

unloading several nesting cases, the dolly he was using tipped over and as he attempted to catch the cases he hurt his back. Appellant stopped work on July 8, 1983. He was released to return to work with no restrictions on July 29, 1983 by his attending Board-certified orthopedic surgeon, Dr. Perry L. Savage.

On November 29, 1983 appellant filed another traumatic injury claim alleging on that date that he hurt his lower back again. He stated that he sustained a recurrence of the July 8, 1983 injury while performing maintenance on aircraft equipment. Appellant noted that the maintenance required him to bend and stoop, which caused the recurrence. He stopped work on November 29, 1983 and returned to work on December 6, 1983.

The Office accepted appellant's claims for a herniated disc at L5-S1, a lumbar strain, lumbar stenosis, lumbar spondylosis and right ankle sprain. Thereafter, he was totally disabled and received appropriate compensation benefits.¹

In an October 20, 1997 letter, the Office advised Dr. Savage that it was conducting a periodic review of appellant's compensation case and requested that he submit a current report regarding his medical condition. In a January 26, 1998 note, Dr. Savage stated that appellant could perform light-duty work with no lifting over 10 pounds.

By letter dated October 2, 1999, the Office advised appellant that he was being referred to vocational rehabilitation services based on Dr. Savage's opinion. In a letter of the same date, the Office informed the employing establishment about Dr. Savage's opinion that appellant was capable of resuming gainful employment within certain restrictions. The Office requested that the employing establishment advise whether permanent modified employment within the restrictions in the enclosed report was available for him. The Office also requested that the employing establishment provide a copy of a written job offer including, among other things, a description of the duties to be performed and the specific physical requirements of the position.

The vocational rehabilitation counselor submitted a March 5, 1999 report identifying the position of biomedical equipment technician as being within appellant's limitations and vocational skills. He also identified a private college program offering a degree in this field, but later located a public college that offered a comparable program based on the Office's request to do so. By letter dated April 14, 1999, the Office approved the proposed vocational rehabilitation plan and advised appellant that he was expected to fully cooperate.

On May 3, 2000 Dr. Savage reviewed the description of the position of biomedical equipment technician and approved of the position. The position as it appeared in the Department of Labor's *Dictionary of Occupational Titles* (DOT) was classified as light work with lifting up to 20 pounds occasionally and up to 10 pounds frequently or a negligible amount constantly. Additional physical demands of this position included occasional stooping and crouching and frequent reaching, handling, fingering, near acuity, accommodation and color vision. The vocational qualifications required one to two years of preparation for the position.

¹ The record reveals that on February 13, 1996 the Office of Personnel Management approved appellant's application for disability retirement due to his inability to perform the duties of his power support systems mechanic position.

The rehabilitation counselor stated that appellant had a high school diploma, post-high school education in electronics and he was enrolled in a training program. Based on a labor market survey, he reported that the biomedical equipment technician position was available in the Birmingham area given sufficient training and was in good demand.

On January 22, 2002 the rehabilitation counselor reported that appellant had completed the two-year program in biomedical equipment technology and that he had begun to apply for jobs in this field within his community. In later reports, the rehabilitation counselor noted that he had applied for several jobs and he had been interviewed for these jobs, but he had not received any job offers. The rehabilitation counselor stated that appellant's prospective employment was a specialized field with limited availability at that time. On May 6, 2002 the rehabilitation counselor reported that he had received one rejection from a potential employer due to lack of experience. On August 7, 2002 the rehabilitation counselor stated that appellant had received a job offer, but it was withdrawn by the employer due to the lifting requirements of the position.

In a January 10, 2003 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was no longer totally disabled, but partially disabled. The Office further advised him that he had the capacity to earn the wages of a biomedical equipment technician. The Office informed appellant to submit additional evidence or argument within 30 days if he disagreed with the proposed action.

In a February 3, 2003 response letter, appellant stated that he was not qualified for the selected position of biomedical equipment technician due to his lifting restrictions. He noted that, according to Dr. Savage, he was allowed to lift 10 pounds and occasionally 20 pounds while biomedical equipment technician positions that were available in his commuting area required him to lift up to 25 pounds frequently and up to 50 pounds occasionally. Appellant submitted four job descriptions, three from major hospitals in his area and one from the United States Air Force in support of his contention. He stated that he received a firm job offer from G & E Medical Services, but this offer was later rescinded because he was not able to meet the lifting requirements. Appellant listed the names and telephone numbers of four directors who controlled 12 hospitals in his area as references.

