

compensation and medical benefits. She returned to limited duties on August 14, 2004 but stopped work again on August 16, 2004. Appellant was eventually placed on the periodic rolls.

In an August 17, 2004 report, Dr. Dennis J. Kvidera, a Board-certified orthopedic surgeon and appellant's treating physician, advised that appellant was unable to return to her light-duty position because of her chronic right sternoclavicular joint subluxation/dislocation. He advised that any lifting and repetition of side-to-side motion, even with limited weight, would produce pain and discomfort. In an August 17, 2004 work capacity evaluation form, Dr. Kvidera indicated that appellant could work eight hours daily with permanent restrictions on reaching, reaching above the shoulder, twisting, bending/stooping, pushing, pulling, squatting, kneeling, climbing and operating motor vehicles at work. A five-pound restriction was placed on repetitive movements of her wrists and elbows.

On September 23, 2004 appellant was referred for vocational rehabilitation. As her employing establishment was unable to accommodate her restrictions, the Office approved additional vocational services for direct placement of appellant as an information clerk, alarm monitor, customer service representative or surveillance system monitor. The vocational rehabilitation counselor submitted CA-66 forms on the positions and noted that the jobs fell within the sedentary category and were within appellant's permanent work restrictions. Labor Market Research also reflected that there was an active labor market for those positions within appellant's commuting area. The position of surveillance systems monitor, Department of Labor, *Dictionary of Occupational Titles* (DOT) 379.367-010, had an estimated earning of \$360.00 per week.

Placement services were provided from February 28 to June 6, 2005 without success. In a June 24, 2005 report, appellant's vocational rehabilitation counselor closed appellant's case as no offers of employment had been received. The counselor opined that appellant was well suited for the identified positions based on her work history, transferable skills and current physical limitations and labor market surveys. The counselor noted that appellant was provided with a thorough evaluation and vocational assessments. Appellant was also provided with additional job leads, assistance with preparation of professional quality resume, sample cover letters, coaching in job search skills and interviewing skills.

On July 27, 2005 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a surveillance systems monitor at the rate of \$360.00 per week.¹ The constructed position was based upon appellant's experience, education, medical restrictions and a labor market study. Appellant was qualified for the position and sufficient positions were reasonably available in her commuting area. Utilizing the wage-earning capacity computation Form CA-816, the Office determined that appellant's compensation would be reduced to \$665.00 every four weeks. The Office indicated that her salary, when her injury occurred, was \$588.13 per week; that the current adjusted pay rate for appellant's job on the date of injury was \$611.61; and that she was capable of earning \$360.00 per week, the rate of the surveillance systems monitor. The Office determined that appellant had a 59 percent wage-earning capacity, which resulted in an adjusted

¹ The Office noted that the surveillance systems monitor position was selected as reaching was not a required function of the position and appellant was restricted from reaching above shoulder level with her right hand.

wage-earning capacity of \$347.00. The Office then determined that appellant had a loss of wage-earning capacity of \$241.13. The Office concluded that, based on a 66 and 2/3 percent rate, her new compensation rate was \$160.75 per week (adjusted by cost-of-living adjustments to \$166.25). The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

In an August 22, 2005 letter, appellant noted her disagreement with the proposed reduction of her compensation. She noted her concerns regarding medical treatment and vocational rehabilitation services and stated that she suffered depression as a result of her worsening physical condition and increased pain due to lack of medical care. With respect to the selected position, appellant alleged that she was never provided any job leads and the surveillance systems monitor position was beyond her physical requirements as it required repetitive reaching to push buttons and adjust monitor controls. She submitted additional medical evidence, which included chart notes from Dr. Thomas F. Schrattenholzer, a Board-certified anesthesiologist specializing in pain management, which documented ongoing treatment and contained an assessment of depression, as well as an August 22, 2005 letter from Dr. Robinann Cogburn, a clinical psychologist, which noted that she had evaluated appellant and her report would be sent to the North Portland Office of Vocational Rehabilitation Services.

Chart notes from Dr. Jeffrey R. Lyman, an orthopedic surgeon, dated March 22 to July 25, 2005 were provided. In an August 9, 2005 report, Dr. Lyman recommended that appellant discuss surgery options with a Dr. Thomas Ellis. He additionally stated that it was necessary for appellant to use narcotic pain medication to control her pain and she could not perform her assigned job duties while under such medication. In an August 18, 2005 report, Dr. Peter de Schweinitz, a Board-certified family practitioner, opined that appellant could perform any job with lifting no greater than five pounds and with no overhead work. Treatment reports were also provided.

