



leg gave way going up stairs. The Office accepted that appellant sustained a right knee sprain and authorized arthroscopic surgery on his knee, which was performed on November 7, 1997.

On March 9, 1998 the employing establishment, which had been accommodating appellant's limitations related to his knee condition, advised the Office that it had no vacant positions for appellant based on his physical restrictions. When appellant stopped working at the employing establishment on March 14, 1998, the Office paid appropriate compensation for temporary total disability.

In a July 16, 1998 report, a private vocational counselor hired by the Office to oversee appellant's vocational rehabilitation recommended that appellant be trained for a "new vocational goal in the rapidly emerging field of environmental technology" at Cape Cod Community College. It was noted that he could expect to earn at least his preinjury wage after he graduated from the program. In an addendum to this report, the rehabilitation counselor requested that appellant be trained as a waste water treatment technician<sup>1</sup> or water treatment technician,<sup>2</sup> both of which fell in the environmental technology field. In approving the training plan, an Office rehabilitation specialist indicated that appellant's occupation after his rehabilitation program would be environmental management/technician.

Appellant began his training at Cape Cod Community College in the fall of 1998 and on January 25, 2001 he received a degree as an associate in science in environmental technology. His courses included geology: culture and environment, coastal ecology, earth science, environmental science, survey of environmental technology, quantum methods for environmentalists, physical oceanography, introduction to water, environmental instrumentation, occupational health and safety, cartography and database management, microcomputer applied software, environmental chemistry, water supply and hazardous waste management. He also completed an internship with a town planning department which involved review of site plans for commercial construction to make sure they fell within zoning regulations, and helping develop a district of critical planning concerns in one section of town concerning development, watersheds, well water and environmental issues. Appellant had previously taken courses at this college: elements of surveying in the fall of 1976, and construction estimation/practice and blueprint reading in the spring of 1978. In May 1972 he was granted a two-year accounting diploma from Andover Institute of Business.

On July 8, 2001 appellant moved to Maine, where he sought to obtain employment during the next five months. On January 15, 2002 the private rehabilitation counselor selected the positions of scientific helper,<sup>3</sup> mechanical engineering technician,<sup>4</sup> and civil engineering

---

<sup>1</sup> Department of Labor's *Dictionary of Occupational Titles* No. 955.362-010.

<sup>2</sup> Department of Labor's *Dictionary of Occupational Titles* No. 954.382-010.

<sup>3</sup> Department of Labor's *Dictionary of Occupational Titles* No. 199.364-014.

<sup>4</sup> Department of Labor's *Dictionary of Occupational Titles* No. 007.161-026.

technician<sup>5</sup> as positions appellant was capable of performing.<sup>6</sup> For the civil engineering technician position, the Department of Labor's *Dictionary of Occupational Titles* indicated that the strength level was light. The rehabilitation counselor indicated that climbing, kneeling, balancing, crouching and crawling were not required and that stooping was occasionally required. Telephone contact with the Augusta Career Center confirmed that the job was being performed in sufficient numbers to make it reasonably available in appellant's commuting area and that the Maine Department of Labor was the source of the wage rate of \$526.00 per week. With regard to how appellant met the two to four years of specific vocational preparation, the vocational counselor noted that he had an associates degree in environmental technology, and experience in survey technology, construction estimating technology, blue print reading, training in computer operating, reviewing construction plans and critical planning. On January 25, 2002 an Office rehabilitation specialist closed appellant's rehabilitation case, stating that, rather than seeking employment, appellant planned to retire and remain on temporary total disability. It was good that, despite intensive and extended placement efforts, appellant had not obtained employment.

In a September 25, 2002 report of appellant's work tolerance limitations, Dr. Kristen McDermott, his attending osteopath, indicated that he could work eight hours per day, with four to six hours of intermittent sitting, one to two hours of walking or standing, pushing or pulling up to 20 pounds for two to three hours, lifting one to two hours, no squatting or kneeling and climbing as tolerated.

On April 8, 2003 the private rehabilitation counselor called Oliver Associates, Inc. and was told the weekly wage for the position of engineering technician was \$613.00 per week.

