

right knee.² The accepted conditions were later expanded to include cervical radiculopathy. Appellant stopped work on June 5, 2006 and did not return.

On February 2, 2010 appellant was referred to an OWCP-sponsored vocational rehabilitation program. Dr. Robert Wood, an attending Board-certified orthopedic surgeon, had indicated in a January 21, 2010 report that appellant was able to work eight hours per day performing sedentary duty with the need to “sit/stand at will.” Appellant was not successful in obtaining a job through vocational rehabilitation efforts.

In a March 6, 2011 report, Elaine Cogliano, appellant’s vocational rehabilitation counselor, indicated that he was vocationally and physically capable of earning wages in the selected position of operations manager.³ The duties of the position were sedentary in nature and required lifting up to 10 pounds. Ms. Cogliano stated that the position was reasonably available in appellant’s commuting area according to the State Employment and Training Office and that positions were also identified on the internet. According to the Occupational Outlook Handbook 2010, the operations manager position had a salary of \$1,480.00 per week. Ms. Cogliano noted that appellant had Bachelor of Arts and Masters of Business Administration degrees with 27 years of experience as an operations specialist in transportation. She also indicated that the Aramark company of Boston, MA, was looking to hire a senior operations manager and that the ideal candidate would have a Bachelor of Arts degree with more than five years in management.

In a March 11, 2011 form report, Dr. Wood indicated that appellant could work eight hours per day in “sedentary duty only.” He did not provide any other work restrictions on the form.

On May 12, 2011 OWCP advised appellant that it proposed to reduce his compensation to zero based on his ability to earn \$1,480.00 per week as an operations manager. It provided an extensive description of the operations manager position which was taken from the Department of Labor’s *Dictionary of Occupational Titles* (DOT). The position involved such duties as directing and coordinating activities of operations departments of air, motor, railroad or water transportation organizations, cooperating with management personnel in formulating administrative and operational policies and procedures and directing and coordinating activities of operations departments to obtain optimum use of equipment, facilities and personnel. Appellant was afforded 30 days to provide evidence or argument against the proposed reduction in his compensation.

In a June 3, 2011 letter, appellant challenged OWCP’s proposal to reduce his compensation. He asserted that the target positions were not suitable to his vocational skills and were not reasonably available, based on his experience seeking employment.

² In November 2006, appellant underwent surgical repair of his right meniscus tear. On January 21, 2009 he had right total knee arthroplasty and on July 31, 2009 he had surgical right knee manipulation. The procedures were authorized by OWCP.

³ The position was listed as “Manager, Operations.” On March 6, 2011 Ms. Cogliano also completed a report indicating that appellant could earn wages as a “Manager, Regional.” Her findings were verified by a vocational rehabilitation specialist.

In a June 15, 2011 decision, OWCP reduced appellant's compensation to zero effective June 5, 2011 based on his ability to earn wages in the selected position of operations manager. It found that he was physically and vocationally capable of earning wages as an operations manager. Appellant's arguments against the decision were found to be without merit. OWCP noted that the physical duties of the position were sedentary in nature and that they were in accordance with the restrictions provided by his attending physician. It indicated that his rehabilitation counselor had determined that he was vocationally capable of performing the position given his business degree and 27 years of experience in transportation operations.

Appellant disagreed with this decision and, through counsel, requested a hearing before an OWCP hearing representative. An oral hearing was scheduled for September 21, 2011 in Boston, MA and appellant requested that a subpoena be issued to compel Ms. Cogliano to attend the hearing and to compel the production of certain vocational rehabilitation documents. Appellant also asked for postponement of the hearing because he would be out of the country on the scheduled date.

In a letter dated September 8, 2011, appellant's request for subpoenas were denied by an OWCP hearing representative because appellant and counsel failed to explain why oral testimony would be the best or only method to obtain evidence from Ms. Cogliano. It was also noted that appellant had already submitted a Privacy Act request from counsel to OWCP's district Office for copies of records that were mentioned in the subpoena request.

In a separate letter of September 8, 2011, appellant was advised that his request to postpone the hearing could not be granted. He was offered the opportunity for appeal *via* a telephone hearing or a review of the written record by an OWCP hearing representative. Appellant chose to proceed *via* a review of the written record.

In a September 15, 2011 letter, counsel continued to argue that the operations manager position was not physically or vocationally suitable for appellant. He argued that appellant was not capable of working as an operations manager because Dr. Wood, his attending physician, had indicated on January 21, 2010 that he needed to be able to sit and stand at will. Counsel further argued that OWCP had not shown that the position was vocationally suitable as it had not provided an adequate description of the position's duties. He posited that Ms. Cogliano did not properly document that the position was reasonably available in appellant's commuting area. Counsel asserted that Ms. Cogliano's reference to a position at the Aramark company was improper because Aramark was a food-related business and appellant's experience was in the transportation industry.⁴

In a March 1, 2012 decision, an OWCP hearing representative affirmed OWCP's June 15, 2011 decision finding that appellant was physically and vocationally capable of performing the selected position of operations manager. The hearing representative addressed the concerns raised by counsel and also found that the denial of appellant's request for subpoenas to compel Ms. Cogliano's appearance at a hearing and to obtain certain vocational rehabilitation documents was not improper.

⁴ The record contains a description of the senior operations manager job opening at Aramark. The position involved overseeing a food products distribution center, which included coordinating the transportation of food products.

