

underwent on June 5, 2001. Appellant stopped work on June 14, 2000 and did not return. He received appropriate benefits and was placed on the periodic rolls.

In a September 7, 2001 attending physician's form report, Dr. David S. Zelouf, a Board-certified orthopedic surgeon specializing in hand surgery, diagnosed persistent triggering following the left ring finger trigger digit release. He noted that appellant remained disabled and recommended further diagnostic testing.

In a January 9, 2003 report, Dr. Steven J. Valentino, a Board-certified orthopedic surgeon and Office referral physician, advised that a December 1, 2000 electromyogram (EMG) of both upper extremities was normal, with no evidence of neuropathy or radiculopathy. Appellant underwent an uncomplicated release of the A1 pulley about the left fourth digit on June 5, 2001. Based on his examination findings and review of the medical records, Dr. Valentino opined that appellant had recovered from his work injury without any residual. He stated that there was no evidence that the work-related condition of November 1, 1999 was active or causing objective findings.

The Office found a conflict in medical opinion between Dr. Zelouf and Dr. Valentino as to whether appellant had continuing residuals of his work injury. It referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic hand surgeon, for an impartial medical examination. In an April 10, 2003 report, he noted the history of injury and appellant's past medical history, which included four left knee operations and left ear Meniere's disease. Dr. Lee reviewed the medical records and set forth his examination findings. He diagnosed mild residual tenosynovitis of flexor tendon of the left ring finger with occasional locking, based on history. Dr. Lee opined that appellant still had residuals, which might require a second surgery or revision surgery to correct his condition. He advised that appellant's prognosis should be excellent as surgical treatment was typically very successful. Dr. Lee stated that appellant's current physical limitations included no repetitive use of the left hand. He provided a work capacity evaluation setting forth restrictions.

In a May 13, 2003 letter, the Office requested clarification from Dr. Lee. It noted that appellant did not undergo a second left trigger finger surgery and that a conflict in medical opinion remained between Dr. Zelouf and Dr. Valentino as to whether such surgery was required. In a May 16, 2003 report, Dr. Lee opined that appellant required tenolysis of the flexor tendon to alleviate the trigger finger as the first surgery was not successful. He stated that this was usually a highly successful procedure and that appellant may require physical therapy thereafter.

In a June 11, 2003 medical note, Dr. Saied Talaie, a Board-certified plastic surgeon, noted appellant's history and provided an impression of right ring trigger finger,¹ status post left ring trigger release with residual click, and bilateral carpal tunnel syndrome. Dr. Talaie ordered a nerve condition velocity (NCV) and EMG studies of both sides from the neck downward. In a progress note of September 10, 2003, Dr. Talaie stated that appellant's EMG showed evidence of

¹ The Board notes that, although Dr. Talaie's report notes a right ring trigger finger, the Board assumes that, given the context of the report, a left ring trigger finger is intended.

borderline bilateral carpal tunnel syndrome. The physician presented the physical examination findings and noted that, as appellant was scheduled to have surgery on his right knee, he was unable to take the prescribed medication to see whether it improved the carpal tunnel symptoms. A copy of the July 21, 2003 NCV and EMG report was provided.

Based on Dr. Lee's work capacity evaluation, appellant was referred for vocational rehabilitation services in June 2003 and underwent vocational testing in August 2003. The vocational rehabilitation specialist noted that appellant had previously worked in a part-time nonfederal position as a fitness instructor. The vocational rehabilitation specialist identified several positions which were medically and vocationally suitable for appellant. The vocational rehabilitation specialist made arrangements for appellant to register at a community college for the purpose of pursuing an Associate degree program in construction technology. The Office, however, did not approve of the vocational training program and recommended that job placement services be initiated based on appellant's current aptitudes. Accordingly, the vocational rehabilitation specialist identified several more positions which were medically and vocationally suitable for appellant and provided placement services.

In a May 4, 2004 report, the vocational rehabilitation counselor identified the position of telephone solicitor, customer complaint clerk and information clerk as within appellant's knowledge, training and physical capabilities. The position of information clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT), No. 237.367-022, required appellant to answer inquiries from persons entering the establishment and include calling employees or officials to the information desk to answer inquiries and keeping a record of questions asked. The position was classified as a sedentary job involving frequent talking, hearing, near acuity, and occasional reaching and handling, with no repetitive use of hands/wrists or fingering, no climbing, no stooping, no balancing, no kneeling no crouching and no crawling. The position was noted to be in an environment, such as business office where typewriters are used, department stores, light traffic and grocery stores, where the activity or conditions exists up to a third of the time. The vocational rehabilitation counselor noted that appellant was qualified for vocational preparation of three to six months and that the position was reasonably available in appellant's commuting area with wages of \$463.20 per week.

