

On September 16, 2002 appellant filed a claim for a recurrence of the September 13, 2000 injury commencing September 12, 2002. The Office accepted the claim for recurrence on October 28, 2002.

On October 7, 2002 Dr. Steven J. Lancaster, appellant's treating Board-certified orthopedic surgeon, listed his impression as status post left knee partial medial meniscectomy and chondroplasty and micropicking procedure and moderately severe degenerative joint disease of the left knee. Dr. Lancaster indicated that appellant was unable to return to his previous occupation and would be at permanent total disability for that work. However, he did state that appellant could work in a sit-down position with some brief periods of standing and walking.

Appellant was referred to vocational rehabilitation on January 22, 2003. Appellant underwent a vocational evaluation examination on April 9, 2003. On June 4, 2003 the vocational counselor recommended that appellant start a data entry and customer service program at Goodwill. The plan called for four months of training and two months of job search. However, appellant did not begin the training and did not contact the vocational rehabilitation counselor. The vocational counselor made repeated attempts to contact appellant. By letter dated August 18, 2003, the Office informed appellant that it had been advised that he had impeded the rehabilitation efforts and advised appellant of the consequences of failing to cooperate with the process.

In a medical report dated August 13, 2003, Dr. Lancaster indicated that appellant was scheduled for a total knee arthroplasty on October 7, 2003. He noted that appellant would be on total temporary disability for approximately four months after the surgery. In a September 8, 2003 report, Dr. Lancaster indicated that appellant was having significant problems with his right knee. Appellant elected to delay the surgery on his left knee which had been authorized and requested a right knee arthroscopy with partial medial meniscectomy. The vocational rehabilitation counselor attempted numerous times to contact appellant without success.

In a report dated September 29, 2003, Dr. Lancaster recommended that appellant have a right knee arthroscopy initially and following that consider the left knee arthroscopy. He stated that appellant's current work status was that he could work in a sit-down position that does not require standing or walking for periods of time. If he could not find a job within these limitations, Dr. Lancaster indicated that he would need to be off work until after the surgeries. He indicated that, if appellant was not going to have the surgeries, he would recommend placement in vocational rehabilitation.

In a report dated February 24, 2004, the vocational counselor indicated that he has had no contact with appellant since July 2003 despite numerous calls and letters requesting that appellant contact him.

By letter to appellant dated March 2, 2004, the Office explained the importance of cooperating with vocational rehabilitation and noted the penalties if appellant failed to do so. The Office directed appellant to contact the rehabilitation specialist every week.

By letter to appellant dated March 10, 2004, the Office advised appellant that he had impeded rehabilitation efforts and again listed the consequences of his failure to cooperate. Appellant was directed to contact his rehabilitation counselor within 30 days.

By decision dated April 19, 2004, the Office reduced appellant's compensation to zero for failure to cooperate with the vocational rehabilitation counselor.

Appellant then indicated his willingness to cooperate with the vocational plan, but the Goodwill training had ended. A comparable plan for training at Florida Community College was implemented. The customer assistance training was for a period of four to six months beginning May 10, 2004 and was to prepare appellant to work as a receptionist or information clerk at \$14,560.00 per year. The Office approved this training program. Appellant's compensation was reinstated after he began cooperation with the vocational counselor.

In a letter from the Office dated June 1, 2004, appellant was informed that he was expected to cooperate fully with the rehabilitation plan, and that, after completion of the training, he would be provided 90 days of placement services. The Office informed appellant that, based on a survey of the local labor market, appellant would have a wage-earning capacity of \$14,560.00 per year at the end of the rehabilitation program.

In a July 16, 2004 report, Dr. Lancaster indicated that, without surgical intervention, he is unable to help appellant.

In a letter to appellant dated September 24, 2004, the vocational rehabilitation counselor indicated that he had not been contacted by appellant since July 14, 2004 and that he was requesting that appellant contact him at the earliest possible opportunity. Appellant's training was extended through December 2004 in order for appellant to enhance his skills. Ninety days were authorized for appellant's job search starting January 3, 2005.

