

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

A.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Salt Lake City, UT, Employer**

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**Docket No. 14-1402
Issued: May 5, 2015**

Appearances:

*J. Ray Barrios, Jr., Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2014 appellant, through counsel, filed a timely appeal from the December 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 appellant met his burden of proof to modify OWCP's January 20, 2012 wage-earning capacity determination.

FACTUAL HISTORY

On March 18, 1993 appellant, then a 32-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained a strained pectoral muscle due to performing repetitive job duties. He first became aware of his claimed condition on June 1, 1992 and first

¹ 5 U.S.C. §§ 8101-8193.

realized on September 18, 1991 that it was caused or aggravated by his work. OWCP accepted appellant's claim for bilateral shoulder, upper arm and thoracic strains, myalgia, myositis, bilateral calcifying shoulder tendinitis, bilateral shoulder impingement, and bilateral bicipital tenosynovitis. Appellant continued to work, but performed restricted duties. OWCP paid appropriate compensation benefits to include wage-loss compensation.

Under a separate case File No. xxxxxx652, OWCP accepted that appellant sustained work-related bilateral carpal tunnel syndrome and authorized carpal tunnel release surgery in both wrists. In connection with this injury, appellant received schedule awards for 33 percent permanent impairment of his left arm and 33 percent permanent impairment of his right arm. Under a separate case File No. xxxxxx775, OWCP also accepted that he sustained temporary reactions of depression and anxiety as a result of his employment.

Appellant stopped work in August 2008 because no work was available within his restrictions and he received wage-loss compensation beginning August 30, 2008 on the daily rolls. He later received wage-loss compensation in the periodic rolls. OWCP authorized right and left shoulder surgeries that were performed in 2009. On January 7, 2009 appellant underwent subacromial decompression, distal clavicle resection, arthroscopic debridement, and rotator cuff repair of the left shoulder. Dr. Charles L. Beck, Jr., an attending Board-certified orthopedic surgeon, released appellant to work with restrictions on March 19, 2009. On December 2, 2009 he underwent subacromial decompression, distal clavicle resection, biceps tenodesis, and debridement of the right shoulder. On May 25, 2010 Dr. Beck reported that appellant could work with restrictions, including no repetitive movements of the arms, intermittent pushing, pulling and lifting to the waist, maximum lifting of five pounds, and no reaching above the shoulder.

In a June 8, 2010 report, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and an OWCP referral physician, detailed appellant's history and reported findings on examination. He indicated that appellant could work with restrictions, including engaging in no more than four hours of repetitive movements and pushing, pulling, and lifting no more than 10 pounds. OWCP also arranged for appellant to undergo a psychiatric evaluation on June 29, 2010 with Dr. Michael A. Kalm, a Board-certified psychiatrist. In his June 29, 2010 report, Dr. Kalm discussed appellant's history and reported the findings of his examination. He stated that appellant could work on a full-time basis with restrictions, including no repetitive work, no lifting over 10 pounds, and no contact with certain postal employees.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Swartz and appellant's attending physicians regarding his physical ability to work and referred him to Dr. Robert Hansen, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter. In a September 23, 2010 report, Dr. Hansen discussed appellant's history, including the medical reports of record, and detailed the findings of Dr. Hansen's September 16, 2010 examination of appellant. He agreed that appellant's shoulder conditions resulted from the work injury and also found that reflex sympathetic dystrophy had developed as a result. In a September 16, 2010 work restrictions form, Dr. Hansen posited that appellant could work with restrictions, including sitting for eight hours, walking and standing for two hours each, no reaching above the shoulder, reaching for one hour, twisting for one hour, pushing and pulling up to five pounds for five hours, and lifting up to five

pounds for two hours. He stated on the form that appellant's depression and anxiety should be considered in identifying a position.

In April 2011, appellant began to participate in an OWCP-sponsored vocational rehabilitation program. Mark Hedrick, OWCP's vocational rehabilitation specialist and vocational rehabilitation counselor who worked with appellant, determined in June 14, 2011 reports that appellant was vocationally capable of working in the constructed position of customer service representative or receptionist. He found that state labor market surveys showed that the positions were reasonably available in his commuting area. The customer service representative position, as described in the Department of Labor's *Dictionary of Occupational Titles* (DOT) under title number 239.362-014, involves interviewing applicants and recording interview information into a computer for water, gas, electric, telephone, or cable television service. The position requires talking with customers by telephone or in person, receiving orders for installation, discontinuance, or other changes in service, and filling out contract forms and other documents. The position is classified as sedentary in nature and requires exerting up to 10 pounds of force occasionally to lift, push, or pull. It also requires occasionally engaging in reaching and handling. Occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday.

