

FACTUAL HISTORY

On July 19, 1990 appellant, then a 37-year-old mark up clerk, filed an occupational disease claim alleging that she developed a wrist condition as a result of her employment duties. She was placed on limited duty. OWCP accepted appellant's claim for synovitis of the left wrist and bilateral carpal tunnel syndrome. Appellant underwent arthroscopy and partial resection of the triangular fibrous cartilage of the left wrist.

On December 3, 1992 appellant filed a recurrence claim alleging that on November 15, 1992 her left and right wrists worsened to the point that she had to wear a brace on her right wrist and elevate it. She stopped work and received disability compensation. Appellant returned to modified duty.

OWCP granted appellant a schedule award for 10 percent permanent impairment of the right and left upper extremities.²

On November 16, 2010 the employing establishment withdrew appellant's modified clerk position through the National Reassessment Process. Appellant stopped work and filed a claim for recurrence of disability. In a decision dated December 3, 2010, OWCP accepted her recurrence of disability claim and paid wage-loss compensation.

OWCP referred appellant, along with a statement of accepted facts, to Dr. Patrick J. Hughes, a Board-certified neurologist, for a second-opinion examination. In a January 19, 2011 report, Dr. Hughes reviewed appellant's records, including the statement of accepted facts and provided an accurate history of injury. He related her complaints of pain in both wrists and hands when doing repetitious works. Appellant also described numbness and tingling in both hands that would last for a number of hours. Dr. Hughes reported that she had no trouble sitting, standing, walking or driving and lifting up to 35 pounds. Examination revealed normal strength in the deltoid, biceps and triceps. Dr. Hughes observed that light touch and pain sensation were normal. Tinel's and Phalen's signs were positive. Dr. Hughes stated that the history and mechanism of injury were consistent with appellant's diagnosed bilateral carpal tunnel syndrome and that she had not fully recovered from her work-related injury. He reported that she continued to suffer residuals of her condition. Dr. Hughes explained that appellant's limitations in repetitive movements such as fine manipulation and simple grasping prevented her from returning to her date-of-injury job as a clerk, but she could work in another occupation that was not as strenuous. He limited her to no lifting more than 35 pounds, no more than four hours a day of fine manipulation, and no more than one hour of simple grasping. Dr. Hughes concluded that appellant reached maximum medical improvement.

On March 4, 2011 OWCP referred appellant for vocational rehabilitation training based on Dr. Hughes' January 19, 2011 report.

On June 1, 2011 appellant returned to modified duty working four hours a day as a modified window clerk. The physical requirements of the job included standing, twisting, grasping, bending, walking and lifting no more than 35 pounds up to four hours a day.

² By decision dated September 21, 2010, OWCP denied an additional impairment rating.

OWCP continued to pay appellant compensation for intermittent periods of wage loss.

On July 29, 2011 the employing establishment advised appellant that it was no longer able to accommodate her medical restrictions. OWCP referred her back to vocational rehabilitation and paid wage-loss compensation. On February 23, 2012 appellant was placed on the periodic rolls.

In reports dated August 5, September 6, October 20 and November 4, 2011 and January 25, 2012 a vocational rehabilitation counselor discussed appellant's education and work history and noted that she graduated from high school and attended a few semesters at a community college. The vocational rehabilitation counselor reported that appellant worked for the employing establishment for 17 years. The vocational rehabilitation counselor summarized efforts to find vocational training or suitable alternative employment for appellant within her physical restrictions.

On November 17, 2011 the vocational rehabilitation counselor identified three positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) for information clerk, DOT #237.367-022, customer service representative, DOT #239.362-014 and Gate Guard, DOT #372.667-030. The vocational rehabilitation counselor identified the occupation requirements for an information clerk, customer service representative and gate guard and provided job descriptions. The positions of information clerk and customer service representative were noted to be sedentary strength position and the position of gate guard was found to be light strength position.³ All of the positions were found to be within appellant's restrictions, her vocational and work history, education, skills and training so as to reflect her capacity to earn wages. The vocational rehabilitation counselor contacted the Bureau of Labor Statistics for that region and determined that the jobs for an information clerk, customer service representative and gate guard were being performed in sufficient numbers so as to make them reasonably available to the claimant within her commuting area and there was a positive labor market for both jobs. The weekly wages were \$393.08 for an information clerk, \$443.46 for a customer service representative and \$380.96 for a gate guard.

