



## ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation effective August 24, 2016 based on her capacity to earn wages as a customer complaint clerk; and (2) whether OWCP properly suspended appellant's compensation effective August 9, 2016 for failure to complete an EN1032 form as requested.

## FACTUAL HISTORY

On June 25, 2004 appellant, then a 50-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging a right shoulder injury that day when she reached to help passengers place bags on a belt.

OWCP accepted that appellant sustained right shoulder and rotator cuff sprains, bilateral shoulder impingement syndrome, temporary aggravation of left shoulder osteoarthritis, and left shoulder tendinitis.<sup>3</sup> Appellant underwent OWCP-authorized right shoulder arthroscopies on March 4, 2005 and July 27, 2010, and left shoulder arthroscopy on July 5, 2012. She returned to light-duty work on a full-time basis after the March 4, 2005 and July 27, 2010 surgeries. Appellant stopped work on July 13, 2011 and did not return. She was returned to the periodic rolls.

In late-2011 appellant was referred to a vocational rehabilitation counselor for participation in a vocational rehabilitation program. She underwent training provided by PCI College for proficiency in computer software and keyboarding skills. Appellant's participation in the program was interrupted by medical issues, but was later restarted in 2013.

On December 4, 2012 Dr. Julian E. Girod, an attending Board-certified orthopedic surgeon, provided work restrictions of lifting limited to 10 pounds and no overhead reaching more than four times per hour.

On May 8, 2013 OWCP approved an employment plan, including training from May 14 to September 6, 2013, followed by 90 days of placement services. Appellant was advised that if placement services were not successful at the end of the 90-day period, OWCP could reduce compensation benefits to reflect the wage-earning capacity in a suitable position. Placement services began on September 9, 2013, after appellant successfully completed office skills training. Although appellant participated in a job search, the efforts did not result in job placement.

On June 12, 2014 Dr. Girod again provided work restrictions of lifting limited to 10 pounds and no overhead reaching more than four times per hour.

In April 2015 appellant's vocational rehabilitation counselor determined that appellant was capable of earnings wages in the constructed position of customer complaint clerk, a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and

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<sup>3</sup> Appellant received disability compensation on the daily rolls beginning August 10, 2004 and on the periodic rolls beginning April 17, 2005.

bearing the DOT # 241.367-014. The position involved investigating customer complaints about merchandise, service, billing, or credit rating. It might require keying information into a computer to obtain computerized records. The physical duties of the position, which was characterized as sedentary, included occasionally lifting and exerting force of up to 10 pounds. Sedentary work allows sitting most of the time and only requires brief periods of standing or walking. The rehabilitation counselor determined that state employment services showed the position of customer complaint clerk was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.

In a letter dated July 16, 2015, OWCP advised appellant that she was only partially disabled and that the position of customer complaint clerk was medically and vocationally consistent with her medical limitations and work experience. It found that appellant was capable of earning wages at the rate of \$360.00 per week as a customer complaint clerk and that the position was reasonably available within her commuting area. OWCP provided an attachment detailing the application of the *Shadrick* formula.<sup>4</sup> Appellant was provided 30 days to submit evidence and argument challenging the proposed action. No response was received within the time allotted.

In a decision dated August 24, 2015, OWCP reduced appellant's compensation effective August 24, 2016 based on her capacity to earn wages as a customer complaint clerk. It found that the evidence of record showed that appellant was vocationally and physically capable of working as a customer compliant clerk. OWCP applied the *Shadrick* formula to adjust her compensation. This resulted in 51 percent wage-earning capacity, or 49 percent loss of wage-earning capacity.

In a March 17, 2016 report, Dr. Girod provided work restrictions of lifting limited to 10 pounds and no overhead reaching more than four times per hour.

Appellant requested a hearing with an OWCP hearing representative. During the hearing held on April 14, 2016, she testified that she could not work as a customer complaint clerk because she could only type about 22 words per minute and was not capable of typing all day. Appellant asserted that she could not lift and handle heavy objects and noted that she was overweight, had diabetes, and took anxiety medication.

By CA-1032 letter dated June 13, 2016, OWCP informed appellant that federal regulations required her to make an affidavit relative to any earnings or employment during the previous year and that an EN1032 form was enclosed for that purpose. It regularly sent her such a letter requesting that she complete an EN1032 form with regard to her employment activity, if any, within the past 15 months.<sup>5</sup> OWCP notified appellant that she had to fully answer all questions on the form and return the statement within 30 days or her benefits would be

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<sup>4</sup> See *infra* note 15.

<sup>5</sup> The EN1032 form also requests information with respect to dependents, receipt of other federal benefits, third-party settlements, and fraud offenses.

suspended pursuant to 20 C.F.R. § 10.528. The letter was mailed to her address of record at the time.<sup>6</sup> No response was received within the allotted period.

In a decision dated June 22, 2016, OWCP's hearing representative affirmed OWCP's August 24, 2015 decision reducing appellant's compensation effective August 24, 2016 based on her capacity to earn wages as a customer complaint clerk.