On the June 14, 2011 report detailing the DOT description of the customer service representative position, Mr. Hedrick wrote:

"It is this vocational rehabilitation counselor's opinion based on past work experiences that a customer service representative types approximately 15 minutes during a seven-hour shift. In addition, a customer service representative clicks a computer mouse approximately 14 minutes per seven-hour shift. The majority of work time for a customer service representative is spent assisting customers via telephone. It is this vocational rehabilitation counselor's opinion based on past work experience that a customer service representative does not have to lift over five pounds. It is this vocational rehabilitation counselor's opinion that a customer service representative is not required to type more than 10 seconds at one time."

In a December 14, 2011 letter, OWCP advised appellant that it proposed to reduce his wage-loss compensation based on his ability to earn wages in the constructed position of customer service representative. It noted that the September 2010 opinion of Dr. Hansen showed that appellant could physically perform the position and that the opinion of Mr. Hedrick showed that he was vocationally able to perform the position. OWCP allowed 30 days for appellant to submit rebuttal evidence.

Appellant submitted a statement in which he argued that OWCP had not adequately considered his bilateral carpal tunnel syndrome in determining that he could work as a customer service representative. He asserted that he could not perform the customer service representative position because he could not use a keyboard for more than 10 minutes per hour. Appellant submitted a January 5, 2011 report in which Dr. John F. Foley, an attending Board-certified neurologist, stated that appellant could work on a keyboard for a maximum of two to three hours per day for maximum durations of 10 minutes at a time.

By decision dated January 20, 2012, OWCP reduced appellant's wage-loss compensation effective January 19, 2012 based on his ability to earn wages on a full-time basis in the constructed position of customer service representative.² It made reference to the comment Mr. Hedrick made in his June 14, 2011 report that his personal work experiences showed that a customer service representative did not have to lift more than five pounds, only had to type for approximately 15 minutes during a 7-hour shift, and only had to click a computer mouse for approximately 14 minutes per 7-hour shift.

Appellant submitted a May 23, 2012 report in which Dr. Foley stated that appellant could not perform fine manipulative procedures using his hands due to his medical condition. Dr. Foley noted that appellant could not type, file, lift his hands, or do any repetitive motion work.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the June 13, 2012 hearing, counsel argued that the customer service representative position was not appropriate as it required more typing, filing, lifting, and other manual dexterity than the vocational rehabilitation counselor had indicated and appellant was not capable of performing the duties of the position. Appellant testified that he cooperated with the rehabilitation process but could not find work. He stated that the reflex sympathetic dystrophy in his hands had worsened in the past year and noted that Dr. Foley found that he could not do repetitive work. Kourtney Layton, a vocational rehabilitation specialist, testified that she had been engaged in vocational rehabilitation for six years and that she had a master's degree and license in vocational rehabilitation. She argued that appellant did not have the transferable skills to become a customer service representative based on the work he performed in the 10 years before his injury. Ms. Layton indicated that the customer service position typically required more typing than indicated in the DOT. She asserted that limitations precluded appellant from working as a customer service representative or receptionist.

Additional evidence was submitted to the record after the hearing, including a May 30, 2012 report in which Dr. Lara Hardman, an attending Board-certified pulmonologist, reported that she treated appellant for pneumonia on July 2, 2011. In a May 29, 2012 report, Dr. Ronald B. France, an attending clinical psychologist, noted that appellant had experienced the effects of obsessive-compulsive disorder, compulsive gambling, and nonrestorative sleep (for which a day shift was recommended). He asserted that appellant was not employable during the past two years. On August 4, 2012 Dr. France noted that appellant's reflex sympathetic dystrophy had spread to his feet. In a June 5, 2012 report, Dr. Beck repeated his earlier work restrictions, including no repetitive activities with the hands. Dr. Fred Reimherr, an attending Board-certified psychiatrist, stated on August 1, 2012 that appellant related being depressed due to having his compensation reduced. He indicated that the history suggested that appellant was unable to return to work at the employing establishment. In a report dated August 6, 2012, Dr. Foley indicated that appellant had reflex sympathetic dystrophy in his lower extremities.

