

FACTUAL HISTORY

On December 10, 2002 appellant, then a 53-year-old casual mail handler, filed a traumatic injury claim alleging that, on that date, while manually pushing a “gaylord of mail,” he injured his left shoulder. The Office accepted appellant’s claim for a left shoulder strain. Appropriate medical and compensation benefits were paid. On May 25, 2004 appellant underwent approved surgery on his left shoulder.¹

In a work capacity evaluation dated January 5, 2005, appellant’s treating Board-certified orthopedic surgeon, Dr. Jon Warner, indicated that he was able to work eight hours a day. He placed limitations on appellant, stating that he could not perform any reaching, pushing, pulling, lifting or climbing.

In an August 8, 2005 report, appellant’s vocational rehabilitation counselor indicated that the position of research and communications specialist would be suitable for appellant. She indicated that the functions of this position incorporated planning and organizing a product release by targeting markets, creating print pieces using text, art and graphics. The position would require appellant to unify printed pieces, web presentation and media releases and integrate the research, design, distribution and production in a mix of marketing/public relations and artistic publications. The job was listed as sedentary and would not require climbing, balancing, stooping, kneeling, crouching or crawling. The vocational rehabilitation counselor indicated that appellant had worked in the field of marketing communications for well over 20 years and had a B.A. in Fine Arts. She indicated that appellant currently had the experience requirements but lacked the Master’s Degree that most employers require.² The counselor indicated that the position was available in sufficient numbers so as to make it reasonably available to appellant. Finally, she indicated that the weekly wage for the position was \$1,246.00.

On August 18, 2005 the Office issued a notice of proposed reduction finding that appellant was capable of working as a research and communications specialist at a salary of \$1,246.00 per week. The Office gave appellant 30 days to respond before the determination was finalized. By letter dated September 14, 2005, appellant responded and indicated that the combination of pain and pain medication has made it impossible for him to function properly as an employee.

By decision dated October 21, 2005, the Office finalized its proposed reduction of appellant’s compensation.

On November 16, 2005 appellant requested an oral hearing. The hearing was set for March 2, 2006 at 10:00 am. In a decision dated March 16, 2006, the Office found that, as

¹ Appellant underwent a left shoulder arthroscopy, extensive debridement of the glenohumeral joint, left shoulder capsular release and left shoulder subacromial decompression.

² In her August 5, 2005 progress report, the vocational rehabilitation counselor indicated that many of the job postings specifically required a Master’s Degree. She noted that, although appellant had extensive experience and success as a marketing communications manager, he did not have a Master’s Degree.

appellant did not appear at the hearing and did not provide an explanation, he had abandoned his request for a hearing.

LEGAL PRECEDENT -- ISSUE 1

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.³

Under section 8115(a) of the Federal Employees' Compensation Act⁴ titled *Determination of Wage-Earning Capacity* states in pertinent part: In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ 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.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ 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.⁸ In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available in the open labor market.⁹

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 the employee's capabilities with regard to his physical limitation, 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.¹⁰ Finally, the application of the principles set

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M Gardner*, 36 ECAB 238, 241 (1984).

⁴ 5 U.S.C. § 8115.

⁵ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁶ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

⁹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁰ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

forth in *Albert C. Shadrick*, will result in the percentage of the employee's loss of wage-earning capacity.¹¹

ANALYSIS

The Office did not properly find that appellant was capable of successfully obtaining employment as a research and communications specialist. The position of research and communications specialist appears to be within appellant's medical restrictions as set forth by his attending physician, Dr. Warner, as it is a sedentary position. However, the Office never addressed the fact that appellant appears to lack the educational requirements to successfully compete for and obtain this type of position. As noted by the vocational rehabilitation counselor, most of the employers require that appellant have a Master's Degree. Although appellant has over 20 years work experience in the field of marketing communications and has a B.A. in Fine Arts, appellant does not have a Master's Degree. Without addressing this element in his educational background, the Office has failed to establish that appellant has the appropriate qualifications to compete for this position. Accordingly, the Office has failed to establish that the position of research and communication specialist represents appellant's wage-earning capacity.

CONCLUSION

The Office has not met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of research and communications specialist represents appellant's wage-earning capacity.¹²

¹¹ *Id.* See *Shadrick*, 5 ECAB 376 (1953).

¹² In light of this determination, the issue of whether appellant abandoned his request for a hearing is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2005 is reversed.

Issued: November 28, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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