In a May 7, 2004 letter, the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn \$463.20 a week as an information clerk, a sedentary position within Dr. Lee's April 10, 2003 restrictions. The Office noted that the additional medical evidence received from appellant did not establish that he was medically or vocationally unable to perform the job of information clerk.

In a June 4, 2004 letter, appellant disagreed with the proposed reduction of his wage-loss compensation. He contended that he was disabled and that the jobs specified were not equivalent in salary to his original job and had no career advancement. The reduction would be a hardship for his family and he requested college training through the Office. Copies of Dr. Talaie's June 11 and September 10, 2003 reports were submitted together with a May 18, 2004 congressional inquiry.

By decision dated June 23, 2004, the Office reduced appellant's wage-loss compensation effective July 11, 2004 based on his ability to earn \$463.20 a week as an information clerk. The

Office stated that appellant was not a candidate for retraining and thus not offered or approved for any type of college or retraining courses, as it had determined that he had transferable skills for job placement services. The Office noted that the medical evidence submitted was previously addressed in the May 7, 2004 letter. The decision did not affect appellant's medical benefits, which remained open for coverage of treatment.²

Appellant requested a hearing regarding the wage-earning capacity determination, which took place on May 25, 2005. Appellant's attorney argued that the Office failed to consider whether appellant's hearing loss which resulted from his preexisting Meniere's disease interfered with his ability to perform the duties of the selected position. Counsel also argued that the Office failed to include appellant's earnings from concurrent private employment when computing the rate of pay for compensation purposes. He argued that the Office improperly discontinued vocational training after the vocational rehabilitation specialist initiated appellant's registration at a community college.

Additional evidence received was submitted including physical therapy reports regarding appellant's upper extremities and hands. In reports dated January 19 to May 4, 2005, Dr. David W. Barnes, a nephrologist, diagnosed bilateral carpal tunnel syndrome. In a June 22, 2005 report, Dr. Barnes diagnosed bilateral carpal tunnel syndrome, bilateral cervical radicular symptoms and left hand trigger finger. He stated that appellant had a chronic, deteriorated, degenerative and neural condition to both upper extremities and was totally disabled.

In a June 14, 2005 report, Dr. Talaie provided an impression of stenosing tenosynovitis multiple digits both hands and bilateral carpal tunnel syndrome which he opined were directly related to the repetitive nature of his work at the employing establishment.

Medical reports from the University of Pennsylvania Health System addressed appellant's treatment for hearing problems from 2001 and 2005 due to his Meniere's disease and recent audiograms showed an increased hearing loss. In a June 21, 2005 note, Dr. Douglas C. Bigelow, a Board-certified otolaryngologist, stated that appellant's most recent audiogram showed moderate to severe sensorineural hearing loss bilaterally, slightly worse in his left ear, causing difficulty answering telephones and taking messages accurately. The reports from Dr. Bigelow indicated that appellant's symptoms were probably consistent with Meniere's disease.

By decision dated August 22, 2005, an Office hearing representative affirmed the Office's June 23, 2004 wage-earning capacity decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ An injured employee who is either unable to return to

² The Office initially issued a decision on June 15, 2004 finalizing appellant's wage-earning capacity, but issued an updated decision as additional evidence from appellant was received within the allotted 30 days.

³ *John D. Jackson*, 55 ECAB ____ (Docket No. 02-2281, issued April 8, 2004); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁵

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.⁶

When the Office makes a medical determination of partial disability and of specific 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 labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.⁷ 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.⁸

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments to resulting from post injury or subsequently acquired conditions.⁹ 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. Additionally, the job selected for determining

⁴ 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁵ 5 U.S.C. § 8115(a); see *Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁷ See *Luis R. Flores*, 54 ECAB 250 (2002).

⁸ See *William H. Woods*, *supra* note 6; *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ See *John D. Jackson*, *supra* note 3; *James Henderson, Jr.*, 51 ECAB 268 (2000).

wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹⁰

ANALYSIS -- ISSUE 1

Appellant received compensation for total disability due to his accepted left hand ring trigger finger and right wrist flexor tenosynovitis. He stopped work on June 14, 2000. The record reflects that appellant has preexisting conditions of Meniere's disease, which resulted in hearing loss in years 2001 to 2005, as well as a left knee condition. The record reflects that appellant subsequently developed bilateral carpal tunnel syndrome, bilateral cervical radicular symptoms and tenosynovitis of multiple digits of both hands. The Board notes that, although the Office had authorized a second surgery to his left ring finger to release the trigger finger, appellant never underwent that surgical option.