By memorandum dated February 24, 2003, the Office advised the rehabilitation specialist that, in response to its notice of proposed reduction, appellant had submitted position descriptions from four local employers which required frequent lifting up to 25 pounds and occasional lifting up to 50 pounds or more which exceeded his weight limitations. The Office requested that the rehabilitation specialist confirm that the description provided in the DOT for the position of biomedical equipment technician was accurate with regard to the physical requirements of the position and that, despite the conflicting position descriptions provided by appellant, the selected position as described in the DOT was reasonably available within his commuting area.

On February 26, 2003 the rehabilitation specialist responded that after appellant completed his training on January 23, 2002 the rehabilitation counselor revised the labor market survey and identified the same job, biomedical equipment technician, as being reasonably available and compatible with the accepted weight limitations. The rehabilitation specialist

stated that the position was identified as light work according to the DOT. She further stated that the position descriptions from the four employers submitted by appellant did not alter the strength requirements of light work documented in the DOT. The rehabilitation specialist noted that the rehabilitation counselor had obtained approval from appellant's treating physician regarding these employment goals prior to the start of training and updated Forms OWCP-66 documented the current availability of these jobs. She concluded that both she and the rehabilitation counselor believed the positions cited above remained compatible with the accepted weight limitations and represented the wage-earning potential of appellant.

By decision dated March 7, 2003, the Office finalized the proposed reduction of compensation. In an April 2, 2003 letter, appellant requested an oral hearing before an Office hearing representative.

In an October 21, 2003 decision, the hearing representative affirmed the Office's March 7, 2003 decision. The hearing representative, however, remanded the case for further development of the issue of whether the information contained in the DOT regarding the physical requirements of the position of biomedical equipment technician was outdated and that the job required greater lifting ability. He noted that appellant had submitted evidence which indicated that the position of biomedical equipment technician had a lifting requirement of 50 pounds. The rehabilitation counselor further noted that the rehabilitation specialist considered this evidence and remained of the opinion that the selected position was light in nature based on the DOT and within appellant's functional capacity. The hearing representative stated that nonetheless he was concerned that the information contained in the DOT may be outdated and that the job required a greater ability to lift than what was listed in the DOT. For this reason, the hearing representative remanded the case to the Office for the purpose of conducting a survey of the employers such as, hospitals in appellant's area who hire biomedical equipment technicians to determine their lifting requirement for this position.

LEGAL PRECEDENT

Once the Office has made a determination that an employee 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.²

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injuries and the degree of physical impairment, his usual employment, the employee's age and vocational qualifications and the availability of suitable employment.³

² *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

³ *Samuel J. Chavez*, 44 ECAB 431 (1993).

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. 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.⁴

Further, the Office is not obligated to actually secure a job for an appellant. The Board has held that a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. The Office must only provide evidence that the selected position is performed in sufficient numbers in the geographical area to be reasonably available.⁵

ANALYSIS

The evidence of record establishes that appellant has the appropriate knowledge, training and background to perform the selected position of biomedical equipment technician as he had a high school diploma, post-high school education in electronics and successfully completed a two-year program for biomedical equipment technology at a local public college. The issue is whether he is physically capable of performing the biomedical equipment technician position.

The DOT description of the position of biomedical equipment technician required light-level work such as, lifting up to 20 pounds occasionally and up to 10 pounds frequently or a negligible amount constantly. Additional physical demands of this position included occasional stooping and crouching and frequent reaching, handling, fingering, near acuity, accommodation and color vision. Although Dr. Savage found that appellant could perform the physical requirements of the selected position, appellant has contended before the Office and on appeal that employers in his commuting area required a biomedical equipment technician to lift 0 to 25 pounds frequently and 50 pounds occasionally, while the DOT job description of this position required an employee to lift up to 20 pounds occasionally and up to 10 pounds frequently. Appellant stated that he was unable to secure a job despite interviews and a job offer that was subsequently withdrawn due to his inability to meet the lifting requirements. He provided the names and telephone numbers of four directors who controlled 12 area hospitals and submitted descriptions of the biomedical equipment technician from three hospitals and the United States Air Force. Further, the hearing representative, in his October 21, 2003 decision, expressed concern about whether the DOT description of the biomedical equipment technician position was up-to-date based on the actual job descriptions of this position that were submitted by appellant.

As a discrepancy exists between the lifting requirements of the position of biomedical equipment technician as available in appellant's commuting area and the physical limitations of this position as set forth in the DOT, the Office has not demonstrated that the position of

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

⁵ See *Alfred R. Hafer*, 46 ECAB 553 (1995).

biomedical equipment technician represented appellant's wage-earning capacity. Thus, the Office hearing representative improperly affirmed the Office's reduction of his compensation based on its determination that the position of biomedical equipment technician represented his wage-earning capacity.

CONCLUSION

The Board, therefore, finds that the Office hearing representative improperly affirmed the Office's reduction of appellant's compensation based on its determination that the selected position of biomedical equipment technician represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the October 21 and March 7, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 27, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member