

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

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<b>P.J., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 15-295</b>
	)	<b>Issued: May 20, 2015</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Carol Stream, IL, Employer</b>	)	

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<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On November 21, 2014 appellant filed a timely appeal from the September 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly adjusted appellant's compensation effective November 26, 2013 based on her ability to earn wages in the constructed position of receptionist; and (2) whether it properly modified its November 26, 2013 wage-earning capacity determination effective February 24, 2014 based on the finding that appellant's actual wages as a modified city carrier fairly and reasonably represented her wage-earning capacity effective that date.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

OWCP initially accepted that on March 11, 1998 appellant, then a 35-year-old letter carrier, sustained a low back contusion, lumbar strain, and coccyx strain when she slipped on ice and fell at work. Appellant's claim was later expanded to include herniated disc at L5-S1 as a work-related medical condition and on September 23, 1998 she underwent OWCP-authorized hemilaminotomy surgery at L5-S1 with removal of herniated disc.

Beginning June 25, 2005, appellant received disability compensation on the daily rolls. On January 27, 2006 she underwent OWCP-authorized left L5-S1 micro-lumbar discectomy. Appellant returned to limited-duty work in February 2006 but stopped work again in November 2011.

In a May 31, 2010 report, Dr. Jon Beran, an attending Board-certified family practitioner, indicated that appellant could perform limited-duty work for eight hours per day with restrictions such as lifting no more than five pounds.

In order to obtain clarification regarding appellant's work-related residuals and ability to work, OWCP referred appellant Dr. Theodore J. Suchy, a Board-certified orthopedic surgeon, for an examination and opinion on the matter. In a September 13, 2010 report, Dr. Suchy opined that appellant could return to work on a full-time basis with restrictions including lifting no more than 15 pounds and walking no more than an hour at a time. In reports dated in 2011, Dr. Beran continued to recommend greater work restrictions than those provided by Dr. Suchy.

Due to the conflict in the medical opinion evidence between Drs. Beran and Suchy regarding her ability to work, OWCP referred appellant to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a report dated June 6, 2012, Dr. Wehner stated that, on examination, appellant's gait pattern was normal, she had mild pain with axial compression/axial rotation and light palpitation in her low back area, and she was able to bend to her mid-tibia area with her fingertips touching. Straight leg raising was negative, motor strength in her lower extremities was 5/5, and her neurological examination was normal. Dr. Wehner indicated that appellant continued to have left leg pain but she was capable of performing limited-duty work on a full-time basis. She could lift 10 to 15 pounds and could walk four to six hours per day (but not more than one hour at a time).

Appellant was referred to an OWCP-sponsored vocational rehabilitation program. In March 2013 her vocational rehabilitation counselor determined that she was capable of working as a receptionist or customer service representative and that current state labor market surveys showed that these positions were reasonably available in her commuting area. The receptionist position Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-038, was characterized as sedentary in nature<sup>2</sup> and involved such duties as receiving callers at

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<sup>2</sup> Sedentary work, according to the DOT, involves occasionally exerting up to 10 pounds of force and sitting most of the time, but may involve walking or standing for brief periods of time.

establishments, determining the nature of their business, operating telephones, and recording the information of callers.

Appellant was notified that she would receive 90 days of job placement assistance and, at the end of that period, compensation would be reduced based on her ability to earn wages, regardless of whether she became reemployed. She was not placed in a job at the end of 90 days.

In an October 3, 2013 letter, OWCP advised appellant that it proposed to reduce her compensation based on her capacity to earn wages in the constructed position of receptionist. It indicated that the duties of the receptionist position, based on the DOT, were within her work capacity, based on the work restrictions provided by Dr. Wehner, and that the position was reasonably available within her commuting area. Appellant's loss of wage-earning capacity was calculated based on her ability to earn wages of \$393.20 per week in the receptionist position. According to the *Shadrick* formula,<sup>3</sup> this resulted in a loss of wage-earning capacity of \$437.83 per week. Appellant was afforded 30 days to provide evidence or argument against the proposed decision to reduce compensation.

Additional medical evidence was received from Dr. Vikram Prabhu, an attending Board-certified neurosurgeon. In his report of September 11, 2013, he advised that he was recommending surgery, including L5-S1 decompression and fusion. Dr. Prabhu did not provide any opinion on appellant's ability to work.

In a November 26, 2013 decision, OWCP adjusted appellant's compensation effective November 26, 2013 based on her ability to earn wages in the constructed position of receptionist. It found that the evidence of record showed that she was physically and vocationally capable of earning wages in the constructed position of receptionist and that the position was reasonably available in her commuting area.