In finding that appellant was physically capable of performing the duties of an information clerk as of July 11, 2004, the Office relied on medical reports dated April 10 and May 16, 2003 from Dr. Lee, the impartial medical specialist. The Office properly found that a conflict of medical opinion arose between Dr. Zelouf, appellant's Board-certified hand surgeon, who opined that appellant had continuing work-related residuals and required additional surgery, and Dr. Valentino, a Board-certified orthopedic surgeon and Office referral physician, who opined that there was no evidence that the work-related condition of November 1, 1999 was active or causing disability. The Office properly referred appellant for an impartial medical examination by Dr. Lee, a Board-certified hand surgeon.¹¹

In cases where the Office has referred appellant to an impartial medical specialist to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹² In an April 10, 2003 report, Dr. Lee reviewed the entire case record, the statement of accepted facts and noted appellant's past medical history, which included left ear Meniere's disease and four left knee operations. Based on his examination findings, Dr. Lee diagnosed a mild residual tenosynovitis of flexor tendon of the left ring finger, with occasional locking. He recommended a second surgery to correct appellant's condition, noting that appellant could achieve an excellent prognosis following the second surgery. He concluded that appellant was capable of working an 8-hour day with restrictions, which included no repetitive use of the left hand. In response to the Office's request for clarification, in a May 16, 2003 report, Dr. Lee reiterated that appellant

¹⁰ See *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004); *James Henderson, Jr.*, *supra* note 9.

¹¹ The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician, who shall make an examination. 5 U.S.C. § 8123(a); *Thomas J. Fragale*, 55 ECAB ____ (Docket No. 04-835, issued July 8, 2004); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹² *Michael Hughes*, 52 ECAB 387 (2001); *Manuel Gill*, 52 ECAB 282 (2001).

required a second surgery to correct the trigger finger and might require physical therapy.¹³ Dr. Lee's reports, which are well rationalized and based on a proper factual background, are entitled to special weight and establish that appellant was capable of working with full-time restrictions for the left hand.

Although Dr. Talaie provided impressions of left ring trigger finger and bilateral carpal tunnel syndrome in her June 11 and July 21, 2003 reports, the physician failed to provide any work restrictions for the accepted left ring trigger finger condition. She failed to provide an opinion as to the causal relationship of the new diagnosis of bilateral carpal tunnel syndrome to his federal employment. As previously noted, any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is not considered in a loss of wage-earning capacity determination.¹⁴ The Board also notes that Dr. Lee was aware of appellant's preexisting Meniere's disease. At the time of Dr. Lee's examination and the Office's wage-earning capacity determination, there was no medical evidence of record establishing that appellant could not perform the selected position due to Meniere's disease. The Board finds that the medical evidence, as represented by Dr. Lee, supports that the selected position of information clerk was medically suitable to appellant's restrictions.

The Office had referred appellant to a vocational rehabilitation counselor; however, the assisted placement program was unsuccessful and appellant did not have actual earnings that fairly and reasonably represented his wage-earning capacity. The vocational rehabilitation counselor identified several positions for determination of his wage-earning capacity. The rehabilitation counselor confirmed that the full-time position of information clerk was available within his commuting area and noted that the position was a sedentary position which required appellant to answer inquiries from persons entering a business and to keep a record of the questions asked. The position involved frequent activity of talking, hearing, near acuity, occasional reaching and handling, and no repetitive use of hands/wrists or fingering, no climbing, stooping, balancing, kneeling, crouching and crawling. As indicated above, these activities are within the restrictions set by Dr. Lee.

Additionally, the vocational requirements of the information clerk position are appropriate given appellant's education and experience. Appellant argued that the Office improperly discontinued the vocational training program recommended by the rehabilitation counselor in construction technology. Office procedures provide: "[l]ong-term training, such as college training, should be considered only when the injured worker shows exceptional tenacity and ability, there is great probability of employment with minimal loss of earnings upon successful completion and the injury is sufficiently severe so as to rule out other options."¹⁵ In this case, the

¹³ It was proper for the Office to seek clarification from Dr. Lee as the Board has held that, when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist. See *Phillip H. Conte*, 56 ECAB ___ (Docket No. 04-1524, issued December 22, 2004).

¹⁴ See *John D. Jackson*, *supra* note 3.

¹⁵ See Federal (FECA) Procedure Manual, Part 3 -- Rehabilitation, *Services*, Chapter 3.200.6(a)(3) (December 1997).

Office found that, since appellant had transferable skills, private placement with minimal loss of earnings could be achieved. The Office did not abuse its discretion in finding that appellant had transferable skills which could result in private placement and was not a candidate for college training. Additionally, the record reflects that appellant had the necessary vocational skills to perform the requirements of the selected position.