By decision dated October 27, 2005, the Office finalized the reduction in appellant's compensation effective October 30, 2005, pursuant to 5 U.S.C. §§ 8105 and 8115, based on her ability to earn wages as a surveillance systems monitor in the amount of \$360.00 per week. The Office found that appellant did not submit evidence or argument sufficient to alter its recommendation to reduce her compensation benefits as proposed. It noted that the decision did not affect appellant's medical benefits, which remained open for coverage of treatment.²

On November 22, 2005 appellant requested a review of the written record. She advised that she was unable to perform the duties of a surveillance systems monitor. Appellant indicated that the job required her to be alert but stated that she was not alert while on pain medication and, without the pain medication, she was in too much pain to function. She also stated that her concentration was limited because of depression over the injury, inability to work, chronic pain syndrome and the employing establishment not authorizing the necessary medical treatment. Additional evidence, not previously of record, was also submitted. In an April 4, 2005 report, Dr. K. McAuliffe, a family practitioner, diagnosed a right sternoclavicular subluxation and recommended surgery to reconstruct the sternoclavicular joint. Limitations on lifting, carrying,

² It also stated that appellant's concerns regarding medical treatment and vocational rehabilitation services would be addressed in a separate letter. Such letter was dated November 21, 2005.

overhead reaching, reaching, pushing, pulling, prolonged standing, kneeling, crawling, squatting and climbing were provided. In a November 14, 2005 report, Dr. Jane Starbird, a licensed clinical psychologist, described appellant's complaints and beliefs. She recommended that appellant participate in counseling to manage her depression and her ability to cope with the pain. In a November 15, 2005 letter, a vocational rehabilitation counselor with the Oregon Department of Human Services noted a decline in appellant's functional abilities due to pain and physical debilitation. In a November 22, 2005 report, Dr. Schrattenholzer advised that appellant had debilitating chronic sternoclavicular pain from her work-related injury. He noted that appellant had concerns regarding diminished cognitive ability due to medication. Dr. Schrattenholzer recommended a formal physical and cognitive work capacity evaluation and opined, pending such evaluation, that appellant was not able to perform her basic job requirements. An April 2005 computer skills assessment was provided. The evaluator felt that appellant would have no problems absorbing the basic computer concepts of Word and Excel, and provided a list of recommended courses if she decided to pursue that direction.

In a November 30, 2005 letter, appellant questioned the medical referrals and other administrative matters pertaining to her case.³ In a December 9, 2005 report, Dr. Schrattenholzer noted that appellant had difficulty concentrating when she was not on pain medication and that she was sleepy to the degree that she had difficulty concentrating when she was taking pain medication. He recommended a functional capacities evaluation and advised that he would generate a letter regarding appellant's specific problems with being a "monitor surveillance employee" secondary to her decreased ability to concentrate secondary to pain versus pain medication. In a January 17, 2006 report, Dr. Schrattenholzer provided an assessment of right sternoclavicular joint pain and depression. He noted that the results of the functional capacity evaluation had not yet been received.⁴

By decision dated March 28, 2006, an Office hearing representative affirmed the Office's October 27, 2005 decision.

On May 17, 2006 appellant requested reconsideration and argued that she was physically and mentally unable to work as a surveillance systems monitor. With her request, she submitted an April 17, 2006 report from Dr. Starbird diagnosing recurrent major depressive disorder. Dr. Starbird concluded that, because appellant reported no previous problems with depression, her poor mood was the result of the limitations she was experiencing. She further stated that her opinion on appellant's ability to work 40 hours a week as a surveillance systems monitor was based on appellant's demeanor and self-report of other limitations. Based on this, Dr. Starbird found that it "did not seem likely" that appellant was capable of performing such work. She deferred to appellant's medical doctor regarding appellant's physical limitations and problems with concentration. A March 3, 2006 physical capacity evaluation from Steve Davis, a physical therapist, was also provided. In an April 14, 2006 report, Dr. Schrattenholzer noted appellant's status and restrictions. In a May 12, 2006 report, he advised that radiological imaging and examination findings confirmed appellant's subluxed right sternoclavicular joint.

³ In a December 16, 2005 letter, the Office responded to appellant's concerns.

⁴ In a January 13, 2006 letter, appellant requested to change treating physicians from Dr. Lyman to Dr. Schrattenholzer.

Dr. Schrattenholzer advised that the joint was swollen and tender with limited range of motion that appeared to cause mild to moderate distress. He noted that appellant's pain was resistant to conservative therapy and that it was unlikely that she could be gainfully employed. Dr. Schrattenholzer advised that her ability to perform reaching, keyboarding, computer use and concentrate was significantly impaired, noting that these tasks might be involved in surveillance system monitoring. Appellant advised that her concentration and alertness were limited due to pain from the work injury or sedative effects of pain medication. Dr. Schrattenholzer recommended that appellant be seen by an expert in subluxed sternoclavicular joints and undergo ongoing treatment and therapy.

