

**United States Department of Labor  
Employees' Compensation Appeals Board**

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C.T., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**U.S. COAST GUARD ACADEMY,** )  
**New London, CT, Employer** )

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**Docket No. 06-1599**  
**Issued: March 12, 2007**

*Appearances:*

*Karl H. Goodman, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 5, 2006 appellant timely appealed the January 23 and June 5, 2006 merit decisions of the Office of Workers' Compensation Programs which determined his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether the constructed position of construction inspector represents appellant's wage-earning capacity; and (2) whether he established a basis for modification of the Office's January 23, 2006 wage-earning capacity determination.

**FACTUAL HISTORY**

Appellant, a 51-year-old former electrician, injured his right wrist at work on November 10, 1999. The Office accepted the claim for right wrist sprain and contusion and later accepted a scapholunate ligament tear. Appellant's right wrist ligament tear was surgically

repaired on May 4, 2000. He underwent a second Office-approved surgery on August 1, 2000 which involved the removal of hardware from the right wrist.

After his November 1999 injury, appellant relocated from Connecticut to Maryland. On October 22, 2001 he returned to work in a limited-duty capacity at the Coast Guard Yard in Baltimore, MD. Effective August 2, 2002, the employing establishment removed appellant from service because it was unable to accommodate his physical restrictions on a permanent or long-term basis. Appellant subsequently filed a claim for wage-loss compensation. The Office placed him on the periodic compensation rolls and paid appropriate wage-loss compensation.

In November 2004, the Office requested an updated medical assessment regarding appellant's condition. Dr. Terrence M. O'Donovan, a Board-certified orthopedic surgeon, submitted a January 28, 2005 work capacity evaluation (Form OWCP-5c).<sup>1</sup> He advised that appellant had reached maximum medical improvement and that his restrictions were permanent in nature. Appellant could work part time, four to six hours per day at light duty, with limited repetitive wrist movements of four to six hours. Dr. O'Donovan also indicated that he could lift four to six hours per day with a 20-pound limitation.

Based on Dr. O'Donovan's work restrictions, the Office referred appellant for vocational rehabilitation in February 2005. A rehabilitation plan was developed with the objective of securing new employment as either a construction inspector or electrician supervisor. Appellant agreed to the plan on August 7, 2005 and the Office gave its approval on August 10, 2005. The plan included job placement assistance through November 9, 2005.

Appellant relocated to South Florida in mid September 2005. He maintained regular contact with his rehabilitation counselor and continued to pursue employment opportunities. Appellant's rehabilitation counselor recommended that the Office facilitate his employment search in Florida and made at least one call to a potential employer located in Florida on appellant's behalf. However, on October 13, 2005 the Office's rehabilitation specialist decided against providing appellant job placement assistance in Florida. He advised that placement efforts should continue to focus on available positions in the Baltimore metropolitan area.

By mid November 2005, appellant had not secured employment and the Office concluded its vocational rehabilitation efforts. The Office's rehabilitation specialist recommended that the Office determine appellant's wage-earning capacity based on the previously identified positions of construction inspector and electrician supervisor.

On January 23, 2006 the Office determined that the constructed position of construction inspector, with full-time weekly wages of \$270.00, represented appellant's wage-earning capacity.<sup>2</sup> The Office reduced appellant's wage-loss compensation effective January 22, 2006.

Appellant requested modification of the wage-earning capacity determination on March 15, 2006. In support of his request, he submitted a February 14, 2006 psychological

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<sup>1</sup> Dr. O'Donovan performed both right wrist surgeries in 2000. He last examined appellant on January 19, 2005.

<sup>2</sup> The Office previously issued a notice of proposed reduction of compensation on December 1, 2005.

evaluation from Dr. Janet Anderson, a licensed psychologist, who diagnosed dysthymic disorder and bulimia nervosa.

By decision dated June 5, 2006, the Office denied modification of the prior wage-earning capacity determination.

### **LEGAL PRECEDENT**

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.<sup>3</sup> 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 to 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 wage-earning capacity in his or her disabled condition.<sup>4</sup>

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence the Office relies on must provide a detailed description of appellant's condition.<sup>5</sup> Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>6</sup>

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 *Dictionary of Occupational Titles*, or otherwise available in the open labor market, that fits the 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>7</sup>

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

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<sup>3</sup> 20 C.F.R. §§ 10.402, 10.403 (2006); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>4</sup> 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>5</sup> *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>6</sup> *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

<sup>7</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.<sup>8</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>9</sup>

### ANALYSIS

The Office bears the burden to justify modification or termination of benefits and the Board finds that the Office failed to meet its burden in the instant case.<sup>10</sup> The January 23, 2006 wage-earning capacity determination was premised on appellant's ability to work full time as a construction inspector. However, Dr. O'Donovan did not indicate that appellant was capable of working on a full-time basis. He advised that he could perform light-duty work, four to six hours per day. The position selected by the Office as a construction inspector full time and not supported by the medical evidence as being within appellant's physical restrictions. There is no medical evidence to establish that appellant has the physical capacity for full-time employment.

Moreover, the construction inspector position is not medically suitable because it requires occasional crawling and frequent handling and fingering. A job function is performed "occasionally" if the activity or condition exists up to one-third of the time. "Frequently" is defined as existing from one-third to two-thirds of the time. Dr. O'Donovan limited repetitive wrist movements and restricted appellant's lifting to 20 pounds. Given the limitations with respect to appellant's right wrist, it is not established that he would be able to crawl up to a third of the time and engage in frequent handling and fingering.<sup>11</sup>

### CONCLUSION

The Board finds that the Office improperly determined that the constructed position of construction inspector represented appellant's wage-earning capacity.<sup>12</sup>

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<sup>8</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. *James B. Christenson*, 47 ECAB 775, 778 (1996).

<sup>11</sup> Appellant also has a gross muscular deformity of the left hand and forearm secondary to childhood polio and related left upper extremity surgery.

<sup>12</sup> In light of the Board's disposition of the first issue on appeal, the second is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 23 and June 5, 2006 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: March 12, 2007  
Washington, DC

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

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

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