In a November 21, 2011 duty status report, Dr. Jeffrey Ribner, a Board-certified neurologist, noted appellant's diagnosis of bilateral carpal tunnel syndrome. He reported that she was capable of working eight hours a day with restrictions of lifting up to 35 pounds, fine manipulation for one to three hours a day and simple grasping for four hours a day.

In a March 7, 2012 report, the vocational rehabilitation counselor stated that appellant had participated in 90 days of job placement services but was not offered a position.

On April 3, 2012 OWCP obtained updated salary information from the employing establishment. In a letter dated April 4, 2012, it advised appellant of its proposal to reduce her

³ The duties of a gate guard were described as: opens gate to allow entrance or exit of employees, truckers and authorized visitors; checks credentials or approved roster before admitting anyone; issues passes at own discretion; directs visitors and truckers to various parts of grounds or buildings; inspects outgoing traffic; may record number of trucks or other carriers entering and leaving; may perform maintenance duties such as mowing lawns and sweeping gate areas; may supervise use of time clocks for recording arrival and departure of employees. The physical restrictions included light strength, occasional handling and no fingering.

wage-loss compensation as the factual and medical evidence established that she was not totally disabled. Appellant had the capacity to earn wages as a gate guard, DOT #372.667-030 at the rate of \$390.19 a week, in accordance with the factors outlined in 5 U.S.C. § 8115. It calculated that her compensation rate should be adjusted to \$1,960.00 each four weeks. The vocational rehabilitation counselor found that the gate guard position was suitable for appellant, given her work restrictions and was available in her commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

In an April 25, 2012 statement, appellant alleged that every job that the rehabilitation counselor found for her involved clerical work even though she was restricted from working on a computer all day. She noted that the position of gate guard required mowing the lawn and frequent use of her wrists all day. Appellant stated that she was entitled to refuse jobs that were not related to her skill set of the last 31½ years at the employing establishment. She also disagreed with OWCP listing her as totally disabled and requested that she be given another part-time position at the employing establishment. Appellant submitted various application and interview lists and print-outs of job searches that she had completed.

By decision dated May 31, 2012, OWCP reduced appellant's compensation to reflect her wage-earning capacity as a gate guard effective June 3, 2012.

On June 10, 2012 appellant requested an oral hearing. She alleged that the gate guard job was not within her medical restrictions and that if she was capable of performing these duties then she should be given a job with the employing establishment. Appellant also noted her disagreement with why the employing establishment was unable to accommodate her medical restrictions.

On October 15, 2012 a telephone hearing was held. Appellant was represented by Stephen Larkin, an OWCP advocate. She described her duties as a postal clerk and provided a history of her employment with the employing establishment and her medical condition. Appellant noted that Drs. Hughes and Ribner authorized her to return to full duty with restrictions of lifting up to 35 pounds, fine manipulation up to four hours and simple grasping up to one hour. She stated that the gate guard duties of mowing lawns and sweeping gate areas involved simple grasping. Counsel alleged that the physical demands of the gate guard position required occasional handling for two hours and 40 minutes of the day, which exceeded the restriction of one hour of handling and grasping duties. The hearing representative stated that the four hours of fine manipulation and one-hour of simple grasping totaled five hours of handling.

In a June 4, 2012 report, Dr. Ribner noted appellant's complaints of pain, predominantly in her left hand and related her problems with finding a job because she could not use the computer but all the jobs were computerized. Upon examination he observed good strength throughout and good small hand movements. Phalen's maneuver and Tinel's sign were positive at the wrists bilaterally. Dr. Ribner did not note any focal weakness. He diagnosed bilateral carpal tunnel syndrome and partial permanent disability with small hand movements.

In an August 13, 2012 report, Dr. Ribner related appellant's complaints of intermittent pain in her right and left upper extremities. He conducted an examination and noted no

significant changes. Dr. Ribner opined that appellant could work full time with restrictions regarding repetitive motion.