² The record also contains a January 19, 2012 document which appears to be a draft decision.

In an August 27, 2012 decision, the hearing representative affirmed the January 20, 2012 wage-earning capacity determination. She found that the new evidence submitted by appellant did not show that OWCP's prior wage-earning determination was improper.

Counsel argued that OWCP had incorrectly relied upon and given inappropriate weight to stale medical reports from various physicians, including Dr. Hansen, and that OWCP ignored newer reports regarding appellant's medical condition. He indicated that appellant was requesting that OWCP's wage-capacity determination be modified. A January 6, 2013 report was submitted in which Dr. Foley stated that appellant was not able to perform any regular gainful positions due to "the severe weight restrictions (five pounds only to waist level) and no repetitive movements of his arms, wrists, or upper extremities -- this includes no keyboarding." On January 28, 2013 Dr. Foley indicated that appellant suffered with complex regional pain syndrome (another name for reflex sympathetic dystrophy) which now affected the lower extremities as well as the upper extremities.

In a March 21, 2013 decision, OWCP denied modification of its prior wage-earning capacity determination.

In a July 22, 2013 decision, OWCP granted appellant a schedule for an additional 16 percent permanent impairment of each upper extremity. The award ran for 99.84 weeks from June 30, 2013 to May 29, 2015.

In a September 9, 2013 letter, counsel requested reconsideration of OWCP's March 21, 2013 decision and asserted that OWCP erred in denying modification of its wage-earning capacity determination. He argued that the finding that appellant could work as a customer service representative was based on inadequate medical evidence and that the original wage-earning capacity determination was in error. Counsel again argued that appellant's injury-related condition had worsened since the time of that determination.

OWCP referred the medical record to Dr. Peter S. Quintero, a Board-certified neurologist, and asked him to indicate whether appellant had additional work-related conditions not already accepted. In a September 23, 2013 report of a review of the medical records, Dr. Quintero found that appellant had work-related reflex sympathetic dystrophy (or complex regional pain syndrome) of the bilateral upper and lower extremities.

In an October 17, 2013 decision, OWCP indicated that it was expanding appellant's accepted conditions to include reflex sympathetic dystrophy (or complex regional pain syndrome) of the bilateral upper and lower extremities.

In a November 5, 2013 report, Dr. Jeffrey Kovnick, a Board-certified psychiatrist and an OWCP referral physician, discussed appellant's medical history and reported the findings of his examination on that date. He indicated that appellant's work-related depression and anxiety prevented him from working as a customer service representative.

In a December 11, 2013 decision, OWCP affirmed its March 21, 2013 decision as modified to reflect the effects of the acceptance of new work-related conditions. It noted that the evidence was sufficient to vacate the March 21, 2013 decision in part because medical evidence supported a material worsening effective September 23, 2013, the date of Dr. Quintero's review

of the medical record. However, the evidence was not sufficient to overturn the entire decision, because the original January 20, 2012 wage-earning capacity decision was correct at the time it was made. Reduced disability compensation from January 20, 2012 to September 23, 2013 was appropriate under the January 20, 2012 wage-earning capacity decision. OWCP found that the worsening of the work-related conditions was not evident in the file until Dr. Quintero's September 23, 2013 report and Dr. Kovnick's November 5, 2013 report. It found:

“The wage earning capacity determination is hereby modified and vacated effective September 23, 2013 and total disability compensation benefit entitlement is restored. Therefore, when the schedule award benefits end on May 29, 2015,³ you will be eligible for total disability compensation (applicable to File Nos. xxxxxx825 and xxxxxx775). The reduced compensation benefits paid from January 20, 2012 through June 29, 2013 are correct and there is no additional benefit entitlement for this period.”

LEGAL PRECEDENT

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.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 regard to the nature of his or her injury, his 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 disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ 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.⁸ The

³ This text refers to OWCP's July 22, 2013 schedule award which ran from June 30, 2013 to May 29, 2015.

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986).

⁸ *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).

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.⁹

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.¹⁰ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹¹

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 Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) 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.¹²

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹³

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁵ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶

⁹ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹⁰ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹¹ *N.J.*, 59 ECAB 397 (2008).

