

On June 9, 2004 appellant, then a 54-year-old maintenance mechanic, filed a traumatic injury claim alleging that on June 2, 2004 he injured his left knee while changing heating ventilating and air conditioning filters. The Office accepted the claim for left knee strain, left

knee lateral cartilage or meniscus tear and authorized arthroscopic surgery, which was performed on September 1, 2004 and total left knee arthroplasty, which occurred on July 25, 2006. Appellant returned to modified work on October 25, 2004. On January 5, 2005 the employing establishment informed the Office that it could not accommodate appellant's permanent restrictions and requested referral to vocational rehabilitation. By letter dated January 24, 2005, the Office placed appellant on the periodic rolls for temporary total disability effective January 23, 2005.

On December 2, 2004 Dr. David E. Taylor, a treating physician, reported appellant was status post resection of left knee medial and lateral meniscus tears and left knee medial compartment Grade 3 degenerative osteoarthritis. He stated that appellant was capable of performing modified work with restrictions which were permanent. The restrictions included no prolonged standing, walking, working on slippery or uneven ground, bending, stooping, squatting, climbing, kneeling, twisting and jumping. Dr. Taylor also indicated that appellant was restricted to lifting, carrying, pulling and pushing no more than 20 pounds.

On January 21, 2005 the Office referred appellant to a vocational rehabilitation counselor. Appellant entered a program at Allied Business College, where he took bookkeeping and account courses in Microsoft Word 2003, Microsoft Excel 2003, Computer Financial Accounting and Quickbooks. The vocational rehabilitation counselor stated that appellant successfully completed the course as of the July 25, 2006 vocational rehabilitation report.

On July 18, 2005 Dr. Taylor diagnosed advanced left knee degenerative osteoarthritis based upon an x-ray interpretation. He recommended that appellant be rehabilitated to a semi-sedentary light-duty job.

In a September 1, 2006 report, Dr. Taylor noted that appellant was status post his July 25, 2006 total left knee arthroplasty surgery. He opined that appellant was currently totally disabled at this time.

On December 4, 2006 Dr. Taylor released appellant to sedentary work. Permanent restrictions include some standing and walking and no lifting, carrying, pulling and pushing more than 20 pounds intermittently. Dr. Taylor stated that appellant's overall work restrictions were similar to those stated in the December 3, 2004 report and had not changed much.

On May 30, 2007 Dr. Yao-Jen Chang, a treating Board-certified urologist, informed the Office that appellant required surgery, which would delay his job placement.

On July 19, 2007 appellant filed a claim for a schedule award.

On July 25, 2007 the vocational rehabilitation counselor identified the position of bookkeeper as being within appellant's physical limitations, vocational skills and geographical area.¹ He noted that the labor market for this position in Merced County was fair.² The

¹ The vocational rehabilitation counselor also identified the position of accounting clerk as being within appellant's physical limitations, vocational skills and geographical area.

² The vocational rehabilitation counselor noted that appellant lives in Mariposa County and that due to the

bookkeeper position, as it appeared in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary position. The position required keeping financial transaction records using a computer and calculator; verifying, allocating and posting business transaction details to subsidiary accounts in the computer files or journals; summarizing details in separate computer files of ledgers; transferring data to a general ledger; and reconciling and balancing accounts. Duties may also include compiling reports showing statistics; calculating employee wages and preparing checks for those wages; withholding Social Security and other tax reports; computing; and typing and mailing monthly financial reports to customers. The physical requirements included sedentary strength that involved lifting up to 10 pounds occasionally, reaching, handling, feeling and near acuity often, fingering occasionally and talking and hearing constantly. No climbing, balancing, stooping, kneeling, crouching, crawling, tasting/smelling, far acuity, depth perception, accommodation, color vision and field of vision were required. Vocational requirements for the position of bookkeeper were two to four years of specific vocational preparation, which the vocational rehabilitation counselor noted were met by appellant's training program. The vocational rehabilitation counselor listed the average weekly earnings of a bookkeeper as \$9.25 per hour with Ramada Inn and \$11.00 per hour with Account Temps.³ He stated that the position was available in sufficient numbers on a full-time basis and in appellant's commuting area or based on a labor market survey.

On August 16, 2007 the Office proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that he was no longer totally disabled but had the capacity to earn wages as a bookkeeper at the rate of \$331.00 per week or \$8.25 per hour.⁴

By decision dated September 26, 2007, the Office adjusted appellant's compensation benefits effective September 30, 2007 based upon its determination that the position of bookkeeper represented his wage-earning capacity. It noted that appellant's weekly pay rate when injured was \$846.04 and that the current pay rate for job and step when injured was \$915.07. The Office found that appellant was capable of earning \$331.00 per week, that the adjusted wage-earning capacity per week was \$304.57, that the percentage of new wage-earning capacity was 36 percent, that the loss in wage-earning capacity amount per week was \$541.47, leaving him with a compensation rate of \$406.10 per week or \$430.25 per week when increased by applicable cost-of-living adjustments. It calculated that this resulted in a new compensation rate every four weeks of \$1,721.00, less health benefits premium of \$346.62, basic life insurance premium of \$13.80, postretirement basic life insurance premium of \$25.76 and optional life

depressed economy there he looked at surrounding areas for employment.