By decision dated October 26, 2006, the Office denied modification of the March 28, 2006 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ 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.⁶

Section 8115 of the Act⁷ and Office regulations provide that 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 the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.⁸

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.⁹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

⁶ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 6.

⁹ *William H. Woods*, 51 ECAB 619 (2000).

¹⁰ *John D. Jackson*, *supra* note 6.

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 for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, 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.¹¹ Finally, application of the principles set forth in *Albert C. Shadrick*¹² will result in the percentage of the employee's loss of wage-earning capacity.¹³

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 impairment results from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. 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.¹⁴

ANALYSIS -- ISSUE 1

Dr. Kvidera's August 17, 2004 report and work capacity evaluation established that appellant was no longer totally disabled and could perform sedentary work. As appellant was unable to obtain employment through vocational rehabilitation efforts, the Office determined that the constructed position of surveillance system monitor represented her wage-earning capacity. The constructed position was identified as sedentary and did not require reaching as a required function of the position. It also conformed to Dr. Kvidera's recommended restrictions. The weight of the medical evidence is represented by Dr. Kvidera's reports, which found that appellant could perform sedentary work.

Other evidence received prior to the reduction of compensation does not indicate that the constructed surveillance systems monitor position was not medically or vocationally suitable. While the reports from Dr. Cogburn and Dr. Lyman indicate that appellant was still undergoing treatment for her work-related condition, was using narcotic pain medicine, and was depressed, they fail to specifically address whether the position of sedentary surveillance system monitor

¹¹ *James M. Frasher, supra* note 5.

¹² 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

¹³ *James M. Frasher, supra* note 5.

¹⁴ *John D. Jackson, supra* note 6.

was unsuitable or address appellant's work capacity.¹⁵ In his August 9, 2005 letter, Dr. Lyman stated that it was not possible for appellant to perform her "assigned job duties" while using narcotic pain medicine. However, his report is of diminished probative value as he fails to identify what is meant by "assigned job duties" or indicate that he was aware of the duties of a surveillance system monitor. Dr. Lyman's report fails to contain a rationalized medical opinion explaining how appellant's employment-related injury prevented her from performing the position surveillance system monitor. Dr. de Schweinitz opined that appellant was capable of work with limitations on lifting and overhead work. His report does not establish that the constructed position is not medically or vocationally suitable.

The medical evidence, therefore, established that appellant was physically capable of performing the surveillance system monitor position.

Appellant's vocational rehabilitation counselor determined that she was able to perform the position of surveillance system monitor. She opined that, based on her experience, education, medical restrictions and a labor market survey, appellant was well qualified for the position of surveillance system monitor and that sufficient positions were reasonably available in her commuting area.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the surveillance system monitor position represented appellant's wage-earning capacity.¹⁶ The weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the duties of surveillance system monitor and that such a position was reasonably available within the general labor market of her commuting area.

The Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in the *Shadrick* decision,¹⁷ and codified at 20 C.F.R. § 10.403. It calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.¹⁸ The Office noted that her salary when her injury occurred was \$588.13 per week; that the current adjusted pay rate for her job on the date of injury was \$611.61 and that she was currently capable of earning \$360.00 per week, the rate of the surveillance systems monitor. It then determined that appellant had a 59 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$347.00. The Office then determined that appellant had a loss of wage-earning capacity of \$241.13. It concluded that, based on a 66 and 2/3 percent rate, appellant's new compensation rate was \$160.75 per week (adjusted by cost-of-living adjustments to \$166.25). The Board finds that the

¹⁵ There is no evidence of record indicating that appellant's newly alleged impairments or conditions were injury related or a preexisting condition. Any incapacity to perform the duties of a selected position resulting from subsequently acquired conditions are immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. See *John D. Jackson, supra* note 6.

¹⁶ *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹⁷ *Albert C. Shadrick, supra* note 12.

¹⁸ 20 C.F.R. § 10.403(c).

Office correctly applied the *Shadrick* formula and, therefore, properly found that the position of surveillance systems monitor reflected appellant's wage-earning capacity effective October 30, 2005.¹⁹

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that actual earnings in employment or earnings in a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.²⁰

Once the wage-earning capacity of an injured employee 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.²¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²²

ANALYSIS -- ISSUE 2

The Board finds that appellant did not meet her burden of proof to modify the October 27, 2005 wage-earning capacity decision as the evidence does not show that the original determination was made in error or that there was a material change in her accepted condition.

The August 17, 2004 report of Dr. Kvidera, as noted, found that appellant could perform sedentary work eight hours a day with restrictions. The Office determined appellant's wage-earning capacity based on the constructed position of surveillance systems monitor.

