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

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| **F.S., Appellant** | ) | |
| **and** | ) | **Docket No. 08-2296** |
| | ) | **Issued: September 24, 2009** |
| **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Las Vegas, NV, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On August 20, 2008 appellant, through her attorney, filed a timely appeal from a July 28, 2008 decision of an Office of Workers' Compensation Programs' hearing representative affirming that the constructed position of information clerk represented her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

### ***ISSUE***

The issue is whether the Office properly reduced appellant's compensation effective March 16, 2008 based on its determination that the constructed position of information clerk represented her wage-earning capacity.

### ***FACTUAL HISTORY***

On June 16, 2004 appellant, then a 44-year-old transportation security screener, twisted her left ankle while retrieving a bag from the rollers. The Office accepted the claim for left ankle

tibiofibular strain and chronic left posterior tibial tendinitis. It accepted appellant's claims for recurrences beginning March 15, 2005 and April 27, 2006. By letter dated March 8, 2007, the Office placed appellant on the periodic rolls for temporary total disability.

In an April 28, 2006 work capacity evaluation form, Dr. Kimberly A. Adams, a treating Board-certified family practitioner, released appellant to work full time with restrictions. Appellant was limited to seven hours of sitting, one hour of walking, one hour of standing, no bending or stooping, no squatting, no kneeling and no climbing.

In a February 28, 2007 work capacity evaluation form, Dr. Roger A. Fontes, Jr., a treating Board-certified orthopedic surgeon, advised that appellant was capable of working eight hours and had permanent work restrictions. Appellant's limitations included 8 hours of sitting, 1/2 hour of walking, 1/2 hour of standing, 8 hours of reaching and twisting, 1 hour of bending or stooping, 8 hours of repetitive wrist and elbow movements, 2 hours of lifting up to 20 pounds and no squatting, kneeling or climbing.

On March 15, 2007 the Office referred appellant to vocational rehabilitation. On March 27, 2007 the employing establishment advised the Office that it was unable to provide employment within appellant's restrictions. On April 21, 2007 the rehabilitation counselor, determined that appellant's medical restrictions would allow her to perform various clerical positions, including receptionist, reservation clerk or information clerk. The positions were identified as sedentary and found reasonably available in appellant's commuting area on a full-time basis.

On April 26, 2007 Dr. Fontes reviewed the job descriptions. He indicated that appellant could perform any of the three positions for eight hours per day.

In a letter dated May 9, 2007, the Office notified appellant that the vocational rehabilitation plan and the jobs identified were within her work limitations. It advised that, after the necessary training or other preparation was completed, she would be provided with 90 days of placement services. At the end of the rehabilitation program, whether appellant was employed or not, it would reduce her compensation based on her wage-earning capacity. The record indicates that appellant completed a computer application training course on July 6, 2007 and began pursuing a job search.

On August 13, 2007 Dr. Fontes advised that he was modifying his prior work capacity report. He released appellant to four hours per day of sedentary work. Restrictions included sitting up to four hours per day and no standing.

In a November 18, 2007 memorandum, the rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for the positions of information clerk.[1] She noted that this position was vocationally appropriate and readily available in sufficient numbers in appellant's commuting area. The rehabilitation counselor provided a job description for the position of an information clerk Department of Labor, *Dictionary of*

[1] The rehabilitation counselor noted that the position of reservation clerk was also available and vocationally appropriate. She noted that the availability for an information clerk was greater than that for the reservation clerk.

*Occupational Titles* (DOT) No. 238.362.022 at a weekly wage of $420.00. She noted that the selected position was sedentary.

In a December 14, 2007 memorandum of telephone call, the employing establishment advised that, as of December 14, 2007, the current pay for appellant's date-of-injury position of transportation security screener would be $28,569.00.

In a January 24, 2008 wage-earning capacity memorandum, the Office noted that appellant's date-of-injury weekly pay was $533.04. The current weekly pay rate for appellant's job and step when injured was $568.86.

On January 24, 2008 the Office issued a notice of proposed reduction of compensation on the grounds that the evidence established that appellant was no longer totally disabled and had the capacity to earn wages as an information clerk at the rate of $420.00 per week. It noted that the position was in compliance with Dr. Fontes' restrictions. Appellant did not respond to the proposed reduction of compensation.

In a January 25, 2008 closure memorandum, the rehabilitation specialist noted that on April 26, 2006 Dr. Fontes had reviewed the position description and physical requirements for the position of information clerk. Dr. Fontes approved the position and indicated that appellant was capable of performing the job full time. The rehabilitation specialist noted that the position was vocationally appropriate and readily available in sufficient numbers in appellant's commuting area. She noted that the selected position was sedentary and provided the job duties for the position. The rehabilitation specialist did not address the August 13, 2007 report of Dr. Fontes.