On February 24, 2014 appellant began working as a modified city carrier for the employing establishment with wages of \$1,097.56 per week.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the hearing held on June 17, 2014, counsel argued that OWCP's reduction of appellant's compensation based on her ability to work as a receptionist was defective on its face because the DOT was outdated and had been replaced by other resources. He claimed that the DOT provides inaccurate job descriptions because it had not been updated to match the actual jobs presently available.

In a September 9, 2014 decision, OWCP hearing representative found that OWCP's November 26, 2013 wage-earning capacity determination was proper at the time it was made. He found that the medical opinion of Dr. Wehner showed that appellant could earn wages as a receptionist. The opinion of appellant's vocational rehabilitation counselor confirmed that she

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<sup>3</sup> See *infra* note 11.

was vocationally capable of performing the position and that it was reasonably available within her commuting area. He indicated that the DOT was a valid source for job descriptions and stated:

“The decision to reduce the claimant’s compensation based on her ability to earn wages as a receptionist was correct, based on the evidence of record at the time it was issued.

“It is noted, however, that the wage-earning capacity decision of November 2[6], 2013 must be modified effective June 11, 2014,<sup>4</sup> when [OWCP] made a formal finding that the claimant’s actual earnings, working as a [m]odified [c]ity [c]arrier since February 24, 2014, fairly and reasonably represented the claimant’s wage-earning capacity. [OWCP] further reduced the claimant’s compensation on this basis.

“Modification of a standing wage-earning capacity 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 erroneous. In this case, the claimant was vocationally rehabilitated.

“For the reasons set forth above, the decision dated November [26], 2013, is hereby affirmed, but modified to reflect that the position of receptionist no longer represented the claimant’s wage-earning capacity effective June 11, 2014, when [OWCP] set that decision aside on the basis the claimant had been rehabilitated, and the claimant’s held job as a [m]odified [c]ity [c]arrier fairly and reasonably represented her wage-earning capacity.”

### **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>5</sup> OWCP’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</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 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, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age,

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<sup>4</sup> The Board notes that appellant’s disability compensation was reduced to zero effective February 24, 2014 and OWCP hearing representative effectively modified OWCP’s November 26, 2013 wage-earning capacity determination to reflect this circumstance.

<sup>5</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>6</sup> *Del K. Rykert*, 40 ECAB 284 (1988).

her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.<sup>7</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>8</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>9</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 her commuting area.<sup>10</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 Office wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to her 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>11</sup>

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."<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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

OWCP accepted that on March 11, 1998 appellant sustained a low back contusion, lumbar strain, coccyx strain, and herniated disc at L5-S1 when she slipped on ice and fell at

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<sup>7</sup> *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

<sup>8</sup> *Albert L. Poe*, 37 ECAB 684 (1986).

<sup>9</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 (1985).

<sup>10</sup> See *Leo A. Chartier*, 32 ECAB 652 (1981).

<sup>11</sup> See *Dennis D. Owen*, 44 ECAB 475 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> *William C. Bush*, 40 ECAB 1064 (1989).

<sup>14</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

work. It authorized low back surgeries that were performed on June 25, 2005 and January 27, 2006. Appellant returned to limited-duty work in February 2006 but stopped work again in November 2011.

The record contains work restrictions provided by Dr. Wehner, a Board-certified orthopedic surgeon who served as an impartial medical specialist on this matter. OWCP properly determined that there was a conflict in the medical opinion evidence and referred appellant to Dr. Wehner for an impartial medical examination.<sup>15</sup> In a well-rationalized report dated June 6, 2012, Dr. Wehner found that appellant was capable of performing limited-duty work on a full-time basis. Appellant could lift up to 15 pounds and could walk for up to six hours per day (but not more than one hour at a time). Dr. Wehner's opinion represents the weight of the medical evidence regarding appellant's ability to work.<sup>16</sup>

The Board notes that the selected position of receptionist is within appellant's physical work tolerances as detailed by Dr. Wehner. The receptionist position was defined as sedentary in nature and only required occasional lifting of up to 10 pounds and walking and standing for brief periods. Appellant's vocational rehabilitation counselor determined that she was able to perform the position of receptionist and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her 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>17</sup>

Counsel alleged that the description of the receptionist position from the DOT did not provide a realistic description of actual jobs in the workplace and therefore it was improper to rate appellant's wage-earning capacity based on such a constructed position.

