that following surgery on appellant's right shoulder, her condition plateaued. He recommended a pain clinic for future treatment. Dr. Bresch opined that appellant was partially disabled as a result of the employment injury. He provided permanent work restrictions, including no lifting greater than 10 pounds, no overhead work, no over the shoulder height reaching, no repetitive overhead reaching, and limited pushing/pulling of the right shoulder. Dr. Bresch also noted that appellant could be gainfully employed within her permanent work restrictions, and that she may receive vocational rehabilitation, if required.

Dr. Ok Hong, a psychiatrist, indicated in a March 1, 2018 report that she was treating appellant for major depression disorder and post-traumatic stress disorder since April 7, 2010. She indicated that appellant was unable to work full time due to these conditions.

On March 26, 2018 appellant was referred for vocational rehabilitation services, based on Dr. Bresch's December 29, 2017 restrictions. The vocational rehabilitation counselor, completed vocational testing on June 11, 2018, and a vocational rehabilitation plan was formulated targeting the positions of order clerk Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 249.362-026 or cashier DOT No. 211.362-010.

On June 11, 2018 appellant's vocational rehabilitation counselor reported that appellant was capable of working as an order clerk or cashier and that labor market surveys showed that

these positions were reasonably available in her commuting area. The receptionist position, under the Department of Labor, *Dictionary of Occupational Titles* described the order clerk position as follows: Processes orders for material or merchandise received by mail, telephone, or personally from customer or company employee, manually or using computer or calculating machine. Edits orders received for price and nomenclature. Informs customer of unit prices, shipping date, anticipated delays, and any additional information needed by customer, using mail or telephone. Writes or types order form, or enters data into computer, to determine total cost for customer. Records or files copy of orders received according to expected delivery date. May ascertain credit rating of customer. The Department of Labor, *Dictionary of Occupational Titles* described the physical requirements of the order clerk position as sedentary to include sedentary lifting, carrying, pushing, pulling 10 pounds, occasionally, mostly sitting, may involve standing or walking for brief periods of time.

OWCP noted in a June 21, 2018 memorandum that placement with a new employer was not being pursued due to the limitations attributable to post-injury or subsequently-acquired conditions.³

In a December 7, 2018 report, Dr. Mehul Sekhadia, an osteopathic physician Board-certified in pain medicine, noted that he was not currently providing appellant medical treatment, and that there were no changes in her work status or the recommended work restrictions from Dr. Bresch.

On May 14, 2019 OWCP proposed to reduce appellant's compensation based on her capacity to earn wages in the constructed position of an order clerk within the restrictions identified by Dr. Bresch. It noted that she had been out of the work force since March 24, 2010. OWCP explained that given the nature of appellant's injury and physical impairment, the order clerk position was determined to be within the provided permanent physical restrictions since it was sedentary. It further noted that the rehabilitation specialist documented that such positions were available in her commuting area and that the entry pay level for the position was \$692.00 per week. OWCP calculated that appellant's compensation rate should be adjusted to \$1,169.00 every four weeks using the *Albert C. Shadrick* formula.⁴ It provided her 30 days to submit additional evidence regarding her capacity to earn wages in the position described. Appellant did not respond.

By decision dated June 17, 2019, OWCP finalized the proposed reduction of compensation, finding that appellant was capable of performing the duties of an order clerk.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁵

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4c (June 2013).

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ Z.W., Docket No. 18-1000 (issued June 24, 2019).

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 his or her loss of wage-earning capacity (LWEC).⁶

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.⁷ 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.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. 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. The 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 or her commuting area.⁹

OWCP must initially determine an employee'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 employee's medical condition.¹⁰ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹¹

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.¹² 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 the claimant may receive compensation.¹³

⁶ *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

⁷ 5 U.S.C. § 8115(a).

⁸ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

⁹ *Id.*

¹⁰ *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹¹ *Id.*

¹² *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

¹³ *Id.*

When OWCP makes a determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position listed in the DOT 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 open labor market should be made through contact with the state employment service, local Chamber of Commerce, employing establishment contacts, and actual job postings.¹⁴ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,¹⁵ as codified in section 10.403 of OWCP regulations,¹⁶ to determine the percentage of the employee's LWEC.¹⁷

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation benefits, effective June 18, 2019, based on her capacity to earn wages in the constructed position of order clerk.

OWCP determined that appellant had the physical capacity to perform the duties of an order clerk. The position is classified as sedentary employment requiring sedentary lifting, carrying, pushing, pulling 10 pounds, occasionally, mostly sitting, may involve standing or walking for brief periods of time. The vocational rehabilitation counselor noted that the position of order clerk allowed for a variety of duties, none of which exceeded Dr. Bresch's restrictions. Dr. Bresch, appellant's treating physician, noted appellant's permanent work restrictions of no lifting greater than 10 pounds, no overhead work, no over the shoulder height reaching, no repetitive overhead reaching, and limited pushing/pulling of the right shoulder. The Board finds that the duties of the sedentary order clerk position fall within appellant's work restrictions. The Board finds that the weight of the medical evidence rests with the opinion of Dr. Bresch and therefore OWCP has met its burden of proof to establish that the constructed position was within appellant's medical restrictions.

Dr. Kaiser and Dr. Hong advised that appellant could not work due to a subsequently-acquired condition. As explained, an incapacity to perform the duties of the selected position resulting from subsequently-acquired conditions is immaterial to an LWEC determination.¹⁸ Neither physician opined that appellant could not work due to residuals from the accepted conditions, or a preexisting condition. The Board, therefore, finds that the weight of the medical

¹⁴ *C.M.*, *supra* note 8; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

¹⁵ *Supra* note 4.

¹⁶ 20 C.F.R. § 10.403.

¹⁷ *C.M.*, *supra* note 8.

¹⁸ *G.E.*, *supra* note 12.

evidence establishes that appellant had the physical capacity to perform the duties of the selected position.¹⁹

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also consider work experience, age, mental capacity, and educational background.²⁰ In her June 11, 2018 report, the rehabilitation counselor described appellant's transferable skills and completed labor market surveys for the positions of order clerk. She noted that the order clerk position was sedentary in nature and available for full-time and/or part-time positions in appellant's commuting area. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether a job is vocationally suitable and reasonably available.²¹

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 she had the capacity to perform the position of order clerk.²² OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²³ in determining her LWEC.

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

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation benefits, effective June 18, 2019, based on her capacity to earn wages in the constructed position of order clerk.

¹⁹ *C.H.*, *supra* note 6.

²⁰ *C.M.*, *supra* note 8.

²¹ *C.H.*, *supra* note 6.

²² *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²³ 5 ECAB 376 (1953); *supra* note 3 at Chapter 2.816.6(b) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 27, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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