By decision dated March 3, 2008, the Office adjusted appellant's compensation benefits to reflect her wage-earning capacity as an information clerk effective March 16, 2008.

On March 9, 2008 appellant's counsel requested a telephonic hearing regarding the reduction of her wage-loss compensation, which was held on June 3, 2008.

By decision dated July 28, 2008, an Office hearing representative affirmed the March 3, 2008 loss of wage-earning capacity decision.[2]

## ***LEGAL PRECEDENT***

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] On July 23, 2008 the Office issued a decision denying appellant's claim for 17.25 hours of wage loss for the period September 4 to 8, 2005. On July 26, 2008 appellant's counsel requested a telephonic hearing on this issue. As of August 20, 2008, the date of appellant's appeal to the Board, no decision had been issued by an Office hearing representative on this issue. In addition, appellant filed a claim for a schedule award. However, no final decision has been issued on her schedule award request. There shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case. 20 C.F.R. §§ 501.2(c); *Jennifer A. Guillary*, 57 ECAB 485 (2005).

[3] *T.F.*, 58 ECAB ___ (Docket No. 06-1186, issued October 19, 2006).

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 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 her wage-earning capacity in her disabled condition.[5]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her 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] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

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 Department of Labor, DOT or otherwise available in the open market, that fit the 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[8] and codified by regulations at 20 C.F.R. § 10.403[9] should be applied. Subsection (d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by the Office, by the current pay rate for the job held at the time of the injury.[10]

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

[4] 20 C.F.R. §§ 10.402, 10.403.

[5] 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB ___ (Docket No. 07-45, issued November 14, 2007); *T.O.*, 58 ECAB ___ (Docket No. 06-1458, issued February 20, 2007); *Dorothy Lams*, 47 ECAB 584 (1996).

[6] *See William H. Woods*, 51 ECAB 619 (2000).

[7] *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

[8] 5 ECAB 376 (1953).

[9] 20 C.F.R. § 10.403.

[10] *Id*. at § 10.403(d).

resulting from postinjury or subsequently acquired conditions.[11] 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 wage-earning capacity must be a job reasonably available in the general labor market in the commuting area, in which the employee lives.[12]

## ***ANALYSIS***

By letter dated March 8, 2007, the Office accepted that appellant sustained left ankle tibiofibular strain and chronic left posterior tibial tendinitis due to a June 16, 2004 employment injury and placed her on the periodic rolls for temporary total disability. It reduced her compensation based on its finding that she had the capacity to earn wages in the selected position of information clerk.

In an April 28, 2006 work capacity evaluation form, Dr. Adams, a treating Board-certified family practitioner, released appellant to work full time with restrictions. The restrictions included seven hours of sitting, one hour of walking, one hour of standing, no bending or stooping, no squatting, no kneeling and no climbing. On February 28, 2007 Dr. Fontes, a treating Board-certified orthopedic surgeon, determined that appellant had permanent work restrictions and was capable of working an eight-hour day. The vocational rehabilitation expert found that the sedentary position of information clerk was suitable to appellant's medical restrictions. She forwarded copies of the position descriptions for jobs she identified to Dr. Fontes for his review. On April 26, 2007 Dr. Fontes advised that appellant was capable of performing any of the identified positions for eight hours. However, in an August 13, 2007 report, he modified appellant's restrictions to light duty with no sitting more than four hours per day and no standing more than four hours per day.

The Board finds that the Office failed to establish that appellant was capable of performing the duties of the selected position full time. Once the Office undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[13] It relied upon the opinion of Dr. Fontes to determine appellant's capacity to perform the selected position. The Office had an obligation to seek clarification from Dr. Fontes as to the number of hours she was capable of working in view of his August 13, 2007 report, which modified his approval of full-time work to part-time work.[14] In approving the selected position, the Office merely noted that the August 13, 2007 report was insufficient to establish that appellant was incapable of performing the full-time duties. The Office did not

[11] *James Henderson, Jr.*, 51 ECAB 268 (2000).

[12] *Id.*

[13] *Richard F. Williams*, 55 ECAB 343 (2004).

[14] *Ayanle A. Hashi*, 56 ECAB 234 (2004); *Mae Z. Hackett*, 34 ECAB 1421 (1983) (where the Office referred a claimant for a second opinion physician and the report did not adequately address the relevant issues, the Office should secure a report on the relevant issues).

request clarification from Dr. Fontes. It has not met its burden of proof to establish appellant's capacity to perform full-time work.

## ***CONCLUSION***

The Board finds that the Office did not meet its burden of proof in reducing appellant's wage-loss compensation benefits effective March 16, 2008.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 28, 2008 is reversed.

Issued: September 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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