On May 16, 2003 the Office issued a proposed reduction of compensation on the basis that appellant had the capacity to earn \$613.00 per week in the constructed position of civil engineering technician. In a June 3, 2003 letter, appellant contended that he was not physically capable of performing the position, that it was not available in his commuting area and that he felt his age and disability status prevented him from obtaining such a position.

On June 27, 2003 the Office referred appellant, his medical records and a statement of accepted facts, to Dr. Philip R. Kimball, a Board-certified orthopedic surgeon, for an evaluation of his condition and his work tolerance limitations. In a July 8, 2003 report, Dr. Kimball noted that, in addition to his right knee condition, appellant complained of double vision, pulmonary fibrosis, a liver problem, diabetes and periodic low back pain. Dr. Kimball indicated that appellant could work eight hours per day with limitations of walking one to two hours, standing one to two hours, no twisting of the knee, occasional light pushing and pulling, lifting up to 30 pounds one to two hours, and no squatting, kneeling or climbing.

In a September 8, 2003 report of appellant's work tolerance limitations, Dr. McDermott indicated that appellant could only work four to six hours per day, that working eight hours per

---

<sup>5</sup> Department of Labor's *Dictionary of Occupational Titles* No. 005.261-014.

<sup>6</sup> The rehabilitation counselor indicated that appellant was also capable of performing the positions of environmental analyst, construction inspector and accounts receivable manager.

day was unreasonable given his multiple restrictions and that any job would need to be flexible to accommodate his need to shift from one activity to another. Dr. McDermott indicated that appellant could perform sitting intermittently four hours, walking one to two hours, standing one to two hours, minimal twisting and bending/stooping, pushing and pulling two to three hours, lifting up to 50 pounds two to three hours, no squatting or kneeling and one to two flights of climbing.

By decision dated October 16, 2003, the Office reduced appellant's compensation effective October 18, 2003 based on his capacity to earn wages as a civil engineering technician.

Appellant requested a hearing and submitted additional evidence. The Department of Veterans Affairs determined that he had the following service-connected conditions: diabetes mellitus, neuropathy of both feet and post-traumatic stress disorder. It denied his claims that his depression and double vision were service connected. In a February 20, 2001 decision, an administrative law judge for the Social Security Administration found that appellant's diabetes mellitus, osteoarthritis of the right knee, pulmonary fibrosis, obstructive sleep apnea and liver cirrhosis caused significant vocationally relevant limitations, but that he retained the residual functional capacity to perform the exertional demands of sedentary work but not of his former employment. Appellant was found disabled as of March 13, 1998.

In a March 17, 2004 report, Dr. McDermott noted appellant's multiple medical problems, including diabetes mellitus with neuropathy resulting in pain down his legs and into his feet with his symptoms completely controlled by medications, pulmonary fibrosis, degenerative joint disease or arthritis affecting his knees and hips and limiting his ability to squat and kneel. She listed degenerative joint disease of the lumbar spine resulting in low back pain preventing him from sitting or standing for a prolonged period, diplopia limiting his ability to tolerate use of a computer screen, depression and post-traumatic stress disorder resulting in poor ability to concentrate for long periods of time at any one given task, sleep apnea, angiomyolipoma of the right kidney and cirrhosis of the liver.

At a hearing held on March 22, 2004, appellant testified that it was impossible to perform the position of civil engineering technician without climbing, balancing, stooping, kneeling, crouching and crawling, as the job required visiting engineering sites and bending and kneeling to look at things and walking in trenches. He submitted a section of the Department of Labor's Bureau of Labor Statistics *Occupational Outlook Handbook*, which stated that "most employers prefer to hire someone with at least a two-year associate degree in engineering technology," and that median annual earnings of civil engineering technicians were \$37,720.00 in 2002, that the middle 50 percent earned between \$29,030.00 and \$47,260.00 and that the lowest 10 percent earned less than \$23,080.00. Appellant also submitted information from Occupational Information Network, O-Net On-Line for the position of civil engineering technician, which ranked numerous elements of work context, including: "How much does this job require standing?" at 55, "How much does this job require walking and running?" at 50, "How much does this job require climbing ladders, scaffolds, or poles?" at 35, "How much does this job require kneeling, crouching, stooping or crawling?" at 25 and "How much does this job require bending or twisting your body?" at 20. At the hearing appellant contended that these numbers

represented the percentage of time a civil engineering technician would be required to perform each of the activities.