The counselor also determined the prevailing wage rate of the position and its reasonable availability in the open labor market.¹⁶ Applying the *Shadrick* formula, the Office reduced appellant's compensation based on his ability to earn \$463.20 a week as an information clerk. Appellant argued that he should be compensated for his lost wages from his nonfederal part-time fitness instructor position. The issue of whether concurrent nonfederal employment may be considered in determining pay rate for compensation purposes is resolved under 5 U.S.C. § 8114¹⁷ and Board precedent. The Board has recognized that nonfederal, concurrent earnings may be included in a compensation pay rate determination only under circumstances where section 8114(d)(3) is applicable.¹⁸ However, section 8114(d)(3) is only applicable if neither sections 8114(d)(1) or 8114(d)(2) are applicable.¹⁹ In the instant case, section 8114(d)(1) is applicable as appellant had worked at the employing establishment in a full-time position for substantially the whole year prior to the injury. Therefore, appellant's nonfederal concurrent employment is not included and his pay rate is based on his federal earnings in accordance with section 8114(d)(1).²⁰ The Board finds that the Office properly excluded appellant's wages from concurrent nonfederal employment in determining his pay rate effective June 14, 2000.

¹⁶ See *Karen L. Lonon-Jones*, 50 ECAB 293, 298 (1999); *Leo A. Chartier*, 32 ECAB 652 (1981) (the fact that an employee has been unsuccessful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area).

¹⁷ Section 8114(d) of the Act provides that average annual earnings are determined as follows: "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay-- (A) was fixed, the average annual earnings are the annual rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week. "(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection. "(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."

¹⁸ *Charles T. Cummings*, 54 ECAB 598 (2003); *Ricardo Hall*, 49 ECAB 390, 394-95 (1998). See 5 U.S.C. § 8114(d)(3).

¹⁹ See *supra* note 17.

²⁰ See *Charles T. Cummings* and *Ricardo Hall*, *supra* note 18.

The Board additionally finds that the Office considered the proper factors, such as availability of information clerk positions and appellant's physical limitations, in determining that the information clerk position represented appellant's wage-earning capacity. Also, the Office followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant did not allege that the Office erred in its calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

LEGAL PRECEDENT -- ISSUE 2

Once a loss of wage-earning capacity is determined, a modification of such a 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.²¹ The burden of proof is on the party attempting to show the award should be modified.²²

ANALYSIS -- ISSUE 2

The evidence does not establish that appellant has been retrained or otherwise vocationally rehabilitated or that the original determination was in fact erroneous.²³ Appellant, however, submitted medical evidence contending that there had been a material change in the nature and extent of his injury-related condition such that he cannot perform the selected position.

Appellant submitted reports of Drs. Talaie and Barnes, who reported in part on the accepted conditions of left trigger finger and tenosynovitis as well as the development and/or prognosis of other conditions/symptoms such as bilateral carpal tunnel syndrome, bilateral cervical radicular symptoms, and tenosynovitis of multiple digits of both hands.²⁴ Dr. Talaie opined in a June 14, 2005 report that the bilateral carpal tunnel syndrome and stenosing tenosynovitis multiple digits of both hands were directly related to the repetitive nature of appellant's work at the employing establishment. However, she failed to provide adequate rationale for her opinion on causal relationship or provide any work restrictions in order to determine whether the selected position was properly within appellant's medical restrictions for the accepted conditions. Furthermore, while Dr. Barnes opined that appellant was totally disabled, he failed to address how or why appellant would be unable to perform the selected

²¹ See *Selden H. Swartz*, 55 ECAB ____ (Docket No. 02-1164, 2004); *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

²² See *Selden H. Swartz*, *supra* note 21; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

²³ Although appellant continued to argue that his earnings from his part-time fitness instructor position should have been included when computing the rate of pay and that the Office failed to provide him training, the Board notes that those arguments were previously addressed.

²⁴ As previously noted, 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. See *John D. Jackson*, *supra* note 3.

position, which is sedentary and does not contain repetitive duties. The medical evidence does not adequately relate the new carpal tunnel and cervical radicular symptoms to appellant's employment, especially in light of the fact that he stopped work on June 14, 2000. This evidence is insufficient to establish that he is not medically capable of performing the selected position.²⁵

Appellant also submitted a June 21, 2005 note from Dr. Bigelow who stated that appellant demonstrated a moderate to severe hearing loss causing difficulty answering telephones and taking messages accurately. The Board finds that this brief note does not provide adequate rationale explaining why the extent of hearing loss would prevent appellant from performing the duties of the selected position. The report does not specifically attribute the documented hearing loss to the preexisting Meniere's disease or provide adequate explanation on appellant's disability for modified duty as an information clerk.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation based on its finding that he had the capacity to earn wages as an information clerk.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 22, 2005 be affirmed.

Issued: June 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁵ *Leslie C. Moore*, 52 ECAB 132 (2000).