³ In the July 25, 2007 Labor Market Assessment, noted that Ramada Inn had an opening for a night auditor which paid between \$8.50 and \$10.00 per hour; Merced County recently hired for the position of Tax Collections Clerk with one year accounting experience at a monthly salary of \$2,276.00; and Account Temps noted that it had bookkeeper positions available in Modesto for people with more than one year of experience and were paid at a salary of \$11.00 to 13.00 per hour.

⁴ The Office used the information contained on the Ramada Inn contact. The Board notes that \$8.25 multiplied by 40 equals \$330.00 not \$331.00. Also, when using the \$9.25 hourly rate noted on this form, the weekly salary is \$370.00.

insurance premium of \$52.18, for a net compensation every four weeks of \$1,264.64 beginning on September 30, 2007.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to 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.⁶

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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard too 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.⁷

The Office must initially determine appellant'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.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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 his 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. Shadrack*¹⁰ and codified by regulation at 20 C.F.R. § 10.403¹¹ should be applied. Subsection(d) of the

⁵ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006).

⁶ 20 C.F.R. §§ 10.402, 10.403.

⁷ 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).

⁸ *See William H. Woods*, 51 ECAB 619 (2000).

⁹ *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

¹⁰ 5 ECAB 376 (1953).

¹¹ 20 C.F.R. § 10.403.

regulations provides 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.¹²

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 resulting from post-injury or subsequently acquired conditions.¹³ 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.¹⁴

ANALYSIS

The Office accepted that appellant sustained left knee strain and left knee lateral cartilage or meniscus tear due to a June 2, 2004 employment injury and paid him compensation for disability beginning January 23, 2005. It reduced his compensation based on its finding that he had the capacity to earn wages in the constructed or selected position of bookkeeper.

On December 2, 2004 Dr. Taylor reported that appellant was status post resection of left knee medial and lateral meniscus tears and left knee medial compartment Grade 3 degenerative osteoarthritis. He stated that appellant was capable of performing modified work with restrictions which were permanent. The restrictions included no prolonged standing walking, working on slippery or uneven ground, bending, stooping, squatting, climbing, kneeling, twisting and jumping. Dr. Taylor also indicated that appellant was restricted to lifting, carrying, pulling and pushing no more than 20 pounds. Following appellant's July 25, 2006 total left knee arthroplasty, Dr. Taylor released him to sedentary work on December 4, 2006. Dr. Taylor stated that appellant's overall work restrictions were similar to those stated in the December 2, 2004 report and had not changed much.

The Board finds that Dr. Taylor's reports establish that appellant was no longer totally disabled and was capable of performing sedentary work with restrictions. The constructed position of bookkeeper was identified as sedentary and did not require prolonged standing, walking, working on slippery or uneven ground, bending, stooping, squatting, climbing, kneeling, twisting, jumping and lifting, carrying, pulling and pushing more than 20 pounds.

In assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background. The rehabilitation counselor determined that appellant had

¹² *Id.* at § 10.403(d).

¹³ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁴ *Id.*

the skills necessary to perform the position of bookkeeping clerk based on his Associate's Degree. He further found that the position was reasonably available within the appropriate geographical area. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, however, the Office may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available.¹⁵ The Board finds that the Office considered the proper factors, including the availability of suitable employment, his physical limitations and employment qualifications in determining that the position of bookkeeper represented his wage-earning capacity.

As to the wage rate, however, the Office stated, without further explanation, the entry level was \$331.00 per week or \$8.25 per hour. The evidence of record does not confirm the Office's finding. There is no indication that the rehabilitation counselor or other vocational specialist opined that appellant was capable of earning \$331.00 per week in the selected position. In the July 25, 2007 labor market assessment, the rehabilitation counselor provided wage information on the bookkeeper position. He noted that his contacts at the Ramada Inn, Merced County and Account Temps resulted in a range of hourly pay rates commencing at \$8.50 per hour and going up to \$13.71 per hour. On the other hand, the Form CA-66 for the Ramada Inn reported an hourly rate of \$9.25, Account Temps reported an hourly rate of \$11.00 and the City of Merced reported an hourly rate of \$12.93. It is not clear from the record how the Office determined that an entry level bookkeeper position earned \$331.00 or \$8.25 per hour based on a review of the July 26, 2007 labor market assessment and the CA-66 forms submitted by the vocational rehabilitation specialist.

Thus, the Board is unable to determine from the record how the Office calculated the entry level wage for an individual appellant's background. None of the CA-66 forms or the July 25, 2007 labor market assessment noted an hourly rate of \$8.25. The Office has not explained, based on the evidence of record, how it arrived at its calculation of the wage rate and the subsequent calculations as to appellant's loss of wage-earning capacity pursuant to *Shadrick* and 20 C.F.R. § 10.403. It is the Office's burden of proof and the Board finds that the Office did not meet its burden of proof in this regard.

CONCLUSION

The Board finds that the evidence supported a finding that the selected position was medically and vocationally suitable, but the evidence was not sufficient to establish the appropriate wage rate for the position and therefore the loss of wage-earning capacity was not properly determined.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2007 is reversed.

Issued: November 17, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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