The vocational rehabilitation counselor submitted a job description for receptionist. The description noted that the incumbent will receive callers at the employing establishment and direct callers to their destination and record messages. A receptionist may perform a variety of clerical duties, may collect and distribute mail and messages and may make appointments and answer inquiries. The occupational requirements called for frequent reaching, handling, talking, hearing and occasional fingering. The job is described as sedentary with lifting, carrying, pushing and pulling 10 pounds occasionally. The position involved mostly sitting but may involve standing or walking for brief periods of time.

On April 4, 2005 the vocational rehabilitation specialist indicated that in Jacksonville, Mississippi and Duval County there are 199 annual vacancies for "receptionists" earning at least \$7.25 per hour (\$290.00 per week).

On May 20, 2005 the Office proposed to reduce appellant's compensation for wage loss due to injury as it determined that appellant had the capacity to earn wages as a receptionist at the rate of \$290.00 per week.

In a report dated June 1, 2005, Dr. Trave L. Brown, a Board-certified orthopedic surgeon, indicated that appellant's orthopedic diagnoses as of that date were bilateral degenerative arthritis of the knees and tear of left medial meniscus.

In a report dated June 10, 2005, Dr. Terry Kuhlwein, a Board-certified family practitioner, indicated that appellant had chronic right knee pain that awakened him. Appellant indicated to him that he also had symptoms in the left knee, but that apparently was not involved in the original injury. Appellant told Dr. Kuhlwein that he could not work.

In a report dated June 28, 2005, Dr. James W. Dyer, a Board-certified orthopedic surgeon, indicated that appellant has right knee medial meniscus tear and chondromalacia. He said that, based on the available information, impairment of the right lower extremity is zero percent.

On June 28, 2005 the Office finalized its proposed reduction in benefits. The Office found that the position of receptionist fairly and reasonably represented appellant's wage-earning capacity.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.²

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 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 her disabled condition.³

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

¹ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

² 20 C.F.R. §§ 10.402, 10.403.

³ 5 U.S.C. § 8115(a); *see Dorothy Lams*, 47 ECAB 584 (1996).

description of appellant's condition.⁴ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁵

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's *Directory of Occupational Titles* 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. Shadrick*⁶ and codified by regulation at 20 C.F.R. § 10.403⁷ should be applied. Subsection(d) of this regulations provides that the employees' 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.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 postinjury 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 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

The Office properly gave appellant notice of the proposed termination of benefits. However, the Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning position. This evidence must provide a detailed description of appellant's condition. None of the medical

⁴ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

⁸ 20 C.F.R. § 10.403(d).

⁹ See *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 18, 2004); *James Henderson, Jr.*, 51 ECAB 268 (2000).

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

evidence provides a detailed, well-rationalized opinion setting appellant's limitations. Dr. Lancaster submitted numerous progress notes and indicated in his September 29, 2003 note that appellant could work in a sit-down position that did not require standing or walking for periods of time. However, this report lacked the necessary detail from which the Office could properly set appellant's restrictions. Furthermore, the last report of Dr. Lancaster addresses appellant's restrictions is the September 29, 2003 report, which was almost two years prior to the reduction of benefits, effective June 28, 2005. As this was not a reasonably current report,¹¹ it therefore cannot form a valid basis for a loss of wage-earning capacity determination.¹² None of the other physicians provided any evaluation of appellant's work capacity. Accordingly, the Office has failed to meet its burden of proof that the constructed job of reception was within appellant's medical restrictions.

CONCLUSION

The Office improperly reduced appellant's compensation benefits on the grounds that he had the capacity to earn wages as a receptionist.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2005 is reversed.

Issued: February 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

¹¹ See *Carl Green*, *supra* note 5.

¹² See *e.g.*, *Keith Hanselman*, 42 ECAB 680, 687 (1991). (The Board notes that the medical report upon which the loss of wage-earning capacity determination was based was almost two years old when the Office issued its decision. Additionally, the relevant work restriction evaluation was over one year old, was not fully completed and did not list any current findings. The Board found that these reports could not form a valid basis for a loss of wage-earning capacity determination.)