The Board notes that OWCP procedure provides 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 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)

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<sup>15</sup> See *supra* notes 12 and 13. In a September 13, 2010 report, Dr. Suchy, a Board-certified orthopedic surgeon serving as an OWCP referral physician, opined that appellant could return to work on a full-time basis with restrictions including lifting no more than 15 pounds and walking no more than an hour at a time. In contrast, Dr. Beran, an attending Board-certified family practitioner, recommend greater work restrictions than those provided by Dr. Suchy.

<sup>16</sup> See *supra* note 14. In a September 11, 2013 report, Dr. Prabhu, an attending Board-certified neurosurgeon, advised that he was recommending surgery, including L5-S1 decompression and fusion. However, he did not provide any opinion on appellant's ability to work.

<sup>17</sup> G.A., Docket No. 13-1351 (issued January 10, 2014).

of the duties and physical requirements of each job.<sup>18</sup> Counsel has not provided compelling argument that the description of the receptionist position in the DOT was inaccurate.

Appellant did not submit evidence or argument showing that she could not vocationally or physically perform the receptionist position. OWCP considered the proper factors, such as availability of suitable employment and her physical limitations, usual employment, age and employment qualifications, in determining that the position of receptionist represented appellant's wage-earning capacity effective November 26, 2013.<sup>19</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of receptionist 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 November 26, 2013 based on her capacity to earn wages as a receptionist.

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

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.<sup>20</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>21</sup>

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>22</sup> A determination regarding whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.<sup>23</sup>

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<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 – Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4 (June 2013); *see also T.G.*, Docket No. 14-921 (issued September 17, 2014) (the Board noted that the claimant did not submit evidence supporting that the position at issue was not reasonably available and that OWCP procedures clearly state that the vocational counselor shall include in his or her report the DOT description of duties and physical requirements).

<sup>19</sup> *See Clayton Varner*, 37 ECAB 248 (1985).

<sup>20</sup> *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004). OWCP procedure provides that it may be appropriate to modify the wage-earning LWEC rating on the grounds that the claimant has been vocationally rehabilitated if the claimant is employed in a new job (a job different from the job for which he or she was rated) obtained with additional training which pays at least 25 percent more than the current pay of the job for which the claimant was rated. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5c (June 2013).

<sup>21</sup> *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>22</sup> *E.W.*, Docket No. 14-584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

<sup>23</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.<sup>24</sup>

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

The Board finds that OWCP properly modified its November 26, 2013 wage-earning capacity determination effective February 24, 2014 based on the finding that appellant's actual wages as a modified city carrier fairly and reasonably represented her wage-earning capacity effective that date. OWCP provided justification for this modification by finding that appellant had been vocationally rehabilitated when she started earning actual wages as a modified city carrier beginning February 24, 2014.

The record reveals that appellant had received actual earnings as a modified city carrier for more than 60 days in that she had been working in the position since February 24, 2014 when OWCP issued its June 11, 2014 decision.<sup>25</sup> OWCP compared appellant's actual earnings as a modified city carrier with the wages she was able to earn in her date-of-injury job. Appellant's actual earnings met or exceeded those she earned at the time of her injury and OWCP properly reduced her wage-loss compensation to zero.<sup>26</sup> OWCP also properly found that appellant's actual wages as a modified city carrier fairly and reasonably represented her wage-earning capacity. The record does not establish that the modified city carrier position constitutes part-time, sporadic, seasonal, or temporary work. Moreover, the record does not reveal that the position is a make-shift position designed for appellant's particular needs.<sup>27</sup>

### **CONCLUSION**

The Board finds that OWCP properly adjusted appellant's compensation effective November 26, 2013 based on her ability to earn wages in the constructed position of receptionist. The Board further finds that OWCP properly modified its November 26, 2013 wage-earning capacity determination effective February 24, 2014 based on the finding that her actual wages as a modified city carrier fairly and reasonably represented her wage-earning capacity effective that date.

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<sup>24</sup> See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *supra* at Chapter 2.815c (June 2013).

<sup>25</sup> See *supra* note 23.

<sup>26</sup> The Board notes that appellant participated in a vocational rehabilitation program and her earnings in the modified city carrier position (\$1,097.56) were more than 25 percent greater than those of her constructed receptionist position (\$393.20) in which she was previously rated. See *supra* note 20.

<sup>27</sup> See *supra* note 24.



**ORDER**

**IT IS HEREBY ORDERED THAT** the September 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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