Appellant has not submitted any evidence establishing a material change in the nature and extent of her employment-related right shoulder condition. The April 2005 computer skills assessment does not establish that the position of surveillance monitor was not vocationally suitable as it did not specifically address the constructed position and indicated that appellant could master basic computer concepts. The November 15, 2005 letter from a vocational rehabilitation counselor noted a decline in appellant's functional abilities due to pain and physical debilitation. However, she did not specifically address the vocational reasons why appellant could not perform the constructed position but instead questioned appellant's medical and psychological ability to perform the position. To the extent that the counselor rendered a medical opinion, she is not a qualified physician under the Act, such that her opinion is of no

¹⁹ *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

²⁰ *See Sharon C. Clement*, 55 ECAB 552 (2004).

²¹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²² *Id.*

probative value.²³ Thus, the April 2005 computer skills assessment and the November 15, 2005 letter from the vocational rehabilitation counselor do not establish that the position of surveillance monitor was not medically or vocationally suitable.

Appellant also provided reports from Dr. McAuliffe, Dr. Schrattenholzer and Dr. Starbird. However, such reports do not establish that the constructed position is not medically or vocationally suitable. While Dr. McAuliffe recommended surgery for the sternoclavicular joint in his April 4, 2005 report, he did not discuss appellant's ability to perform the position of surveillance monitor. Thus, his report is insufficient to establish that the constructed position is not medically or vocationally suitable.

Several of Dr. Schrattenholzer's chart notes and reports state that appellant has diminished cognitive ability due to pain and pain medication. However, they contain no discussion on appellant's work capabilities or her ability to perform the surveillance monitor position. While Dr. Schrattenholzer opined in his November 22, 2005 report that appellant may not be able to perform her "basic job requirement" pending a work capacity evaluation, he did not indicate whether he reviewed a description of the constructed surveillance monitor position, nor did he identify the job requirements that appellant could not perform or otherwise explain why her diminished cognitive ability prevented her from performing the surveillance monitor position. In his December 9, 2005 report, Dr. Schrattenholzer recommended a functional capacity evaluation but he did not provide any medical rationale explaining appellant's inability to perform the selected position. In his April 14, 2006 report, Dr. Schrattenholzer provided restrictions but provided no medical rationale on whether appellant would be precluded from performing the constructed position. In his May 12, 2006 report, he noted appellant's assertions of her inability to work but he did not provide his own detailed medical rationale, based on his examination, regarding how the employment-related shoulder condition or any preexisting condition prevented appellant from performing the duties of the constructed position. Dr. Schrattenholzer also stated that he was not qualified to provide psychologic or cognitive evaluations. Consequently, his reports do not establish that the constructed position is not medically or vocationally suitable.

In her November 14, 2005 report, Dr. Starbird failed to indicate that there was a causal relationship between her diagnosed depression and the accepted work injury. Further, she did not discuss whether appellant's employment-related condition prevented her from performing the duties of the constructed position. In her April 17, 2006 report, Dr. Starbird stated that appellant's ability to work as a surveillance systems monitor would rely on her demeanor and her self-report of other limitations. However, she did not attribute with medical rationale appellant's psychiatric condition to her accepted employment-related injury nor did she address her specific ability to perform the constructed position of surveillance systems monitor. Dr. Starbird specifically stated that she had no medical understanding of appellant's injury or how limiting it may or may not be. Moreover, as the Office never accepted that appellant sustained a psychiatric condition as a result of her work-related injury, the burden of proof is on appellant to establish

²³ See generally 5 U.S.C. § 8101(2); see also *Ricky S. Storms*, 52 ECAB 349 (2001). Likewise, a Mr. Davis' March 3, 2006 physical capacity evaluation has no probative value as medical evidence as Mr. Davis, a physical therapist, is not a physician.

such a causal nexus.²⁴ The Board finds that there is no medical evidence to support such a conclusion.

The Board finds that there is no medical evidence which establishes a change in appellant's employment-related shoulder condition such that a modification of the Office's loss of wage-earning capacity determination would be warranted. The evidence from Dr. McAuliffe, Dr. Schrattenholzer and Dr. Starbird does not indicate that the position of surveillance systems monitor was unacceptable. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that she had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous. Consequently, she had failed to carry her burden of proof to establish modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective October 30, 2005 based on its determination that the constructed position of surveillance systems monitor represented her wage-earning capacity. The Board further finds that appellant has failed to establish a basis for modification of the October 27, 2005 wage-earning capacity rating as a surveillance systems monitor.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated October 26 and March 28, 2006 are affirmed.

Issued: August 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²⁴ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).