

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

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**H.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Grand Rapids, MI, Employer**

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**Docket No. 10-2016  
Issued: June 10, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 3, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) June 24, 2010 merit decision reducing her compensation benefits to reflect her wage-earning capacity. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> 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 properly reduced appellant's compensation effective November 4, 2009 based on its determination that the constructed position of employment interviewer represented her wage-earning capacity.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 19, 2007 appellant, a 32-year-old rural carrier, filed a traumatic injury claim alleging that she sustained right arm and shoulder injuries while pulling down mail on that date. OWCP accepted her claim for cervical and thoracic subluxations of the spine and myofascial pain syndrome and placed her on the periodic rolls.

OWCP referred appellant to Dr. Edward J. Westerbeke, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion regarding her ability to work and the extent of any remaining residuals or disability. In a November 18, 2008 report, Dr. Westerbeke opined that appellant's cervical and thoracic subluxations of the spine had resolved, but that she could not work as a rural carrier. Job restrictions included pulling, pushing and lifting no more than 10 pounds and one hour of repetitive elbow movement and climbing.<sup>2</sup>

As the employing establishment was unable to accommodate her work restrictions, appellant was referred to vocational rehabilitation in an effort to assist her in returning to work in a position other than her date-of-injury job. In a January 16, 2009 transferable skills report, the vocational rehabilitation counselor noted that appellant previously held positions as a truck driver, manager of a fast food restaurant and waitress, all of which required reaching and handling on a continual basis. Results of vocational testing indicated that she could be expected to have difficulty reading and utilizing complex reports and data. Based upon available data, the counselor selected the positions of employment interviewer and loan officer for job placement. On July 7, 2009 Dr. Westerbeke opined that appellant was physically capable of performing the duties of both identified positions.

The job description for an employment interviewer position (166.267-010) according to the Department of Labor, *Dictionary of Occupational Titles (DOT)* is as follows:

“Interviews job applicants to select people meeting employer qualifications: Reviews employment applications and evaluates work history, education and training, job skills, compensation needs, and other qualifications of applicants. Records additional knowledge, skills, abilities, interests, test results and other data pertinent to selection and referral of applicants. Reviews job orders and matches applicants with job requirements, utilizing manual or computerized file search. Informs applicants of job duties and responsibilities, compensation and benefits, work schedules and working conditions, company and union policies, promotional opportunities and other related information. Refers selected applicants to person placing job order, according to policy of organization. Keeps records of applicants not selected for employment. May perform reference and background checks on applicants. May refer applicants to vocational counseling services. May conduct or arrange for skills, intelligence, or psychological testing of applicants. May evaluate selection and placement techniques by conducting research or follow-up activities and conferring with management and supervisory personnel. May specialize in

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<sup>2</sup> On January 16, 2009 the Office terminated appellant's medical benefits as they related to cervical and thoracic subluxations. The case remained open for claims relating to her myofascial pain syndrome.

interviewing and referring certain types of personnel, such as professional, technical, managerial, clerical, and other types of skilled or unskilled workers. May search for and recruit applicants for open positions [PERSONNEL RECRUITER (profess. & kin.) 166.267-038]. May contact employers in writing, in person, or by telephone to solicit orders for job vacancies for clientele or for specified applicants and record information about job openings on job order forms to describe duties, hiring requirements and related data.”

An employment interviewer is required to have knowledge of policies and practices involved in personnel/human resource functions, including recruitment, selection, training, and promotion regulations and procedures compensation and benefits packages; labor relations and negotiation strategies; and personnel information systems. She is also required to have knowledge of information and techniques needed to rehabilitate physical and mental ailments and to provide career guidance including alternative treatments, rehabilitation equipment and its proper use, and methods to evaluate treatment effects; knowledge of principles and processes involved in business and organizational planning, coordination and execution, including strategic planning, resource allocation, manpower modeling, leadership techniques and production methods; knowledge of laws, legal codes, court procedures, precedents, government regulations, executive orders, agency rules, and the democratic political process; knowledge of instructional methods and training techniques including curriculum design principles, learning theory, group and individual teaching techniques, design of individual development plans and test design principles.

Skills required for the position of employment interviewer are identified as follows in order of importance: talking to others to effectively convey information; knowing how to find and identify essential information; understanding written sentences and paragraphs in work-related documents; listening to what other people are saying and asking questions as appropriate; translating or explaining what information means and how it can be understood or used to support responses or feedback to others; performing for people or dealing directly with the public; compiling, coding, categorizing, calculating, tabulating, auditing, verifying, or processing information or data; combining, evaluating, and reasoning with information and data to make decisions and solve problems; scheduling events, programs, activities, as well as the work of others; and evaluating information against a set of standards and verifying that it is correct.

In a June 4, 2009 report, the vocational rehabilitation counselor stated that appellant met the specific vocational preparation (SVP) for this position (level 5, which equated to six months to greater than one year) based on her prior work as a fast food manager (which equated to level seven on the SVP scale, which was two to four years). The rehabilitation counselor concluded that appellant’s work experience qualified her to meet the vocational requirements of the employment interviewer position and that, based on a labor market survey, the position was reasonably available in her commuting area.

On June 4, 2009 OWCP approved the rehabilitation plan to return appellant to work in the sedentary position of employment interviewer “after any necessary training or other preparation [was] completed.” It informed appellant that, following 90 days of placement services, it would likely reduce he compensation benefits based on her ability to earn \$828.40 weekly.