¹² See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹³ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

Between 1993 and 2001, OWCP accepted appellant's claim for bilateral shoulder, upper arm and thoracic strains, myalgia, myositis, bilateral calcifying shoulder tendinitis, bilateral shoulder impingement, bilateral bicipital tenosynovitis, bilateral carpal tunnel syndrome, and temporary reactions of depression and anxiety due to his employment.

In a January 20, 2012 decision, OWCP reduced appellant's wage-loss compensation effective January 19, 2012 based on his ability to earn wages in the constructed position of customer service representative. In December 2013, it modified its January 20, 2012 wage-earning capacity decision effective September 23, 2013 based on new medical evidence.¹⁷

The Board finds that appellant has met his burden of proof to modify OWCP's January 20, 2012 wage-earning capacity determination prior to OWCP's own modification of this determination in 2013 because the evidence shows that the original January 20, 2012 determination was erroneous.¹⁸

OWCP based its determination that appellant was physically capable of earning wages in the constructed position of customer service representative on the opinion of Dr. Hansen, a Board-certified orthopedic surgeon, who served as impartial medical specialist regarding appellant's ability to work.¹⁹ In a work restrictions form completed on September 16, 2010, Dr. Hansen posited that appellant could work with restrictions, including sitting for eight hours, walking and standing for two hours each, no reaching above the shoulder, reaching for one hour, twisting for one hour, pushing and pulling up to five pounds for five hours, and lifting up to five pounds for two hours. He stated on the form that appellant's depression and anxiety should be considered in identifying a position. OWCP identified these restrictions as the best representation of appellant's ability to work.

The Board finds that the restrictions recommended by Dr. Hansen would not have allowed appellant to physically perform the customer service representative position at the time of the January 20, 2012 wage-earning capacity determination which reduced his wage-loss compensation. The customer service representative position, as described in the Department of Labor's DOT under title number 239.362-014, is classified as sedentary in nature and requires exerting up to 10 pounds of force occasionally to lift, push, or pull. It also requires occasionally engaging in reaching and handling. Occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday. As Dr. Hansen indicated that appellant could only lift, push, or pull up to five pounds, his work restrictions would not allow appellant to

¹⁷ In an October 17, 2013 decision, OWCP indicated that it was expanding appellant's accepted conditions to include reflex sympathetic dystrophy (or complex regional pain syndrome) of the bilateral upper and lower extremities based on a September 23, 2013 report of a Dr. Quintero, a Board-certified neurologist who reviewed the medical records at OWCP's request. In a November 5, 2013 report, Dr. Kovnick, a Board-certified psychiatrist, who served as an OWCP referral physician, indicated that appellant's work-related depression and anxiety prevented him from working as a customer service representative.

¹⁸ See *supra* note 13.

¹⁹ See *supra* notes 14 through 16.

work as a customer service representative. Moreover, given the restriction that appellant could only lift up to five pounds for two hours per day, the position's requirement that appellant lift for 1/3 of an eight-hour workday would be beyond appellant's physical abilities.²⁰

OWCP noted that Mr. Hedrick, appellant's vocational rehabilitation counselor and specialist, provided a notation in a June 2011 report that, from his personal work experiences, he believed that the position of customer service representative only required lifting up to five pounds. It accepted that appellant sustained temporary reactions of depression and anxiety due to his employment. The Board also finds that OWCP did not adequately explain how the medical evidence showed that these accepted conditions prevented appellant from working as a customer service representative at the time the January 20, 2012 wage-earning capacity determination was made. The Board notes that OWCP procedures provide that in cases where the 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 more jobs which are medically and vocationally suitable for the claimant. The report will include the corresponding job numbers from the Department of Labor's DOT or (OWCP-specified equivalent) and pay ranges in the relevant geographical area. The vocational rehabilitation counselor will also include the DOT's description (or OWCP-specified equivalent) of the duties and physical requirements of each job.²¹ For these reasons, appellant met his burden of proof to modify OWCP's January 20, 2012 wage-earning capacity determination by showing that the original determination was, in fact, erroneous.

CONCLUSION

The Board finds that appellant met his burden of proof to modify OWCP's January 20, 2012 wage-earning capacity determination.

²⁰ The calculations reducing appellant's compensation were based on appellant's ability to work on a full-time basis as a customer service representative.

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4 (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2013 decision of the Office of Workers' Compensation Programs is reversed with respect to the finding that appellant did not meet his burden of proof to modify its January 20, 2012 wage-earning capacity determination.

Issued: May 5, 2015
Washington, DC

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

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

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