



Appellant stopped working on October 22, 1994 and received continuation of pay from that date until December 4, 1994. On December 4, 1994 the Office began paying compensation for temporary total disability. He returned to work for a few days in January and February 1995, but has not worked since March 1, 1995.

In a medical report dated February 26, 1996, Dr. Thomas P. Perone, appellant's treating Board-certified neurosurgeon, noted that appellant still complained of pain in his neck. He noted that he still had some limitation of motion of his cervical spine but had intact strength and symmetrical reflexes. Dr. Perone noted that appellant had reached maximum medical improvement. He indicated that appellant could be returned to work with restrictions unless there was a psychological reason why he could not return to work. In a medical report dated August 8, 1996, Dr. Perone set forth more detailed restrictions for appellant's return to work, indicating that he could work four hours per day with no overhead work or lifting over 25 pounds.

On March 5, 1997 an Office rehabilitation specialist provided job descriptions of positions that appellant was capable of performing, including that of order clerk.<sup>1</sup> This position has a specific vocational preparation of three to six months, is considered a light-duty position, and has an hourly pay rate of \$8.85. She further noted that the position was being performed in sufficient numbers to make it reasonably available in appellant's commuting area.

By letter dated July 15, 1998, the Office proposed reducing appellant's compensation to reflect the fact that he had the capacity to earn wages as an order clerk at the rate of \$177.00 per week. In response, appellant stated that he disagreed with the proposal because of his feelings about the employing establishment and indicated that he would not want to place anyone or himself in jeopardy. By decision dated August 31, 1998, the Office reduced appellant's compensation effective September 13, 1998 based on his capacity to earn wages as an order clerk for 20 hours per week. On September 29, 1998 appellant requested review of the written record. By decision dated March 11, 1999, the hearing representative affirmed the Office's decision.

On December 2, 1999 Dr. Randall D. Lea, a Board-certified orthopedic surgeon, performed a fitness-for-duty evaluation for the employing establishment, and stated that appellant did not have many objective findings of the cervical spine but that the diagnostic studies offer the reason for his neck discomfort. Dr. Lea concluded that appellant could perform medium duty with lifting of 20 to 35 pounds for eight hours per day. In a medical report dated January 20, 2000, Dr. Perone indicated that he believed that appellant could work eight hours a day with restrictions.

Appellant's social security records covering the period January 1997 through December 1999 indicate that appellant had no earnings reported.

On May 8, 2002 appellant's application for disability retirement was approved. However, in October 2002 appellant elected to be transferred from retirement back to compensation benefits.

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<sup>1</sup> Department of Labor's *Dictionary of Occupational Titles* No. 219.367.030.

At the request of the Office, Dr. Jorge E. Isaza, a Board-certified orthopedic surgeon, gave an updated medical opinion on appellant's condition by letter dated April 30, 2004. He noted that appellant had decreased range of motion and decreased sensation in the upper extremity on examination. He recommended continued conservative treatment.

In a decision dated June 8, 2004, the Office indicated that appellant was recently employed as an order clerk for the employing establishment with wages of \$177.00 per week, that this employment was effective July 14, 1998 and that the position fairly and reasonably represented appellant's wage-earning capacity. The Office noted that appellant was working full time at the time of his injury but currently is only capable of part-time employment. Therefore, appellant's entitlement to compensation would be reduced effective July 14, 1998. The Office further noted that appellant was entitled to compensation from May 19, 2002 to present based on actual earnings at the compensation level provided. The Office noted that appellant's entitlement to medical benefits continued.

### **LEGAL PRECEDENT**

Under section 8115 of the Federal Employees' Compensation Act,<sup>2</sup> 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, appellant's 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 appellant's wage-earning capacity in his disabled condition.<sup>3</sup> Once loss of wage-earning capacity is determined, a modification of such 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.<sup>4</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>5</sup>

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<sup>2</sup> 5 U.S.C. § 8115.

<sup>3</sup> See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a). Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. 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. *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

<sup>4</sup> *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

<sup>5</sup> *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

### ANALYSIS

In the present case, the Office issued a loss of wage-earning capacity decision on August 31, 1998 finding that appellant had the capacity to earn wages as an order clerk for 20 hours per week effective September 13, 1998.<sup>6</sup> The Board notes that this was a constructed position, not one that appellant was performing at that time or at any time. Appellant has had no actual earnings since March 1, 1995.

The record does not explain why the Office issued its June 8, 2004 loss of wage-earning capacity decision. As this decision found that appellant had exactly the same capacity to earn wages, \$177.00 per week, as the August 31, 1998 loss of wage-earning capacity decision, the Board finds that the June 8, 2004 decision had no practical effect, other than to move the beginning date of compensation for loss of wage-earning capacity back two months, from July 14 to September 13, 1998. The Office did not even attempt to show in the June 8, 2004 decision that any of the criteria for modifying an existing loss of wage-earning capacity were met. For this reason alone, the June 8, 2004 decision must be reversed. It also must be reversed because it is based on an erroneous finding that appellant had actual earnings as an order clerk.

### CONCLUSION

The Board finds that the Office did not meet its burden of proof to modify its determination of appellant's loss of wage-earning capacity.

### ORDER

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 8, 2004 is reversed.

Issued: July 6, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>6</sup> The Board does not have jurisdiction to review this decision on appeal, as it was issued more than one year before the present appeal was filed.