By decision dated August 9, 2016, OWCP suspended appellant's compensation effective August 9, 2016 for failure to complete the EN1032 form as requested. It noted that, if she completed and returned an enclosed copy of the form, her compensation benefits would be restored retroactively to the date they were suspended.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>7</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

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 regard to the nature of the injury, degree of physical impairment, usual employment, age, qualifications for other employment, availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in the disabled condition.<sup>9</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>10</sup> 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.<sup>11</sup> 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 commuting area.<sup>12</sup>

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<sup>6</sup> Appellant had advised OWCP of her new address in April 2016.

<sup>7</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>8</sup> *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>9</sup> *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

<sup>10</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>11</sup> *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

<sup>12</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.<sup>13</sup> In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.<sup>14</sup>

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 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 or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>15</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on June 25, 2004 appellant sustained right shoulder and rotator cuff sprains, bilateral shoulder impingement syndrome, temporary aggravation of left shoulder osteoarthritis, and left shoulder tendinitis. She received disability compensation. OWCP received information from appellant's attending physician, Dr. Girod, who found that appellant had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of customer complaint clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. Appellant's vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on her opinion regarding reasonable availability and vocational suitability.<sup>16</sup>

The Board finds that review of the medical evidence of record reveals that appellant is physically capable of performing the position of customer complaint clerk. Appellant did not submit any evidence or argument showing that she could not perform the physical duties of the position. Between 2012 and 2016, Dr. Girod consistently provided work restrictions that allowed appellant to perform the physical duties of a customer complaint clerk. He provided work restrictions of lifting limited to 10 pounds and no overhead reaching more than four times per hour. At the hearing held on April 14, 2016, appellant argued that medical conditions other than her accepted work conditions prevented her from working as customer complaint clerk.

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<sup>13</sup> See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

<sup>14</sup> *N.J.*, 59 ECAB 397 (2008).

<sup>15</sup> See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>16</sup> *G.A.*, Docket No. 13-1351 (issued January 10, 2014).

However, Dr. Girod considered appellant's work-related and nonwork-related medical conditions in making his recommendations regarding work restrictions.<sup>17</sup>

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of customer complaint clerk represented appellant's wage-earning capacity.<sup>18</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of customer complaint clerk and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly reduced appellant's compensation effective August 24, 2015 based on her capacity to earn wages as a customer complaint clerk.

On appeal counsel argues that appellant is unable to work as customer complaint clerk because she can only type 22 words per minute, whereas as prior to her June 25, 2004 employment injury she was able to type 60 words per minute. The Board notes that there is no indication that the customer complaint clerk would require typing more than 22 words per minute.<sup>19</sup> Appellant's vocational rehabilitation counselor was aware of appellant's typing ability when she selected the position of customer complaint clerk and, as noted above, the rehabilitation counselor's expert status means that OWCP may rely on her opinion regarding vocational suitability.<sup>20</sup> Counsel also asserted that appellant could not perform the lifting and standing requirements of the position. However, the medical evidence of record, including the work restrictions recommended by Dr. Girod, shows that appellant is capable of performing the lifting and standing duties of a customer complaint clerk.<sup>21</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

FECA authorizes the Secretary of Labor to require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.<sup>22</sup>

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.<sup>23</sup> If an employee

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<sup>17</sup> See *supra* notes 13 and 14.

<sup>18</sup> See *Clayton Varner*, 37 ECAB 248, 256 (1985).

<sup>19</sup> The typing requirements of the position of customer complaint clerk are not extensive. The position may require keying information into a computer to obtain computerized records.

<sup>20</sup> See *supra* note 16.

<sup>21</sup> The sedentary work of a customer complaint clerk allows sitting most of the time and only requires occasional lifting of 10 pounds and brief periods of standing or walking.

<sup>22</sup> 5 U.S.C. § 8106(b).

<sup>23</sup> 20 C.F.R. § 10.528.

who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.<sup>24</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly suspended appellant's compensation effective August 9, 2016 for failure to complete an EN1032 form as requested.

On June 13, 2016 OWCP provided appellant with the EN1032 form and noted that federal regulations required her to complete the form and answer all questions concerning her employment or earnings. It properly notified appellant that, if she did not completely answer all questions and return the statement within 30 days, her benefits would be suspended. The record reflects that OWCP's letter was properly sent to her address of record. Under the mailbox rule, a document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee.<sup>25</sup>

Appellant failed to timely submit the EN1032 form within 30 days. She was receiving wage-loss compensation and she was required to complete the EN1032 form. The failure to file an EN1032 form within 30 days results in the suspension of compensation.<sup>26</sup> Thus, the Board finds that OWCP properly suspended appellant's compensation benefits effective August 9, 2016 pursuant to 20 C.F.R. § 10.528.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly reduced appellant's compensation effective August 24, 2015 based on her capacity to earn wages as a customer complaint clerk; and OWCP properly suspended appellant's compensation effective August 9, 2016 for failure to complete an EN1032 form as requested.

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<sup>24</sup> *Id.* See also *P.M.*, Docket No. 16-0382 (issued May 19, 2016).

<sup>25</sup> See *James A. Gray*, 54 ECAB 277 (2002).

<sup>26</sup> See *M.W.*, Docket No. 15-0507 (issued June 18, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 9 and June 22, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 13, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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