

FACTUAL HISTORY

On August 31, 2001 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment. OWCP accepted the claim for bilateral tenosynovitis of the wrists.²

By decision dated July 23, 2008, OWCP determined that appellant had no loss of wage-earning capacity, finding that her actual earnings as a modified mail processor effective February 1, 2007 fairly and reasonably represented her wage-earning capacity. On November 5, 2010 it modified its July 23, 2008 determination based on the employing establishment's withdrawal of her position under the National Reassessment Process. OWCP paid appellant's compensation beginning August 28, 2010.

In a duty status report dated November 3, 2010, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, found that appellant could sit, stand and walk eight hours per day, lift and carry up to 10 pounds, kneel, bend and stoop for two hours per day, twist, push and pull four hours per day, grasp six hours per day, perform fine manipulation for four hours per day and reach over the shoulder for two hours per day. He determined that she could not climb, drive a vehicle or operate machinery.

On November 10, 2010 OWCP referred appellant for vocational rehabilitation.

In a work restriction evaluation dated November 15, 2010, Dr. Shade found that appellant could sit, walk and stand for eight hours per day, reach for two hours per day, reach above the shoulder for two hours per day, bend, stoop, squat and kneel for two hours per day, twist, push and pull for four hours per day, perform repetitive movements of the wrists and elbows for four hours per day and lift up to 10 pounds for eight hours per day. He further found that she could drive a vehicle to and from work for one hour per day.

In a December 1, 2010 transferrable skills analysis, the rehabilitation counselor noted that appellant had completed one year of college and reviewed her work history as a mail processor, office clerk and customer service representative. She identified the positions of appointment clerk and hospital admitting clerk as within appellant's vocational ability and work restrictions.

In a December 6, 2010 labor market survey, the rehabilitation counselor selected the job of appointment clerk from the Department of Labor's *Dictionary of Occupational Titles*. The position was sedentary and required frequent reaching and handling and occasional fingering. The rehabilitation counselor identified the specific vocational preparation required as a level three. She found that appellant met the specific vocational preparation through her work history and experience operating office machines and working with people. The rehabilitation counselor further determined that the position was reasonably available within her commuting area and noted that seven employers were "actively hiring for this position."

² By decision dated February 13, 2008, OWCP granted appellant a schedule award for an 11 percent permanent impairment of the right upper extremity and a 10 percent permanent impairment of the left upper extremity.

By letter dated December 16, 2011, OWCP advised appellant that it was providing her with 90 days of job assistance.³ In a March 17, 2011 status report, it noted that she had not found a position and closed the rehabilitation file. In a March 17, 2011 closure report, the rehabilitation counselor determined that, while appellant had not found employment, the position of appointment clerk was reasonably available and vocationally and medically suitable. She found that wages for the position were \$301.34 per week based on 2006 employment statistics.

On May 20, 2011 OWCP advised appellant of its proposed reduction in her compensation as the evidence established that she was no longer totally disabled but had the capacity to work as an appointment clerk for \$502.34 per week. It provided her 30 days to respond to its proposed reduction of compensation.

By decision dated June 20, 2011, OWCP reduced appellant's compensation effective July 3, 2011 after finding that she could earn wages of \$502.34 per week as an appointment clerk. It applied the formula set forth in *Albert C. Shadrick*,⁴ to calculate the percentage of her loss of wage-earning capacity.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁵ Under section 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 his or her 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, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.⁶

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's *Dictionary of Occupational Titles* 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.⁷ 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

³ In progress reports dated January 10, 2011, Dr. Shade found that appellant could perform limited duty.

⁴ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

⁵ *T.O.*, 58 ECAB 377 (2007).

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁷ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

principles set forth in *Albert C. Shadrick*⁸ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained bilateral tenosynovitis of the wrists due to her accepted work injury. On July 23, 2008 it determined that she had no loss of wage-earning capacity finding that her actual earnings effective February 1, 2007 fairly and reasonably represented her wage-earning capacity. On November 5, 2010, however, OWCP modified its July 23, 2008 decision and paid appellant compensation for total disability beginning August 28, 2010.

Based on Dr. Shade's November 2010 finding that appellant could work with restrictions, OWCP properly referred her for vocational rehabilitation. The Board finds that OWCP properly relied upon the medical evidence in referring her for vocational rehabilitation as she was no longer totally disabled due to residuals of her employment injury.

The Board finds, however, that OWCP did not meet its burden of proof to reduce appellant's compensation as the medical evidence is insufficient to support that the selected position of appointment clerk was within her physical limitations. As the Board explained in *Mary A. Henson*,⁹ OWCP must clarify whether the position selected is consistent with the employee's work tolerance restrictions. On November 15, 2010 Dr. Shade found that appellant could perform both regular reaching and overhead reaching for no more than two hours per day. The Department of Labor's *Dictionary of Occupational Titles*, however, describes the duties of selected position of appointment clerk as requiring frequent reaching and handling between one-third to two-thirds of the day. Based on this evidence, OWCP did not establish that the duties of an appointment clerk were within the restrictions set forth by Dr. Shade as the job necessitates reaching for more than two hours a day.¹⁰ As the medical evidence does not clearly and unequivocally establish that appellant could perform the duties of the selected position, OWCP did not meet its burden of proof to reduce his compensation.¹¹

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation based on its finding that she had the capacity to perform the selected position of appointment clerk.

⁸ See *supra* note 4.

⁹ 36 ECAB 565 (1985).

¹⁰ The Board further notes that the rehabilitation counselor indicated that the current wages for the position of appointment clerk was \$301.34 per week; however, OWCP in its June 20, 2011 decision, found that appellant could earn wages of \$502.34 per week.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009); see also *William H. Woods*, 51 ECAB 619 (2000).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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