

acute reaction to stress, generalized anxiety disorder and prolonged depressive reaction.¹ Appellant was hired as a full-time temporary worker from April to October 2000 and stopped work on May 11, 2000 and did not return. His pay rate at the time of injury was \$225.00 per week. He received appropriate compensation benefits.

Appellant came under the treatment of Don Edward Miller, Ph.D., a clinical psychologist, who submitted reports dated September 4, 2001 through February 15, 2002. He provided a history of appellant's work-related injury and diagnosed generalized anxiety disorder, major depressive disorder, recurrent, severe without psychotic features and post-traumatic stress disorder. He advised that appellant was totally disabled from work at this time. In a report of June 4, 2002, he noted improvements in appellant's condition and recommended rehabilitation counseling.

On June 19, 2002 appellant was referred for rehabilitation counseling. A vocational assessment report dated August 16, 2002 revealed appellant's basic skills and learning ability at college level with an express interest in return to alternative civil service work or teaching. On October 23, 2002 a rehabilitation plan was prepared and approved by the rehabilitation counselor and appellant with the objective of obtaining a position as an administrative assistant or a customer service representative based on receiving software applications training.

In a letter dated November 13, 2002, the Office notified appellant that the rehabilitation plan was determined to be within his work limitations. The Office advised that the rehabilitation counselor's vocational evaluation and survey of the local labor market revealed a wage-earning capacity of \$20,500.00 per year. The Office further advised appellant that at the end of the rehabilitation program, it would reduce his wage-loss compensation.

In a rehabilitation report dated April 1, 2003, the counselor advised that appellant completed computer training on March 1, 2003 and commenced job placement services.

In a job classification statement dated June 18, 2003, the rehabilitation counselor noted the job description of a customer service representative, the wage of the position, and opined that such a position was reasonably available in appellant's commuting area.

Appellant submitted additional reports from Dr. Miller dated July 15, 2003 who noted that appellant successfully completed computer training and was searching for work.

On November 12, 2003 a rehabilitation counselor requested that Dr. Miller review a job analysis for an administrative assistant and customer service representative and comment on the suitability of the positions for appellant. In a work capacity evaluation dated November 15, 2003, Dr. Miller advised that he reviewed the job description for an administrative assistant and customer service representative and could see no reason why appellant could not perform either position. He recommended that appellant continue on his current medications.

¹ After initially finding that appellant was not entitled to wage-loss compensation, the Office found that appellant was entitled to monetary compensation subsequent to May 10, 2000.

In a closure memorandum dated January 23, 2004, the rehabilitation counselor advised that appellant received 90 days of job placement which ended June 18, 2003 but did not find employment. The counselor advised that an updated labor market survey revealed the market was favorable. The counselor further noted that appellant did not find employment because he did not follow through on all openings, did not register with an employment agency as recommended, and did not make personal employer contacts.

On March 11, 2004 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant was partially disabled and had the capacity to earn wages as a customer service representative at the rate of \$280.00 per week.

By decision dated April 21, 2004, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a customer service representative. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which he lived.

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.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 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.³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁴ 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.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation,

² *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

³ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *Id.*

education, age and prior experience. 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.

ANALYSIS

On October 23, 2002 the Office rehabilitation counselor determined that appellant was able to perform the positions of an administrative assistant and customer service representative. She determined that the positions were available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was \$280.00 per week. The rehabilitation counselor noted that there were administrative assistant and customer service representative jobs which were entry level and for which appellant met the requirements. She advised that there were no medical restrictions. The rehabilitation counselor provided a job description for the position of an entry-level administrative assistant and customer service representative. In a January 23, 2004 closure memorandum, the rehabilitation counselor advised that appellant received 90 days of job placement which ended June 18, 2003 and appellant did not find employment. The counselor advised that an updated labor market survey revealed the market remained favorable and that appellant did not find employment because he did not follow through on job openings.

The Office received a work capacity evaluation dated November 15, 2003 from Dr. Miller, appellant's attending physician, who reviewed the job descriptions for an administrative assistant and customer service representative and found no reason why appellant could not perform either position. His reports do not establish that appellant remains totally disabled or unable to do any work due to residuals of his accepted injuries of acute reactions to stress, generalized anxiety disorder and prolonged depressive reaction.

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.⁶

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, and age and employment qualifications, in determining that the position of customer service representative represented appellant's wage-earning capacity.⁷ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer service representative and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of customer service representative reflected appellant's wage-earning capacity effective April 18, 2004.

⁶ *Dorothy Jett*, 52 ECAB 246 (2001).

⁷ *See Clayton Varner*, 37 ECAB 248, 256 (1985).

CONCLUSION

The Board finds that the Office properly determined that the position of customer service representative reflects appellant's wage-earning capacity effective April 18, 2004, the date it reduced his compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated April 21, 2004 is hereby affirmed.

Issued: March 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member