LEGAL PRECEDENT

Once OWCP 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.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

Under section 8115(a) of FECA, 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.⁷ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁸ 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.⁹ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹⁰

OWCP's procedure instructs that in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have provided this report. Included will be the corresponding job numbers from the DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.¹¹ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Albert C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹²

⁵ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁸ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁹ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

¹⁰ *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

¹² *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

ANALYSIS

OWCP accepted that on June 1, 2006 appellant sustained a tear of the horn of his right knee posterior meniscus and a sprain/strain of his right knee. The accepted conditions were later expanded to include cervical radiculopathy. Appellant stopped work on June 5, 2006 and did not return. On February 2, 2010 he was referred to an OWCP-sponsored vocational rehabilitation program. In a March 6, 2011 report, Ms. Cogliano, appellant's vocational rehabilitation counselor, indicated that he was vocationally and physically capable of earning wages in the selected position of operations manager.¹³ In a March 11, 2011 form report, Dr. Wood, an attending Board-certified orthopedic surgeon, indicated that appellant could work eight hours per day in "sedentary duty only." Dr. Wood did not provide any other work restrictions on the form.¹⁴

In this case, OWCP properly relied on the professional assessment of Ms. Cogliano, the vocational rehabilitation counselor when it determined that appellant could earn wages in the selected position of operations manager.¹⁵ The medical and vocational suitability of the position and the reasonable availability of the position within appellant's commuting area were sufficiently documented in the record.

Counsel argued that the selected position was not medically suitable for appellant as appellant's attending physician, Dr. Wood, had indicated that appellant required the ability to stand or sit at will. He indicated that the selected position was noted as sedentary, but that it was not clear that the position would allow appellant to stand or sit at will. Although Dr. Wood indicated in a January 21, 2010 report that appellant must "sit/stand at will," in a more recent report dated March 11, 2011 he altered appellant's restrictions to read "sedentary duty only" with no requirement to stand or sit at will. Therefore, the operations manager position was consistent with appellant's most recent work restrictions.

Counsel argued that the job leads provided by the vocational rehabilitation counselor were mostly positions that were not compatible with appellant's vocational experience. However, Ms. Cogliano provided a proper professional opinion that the selected assessment of operations manager was compatible with appellant's work experience, education and vocational

¹³ The duties of the position, which involved coordinating transportation operations, were sedentary in nature and required lifting up to 10 pounds. Ms. Cogliano stated that the position was reasonably available in appellant's commuting area according to the State Employment and Training Office and that positions were also identified on the internet. According to the Occupational Outlook Handbook 2010, the operations manager position had a salary of \$1,480.00 per week. She noted that appellant had Bachelor of Arts and Masters of Business Administration degrees with 27 years of experience as an operations specialist in transportation. Ms. Cogliano's findings were verified by a vocational rehabilitation specialist.

¹⁴ Dr. Wood had indicated in a January 21, 2010 report that appellant was able to work eight hours per day performing sedentary duty with the need to "sit/stand at will."

¹⁵ Moreover, Ms. Cogliano's opinion was verified by a vocational rehabilitation specialist.

ability. She noted that appellant had an advanced business degree and more than 27 years of experience in transportation operations.¹⁶

Although counsel argued that appellant was unable to secure an adequate number of interviews and/or was not employed in a target position during the vocational rehabilitation process, it is noted that these factors alone do not establish that a selected position is not reasonably available in appellant's commuting area.¹⁷ Ms. Cogliano provided confirmation that the position was reasonably available in appellant's commuting area and based this on information obtained from the State Employment and Training Office as well as an internet search of available position in appellant's commuting area.

Counsel argued that in *Ronald F. Kibbe*¹⁸ the Board found that inadequate documentation of the availability of the selected position in appellant's commuting area was a reversible error. In *Kibbe*, the Board found that there was no indication of any contact with the California State Employment Service and the contacts listed were not sufficiently identified to allow the Board to conclude that the position was reasonably available in appellant's commuting area. However, in the current case, the evidence supports that Ms. Cogliano, the vocational rehabilitation counselor, contacted the State Employment and Training Office and information was provided at that time to support the reasonable availability of the selected position within appellant's commuting area. Ms. Cogliano also cited additional sources to support that the selected job was reasonably available in appellant's commuting area.

For these reasons, OWCP properly reduced appellant's compensation effective June 5, 2011 based on the selected position of operations manager.¹⁹

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly adjusted appellant's compensation effective June 5, 2011 based on his ability to earn wages in the selected position of operations manager.

¹⁶ Counsel noted that he disagreed with that Ms. Cogliano's assessment that an opening for a position at Aramark was suitable for appellant. He has not adequately explained why such a position, which involved coordinating the transport of food products, could not be performed by appellant.

¹⁷ See *supra* note 10.

¹⁸ Docket No. 04-984 (issued May 20, 2005).

¹⁹ The Board also finds that an OWCP hearing representative properly denied appellant's request to subpoena Ms. Cogliano for the oral hearing and to subpoena various vocational rehabilitation documents. Section 8126 of FECA provides that the Secretary of Labor may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. 5 U.S.C. § 8126. Section 10.619 of the Code of Federal Regulations provides that a claimant may request a subpoena as part of the hearings process but that the decision to grant or deny the request is within the discretion of an OWCP hearing representative. The claimant's request must explain why the testimony is directly relevant to the issues at hand and why a subpoena is the best method to obtain such evidence considering the other possible means of obtaining it. 20 C.F.R. § 10.619. OWCP's hearing representative did not abuse his discretion in denying appellant's subpoena request in that he explained that appellant did not show that the documentation or witness testimony sought would be pertinent or that it could not be obtained by means other than the issuance of subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2012 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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