By decision dated June 16, 2004, an Office hearing representative affirmed the October 16, 2003 wage-earning capacity determination, finding that the medical restrictions set forth by Dr. Kimball on July 8, 2003 and by Dr. McDermott on September 8, 2003 showed appellant was medically capable of performing the position of civil engineering technician.

### **LEGAL PRECEDENT**

Once the Office 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>7</sup> 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 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 injury, his degree of physical impairment, his usual employment, his age, his 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.<sup>8</sup> If the employee has no actual earnings, the Office uses these factors to select a position which represents his or her wage-earning capacity.<sup>9</sup>

Section 10.520 of the Office's regulations, titled "How does [the Office] determine compensation after an employee completes a vocational rehabilitation program?" states:

"After completion of a vocational rehabilitation program, [the Office] may adjust compensation to reflect the injured worker's wage-earning capacity. Actual earnings will be used if they fairly and reasonably reflect the earning capacity. The position determined to be the goal of a training plan is assumed to represent the employee's earning capacity if it is suitable and performed in sufficient numbers so as to be reasonably available, whether or not the employee is placed in such a position."<sup>10</sup>

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 postinjury or subsequently acquired conditions. 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

---

<sup>7</sup> *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>8</sup> 5 U.S.C. § 8115(a).

<sup>9</sup> 20 C.F.R. § 10.403(a).

<sup>10</sup> 20 C.F.R. § 10.520.

employment injury and for which appellant may receive compensation.<sup>11</sup> However, if there is no medical evidence establishing that the claimant had any physical restrictions as a result of any of these additional conditions and no explanation why these conditions would prevent him or her from performing the duties of the selected position, the Office need not consider the preexisting conditions.<sup>12</sup>

### ANALYSIS

Due to his employment injury to his right knee, appellant was unable to return to work in his position of maintenance mechanic leader. The Office sponsored appellant's training at Cape Cod Community College, resulting in his obtaining an associate's degree in environmental technology.

The Board finds that there is an unresolved conflict of medical opinion on the question of whether appellant is physically capable of performing the duties of the position of civil engineering technician. Appellant's attending osteopath, Dr. McDermott, indicated in a September 8, 2003 report that appellant could work only four to six hours per day. In a July 8, 2003 report, Dr. Kimball, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, indicated that appellant could work eight hours per day. The other restrictions set forth by both these physicians would not preclude appellant from performing the light duties of the position of civil engineering technician.<sup>13</sup>

The Board also finds that the Office should also consider impairments resulting from appellant's preexisting conditions. In a March 17, 2004 report, Dr. McDermott stated that appellant's degenerative joint disease of the lumbar spine resulting in low back pain prevented him from sitting or standing for a prolonged period, and that his depression and post-traumatic disorder resulted in poor ability to concentrate for long periods of time. As there is medical evidence that these conditions impair appellant's ability to work, the Office should determine whether they preexisted his April 17, 1997 employment injury and, if so, have the medical specialist address whether they impact his wage-earning capacity.

### CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation. The case will be remanded to the Office for further development of the medical evidence and for referral to an impartial medical specialist to resolve the conflict of medical opinion.

---

<sup>11</sup> *John D. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 03-2281, issued April 8, 2004).

<sup>12</sup> *Darletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003).

<sup>13</sup> With respect to the evaluation of the medical evidence, section 8123(a) of the Act provides in pertinent part: "If there is a 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." 5 U.S.C. § 8123(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 16, 2004 and October 16, 2003 decisions of the Office of Workers' Compensation Programs are reversed. The case is remanded to the Office for action consistent with this decision of the Board, to be followed by an appropriate decision on appellant's loss of wage-earning capacity.

Issued: April 20, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member