Appellant was not able to secure actual employment *via* the vocational rehabilitation effort.

On September 21, 2009 OWCP issued a notice of proposed reduction in compensation based on the selected position of employment interviewer, which it determined fairly and reasonably represented appellant's wage-earning capacity. It determined that this position was medically and vocationally suitable and was reasonably available in the general labor market. OWCP concluded that as an employment interviewer in the general commuting area, appellant had a wage-earning capacity of \$520.00 per week (or \$13.00 per hour) which represented 65 percent of her salary in her date-of-injury position.

On November 3, 2009 OWCP reduced appellant's compensation effective November 4, 2009 to \$193.04 per week based on the finding that the selected position of employment interviewer fairly and reasonably represented the claimant's wage-earning capacity. On November 6, 2009 appellant's representative requested an oral hearing.

During a February 19, 2010 telephonic hearing, counsel argued that the position of employment interviewer was not vocationally suitable, as appellant had no prior experience as a job interviewer, had no skills in preparing written reports or calling employers and was offered no on-the-job training. He contended that the position was more than an entry level position and appellant could not earn \$13.00 per hour in this position as determined by OWCP. Appellant testified that she never graduated from high school and had no managerial or interviewing experience. She indicated that, when she originally agreed to seek a job as an employment interviewer, she misunderstood the requirements of the position. Appellant did not realize that she would be required to prepare written reports concerning applicants. She emphasized that she had no experience with either the interviewing or hiring process.

By decision dated June 24, 2010, OWCP's hearing representative affirmed the November 3, 2009 decision. He found that the position of employment interviewer was medically and vocationally suitable and that OWCP met its burden of proof to reduce appellant's compensation benefits to reflect a loss of wage-earning capacity in the amount of \$257.38 per week.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>3</sup> 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.<sup>4</sup>

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<sup>3</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>4</sup> 20 C.F.R. §§ 10.402, 10.403 (2002).

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 employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in her disabled condition.<sup>5</sup>

OWCP must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which OWCP relies must provide a detailed description of appellant's condition.<sup>6</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>7</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP's wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *DOT* or otherwise available in the open market, that fit the 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 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*<sup>8</sup> and codified by regulations at 20 C.F.R. § 10.403<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, the job selected for determining

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<sup>5</sup> 5 U.S.C. § 8115(a); see *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>6</sup> See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>7</sup> *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

<sup>8</sup> 5 ECAB 376 (1953).

<sup>9</sup> 20 C.F.R. § 10.403.

<sup>10</sup> *Id.* at § 10.403(d).

<sup>11</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000).

wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>12</sup>

### ANALYSIS

The evidence establishes that appellant has the capacity to earn wages. Dr. Westerbeke, the referee physician, reported in November 2008 that appellant was no longer totally disabled for work and released her to modified work and specified her work restrictions. An OWCP vocational rehabilitation counselor found that appellant was capable of earning wages as an employment interviewer. She conducted a labor market survey to determine the wage and availability of the selected position. Dr. Westerbeke reviewed the job description and confirmed that the position was physically appropriate for appellant. Appellant did not argue that the selected position was medically unsuitable or that she could not physically perform the duties of the employment interviewer position. The Board finds that the position of employment interviewer is medically suitable.

OWCP's burden is not satisfied, however, by establishing that the selected position is medically suitable. As noted, in determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must also determine whether the position is vocationally suitable, taking into account her education, age and prior experience.<sup>13</sup> OWCP's hearing representative relied on the vocational rehabilitation counselor's conclusion that appellant met the specific vocational preparation (SVP) for the employment interviewer position (level five, which equated to six months to greater than one year) based on her prior work as a fast food manager (which equated to level seven on the SVP scale, which was two to four years). Neither the hearing representative nor the rehabilitation counselor explained, however, how appellant's prior work experience qualified her for the numerous requirements of the selected position.

There is no evidence of record that appellant had the required knowledge of policies and practices involved in personnel/human resource functions, including recruitment, selection, training, and promotion regulations and procedures; compensation and benefits packages; labor relations and negotiation strategies; and personnel information systems. There is no evidence to rebut her testimony that she had no experience recruiting or interviewing job applicants, nor is there evidence that she had knowledge of information and techniques needed to rehabilitate physical and mental ailments or to provide career guidance. Results of vocational testing indicated that appellant does not have the requisite skills to perform the duties of the selected position, as she would have difficulty reading and utilizing complex reports and data. As appellant received no vocational training, she could not be expected to successfully perform the duties of the selected position.

OWCP's hearing representative relied on the opinion of the rehabilitation counselor in determining that the job was vocationally suitable, noting that he is permitted to do so according to OWCP procedures. OWCP procedures provide that the claims examiner may rely on the

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<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.403.

opinion of a rehabilitation specialist, who is considered to be an expert in the field of vocational rehabilitation.<sup>14</sup> Assistance from a vocational rehabilitation counselor does not, however, relieve the claims examiner or hearing representative of his responsibility to properly evaluate all of the relevant evidence in reaching a final determination.

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation for total disability. OWCP failed to give due regard to relevant factors in determining appellant's wage-earning capacity. The Board will therefore reverse the hearing representative's June 24, 2010 decision.

### **CONCLUSION**

The Board finds that OWCP improperly reduced appellant's compensation effective November 4, 2009 based on its determination that the constructed position of employment interviewer represented her wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 10, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).