In a June 4 and August 13, 2012 duty status reports, Dr. Ribner authorized appellant to return to work on June 4, 2012 with restrictions. He limited her to lifting no more than 35 pounds for eight hours a day, fine manipulation for one to three hours a day and simple grasping up to four hours a day.

In an October 26, 2012 statement, Mr. Larkin requested that Dr. Hughes, the second-opinion examiner, be given an opportunity to determine the suitability of the gate guard position. He alleged that because holding gardening tools involved grasping, the gate guard position required more than one hour of grasping.

By decision dated December 21, 2012, OWCP's hearing representative affirmed the May 31, 2012 reduction in wages finding that the medical evidence established that appellant was capable of performing the selected position of a gate guard and that this position fairly and reasonably represented appellant's capacity to earn wages.

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 proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

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 wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁶

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence relied upon must provide a detailed description of the condition.⁷ Additionally,

⁴*Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

⁵*See Del K. Rykert*, 40 ECAB 284 (1988).

⁶ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

⁷*William H. Woods*, 51 ECAB 619 (2000).

the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁸

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have provided the report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.⁹ 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 employee service or other applicable service. Finally, application of the principles set forth in the *Shadrick*¹⁰ decision will result in the percentage of the employee's loss of wage-earning capacity.

In determining an employee's wage-earning capacity based on a position defined 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 postinjury or subsequently acquired conditions. 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.¹¹ Additionally, 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

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective June 3, 2012 based on her capacity to earn wages in the constructed position of gate guard.

The Board finds that the weight of medical evidence is represented by the January 19, 2011 report from Dr. Hughes, who provided a second opinion evaluation that established that appellant was not totally disabled. Dr. Hughes provided an accurate history of injury and conducted a thorough examination. He explained that appellant's limitations in repetitive movements such as fine manipulation and simple grasping prevented her from returning to her date-of-injury job as an office clerk. Dr. Hughes opined that she could work in another

⁸*John D. Jackson*, 55 ECAB 465 (2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

¹⁰*Albert C. Shadrick*, 5 ECAB 376 (1953).

¹¹*James Henderson, Jr.*, 51 ECAB 268 (2000).

¹²*Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

occupation that was not as strenuous as her office clerk position. He limited appellant to lifting no more than 35 pounds, fine-manipulation for up to four hours and simple grasping for up to one hour. Based on Dr. Hughes' report, OWCP referred her for vocational rehabilitation. The Board finds that it properly referred appellant for vocational rehabilitation counselor as she was capable of working with restrictions. In a November 17, 2011 report, the vocational rehabilitation counselor identified positions that conformed to appellant's capabilities and determined that she could perform the duties of a gate guard.

Appellant disagreed with the proposed reduction and in a telephone hearing alleged that the requirements for occasional handling exceeded her medical restrictions. The Board finds, however, that the physical demands of the gate guard position do not exceed her restrictions provided by Dr. Hughes' January 19, 2011 second-opinion report. The position has a light strength level and does not require frequent fingering, handling or grasping.¹³ The Department of Labor's *Dictionary of Occupational Titles* classified the position as within light strength levels, occasional reaching and handling and negligible fingering.¹⁴ The vocational rehabilitation counselor determined that the position was being performed in sufficient numbers so as to make them reasonably available to the claimant within her commuting area.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, such as age, employment and qualifications, in determining that the position of gate guard represented her wage-earning capacity. The rehabilitation counselor noted that appellant had a high school diploma and over 30 years of work experience with the employing establishment. The vocational rehabilitation counselor also contacted the Bureau of Labor Statistics for that region and found the position to be in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The evidence of record establishes that appellant has the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the position of gate guard reflected appellant's wage-earning capacity and using the *Shadrick* formula¹⁵ properly reduced her compensation effective June 3, 2012.

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

CONCLUSION

The Board finds that OWCP met its burden of proof in reducing appellant's compensation.

¹³See *A.L.*, Docket No. 13-857 (issued August 14, 2013).

¹⁴*Supra* note 3.

¹⁵*Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2012 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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