

attending physician, Dr. Alexander Kalenak, a Board-certified orthopedic surgeon, performed a second carpal tunnel release on July 31, 1998. The Office referred appellant for a second opinion evaluation with Dr. R.S. Mathew, a Board-certified orthopedic surgeon, who opined that appellant could consider returning to light work. The Office found a conflict of medical evidence and referred appellant to Dr. George Kent, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated June 16, 1999, Dr. Kent found that appellant was totally disabled due to her recurrent carpal tunnel syndrome.

In a report dated May 31, 2001, Dr. Jeffrey J. Backenstoos, an osteopath and appellant's physician, noted appellant's history of injury and diagnosed mild persistent right carpal tunnel syndrome "with a great deal of pain." He opined that appellant was totally disabled.

The Office referred appellant for a second opinion evaluation on October 29, 2003 with Dr. Perry Eagle, a Board-certified orthopedic surgeon. In a report dated November 18, 2003, Dr. Eagle noted appellant's history of injury and medical history. He completed a work capacity evaluation and found that she could work eight hours a day with restrictions.

The Office referred appellant for vocational rehabilitation counseling on December 9, 2003. The vocational rehabilitation counselor closed appellant's file on August 5, 2004 and opined that appellant was capable of performing the duties of a dispatcher which entailed reading and recording the coded signals received in the central station of an electrical protective signaling system. This position required sedentary physical demands lifting up to 10 pounds and the ability to reach, handle, finger, feel, talk, hear and see. The vocational rehabilitation counselor determined that this position was being performed in sufficient numbers within appellant's commuting area by contacting the State Employment Service.

Dr. Kalenak examined appellant on May 26, 2004 and July 20, 2004 and diagnosed bilateral carpal tunnel syndrome based on positive Tinel's sign bilaterally and atrophy of the thenar and hypothenar muscles. He noted that electromyography (EMG) and nerve conduction velocity testing were compatible with entrapment neuropathy along the median nerve bilaterally.

In a letter dated September 30, 2004, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a dispatcher. By decision dated March 10, 2005, the Office reduced appellant's compensation benefits based on her capacity to earn the wages of a dispatcher effective March 20, 2005.

Appellant requested a review of the written record on March 24, 2005. On July 20, 2005 the hearing representative set aside the Office's March 10, 2005 decision and remanded the case for referral to an impartial medical examiner to resolve the conflict in medical opinion between Drs. Backenstoos and Eagle.

The Office referred appellant for an impartial medical examination with Dr. Daniel P. Hely, a Board-certified orthopedic surgeon, on October 6, 2005. On October 14, 2005 Dr. Hely reviewed the statement of accepted facts and performed a physical examination. He reported that appellant had positive Phalen's test and negative Tinel's test over the carpal tunnel on the left and that both tests were positive on the right. Dr. Hely noted that appellant had limited two-point discrimination in both hands. He reviewed the physical requirements of a dispatcher and

opined that the position was within appellant's work abilities. Dr. Hely provided appellant's work restrictions indicating that she could work eight hours a day, sitting for eight hours, walking for six hours, standing for six hours and reaching for four hours as well as reaching above the shoulder for four hours. He stated that appellant could perform minimal repetitive movements of the wrist and elbow of up to 10 pounds. Dr. Hely found that appellant could push, pull and lift up to 10 pounds for one to two hours a day.

In a letter dated November 2, 2005, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a dispatcher. The Office stated, "Please note, this calculation is subject to change when we receive and review your employing agency's response to our request for the current pay rate for the job, grade and step you held on the date of injury, May 30, 1997." Appellant disagreed with this proposal on November 14, 2005 and alleged that she was unable to peel potatoes. She submitted reports dated May 24, July 26, October 18 and November 10, 2005 from Dr. Shirley Albano-Aluquin, a Board-certified rheumatologist, diagnosing fibromyalgia, osteoarthritis and carpal tunnel syndrome and opining that appellant was totally disabled due to active fibromyalgia and arthritis.

The Office requested a supplemental report from Dr. Hely on November 25, 2005 addressing whether appellant's alleged inability to peel potatoes had any effect on his opinion that she could perform the selected position of dispatcher. On January 3, 2005 Dr. Hely responded noting that the difficulty of peeling a potato resulted from the need for a "power grip and repetitive use of the hand and wrist." He stated that this task would be demanding for someone with appellant's condition. However, Dr. Hely concluded that the job of dispatcher did not require similar tasks and that appellant could function in this position without aggravating her condition.

By decision dated January 12, 2006, the Office determined that the position of dispatcher represented appellant's wage-earning capacity and reduced her compensation benefits effective February 19, 2006. The Office noted that the employing establishment had not yet provided appellant's pay rate information and that when that information was received, the necessary adjustments would be made to her compensation benefits. The Office calculated appellant's wage-earning capacity based on the January 1, 2005 pay rate for the job she held when injured of \$546.00 and concluded that she was entitled to compensation every four weeks in the amount of \$32.78. The Office requested updated pay rate from the employing establishment on January 12, 2006.

Dr. Hely submitted a report dated January 11, 2006 and stated that the normal tasks of the dispatcher position were well within appellant's abilities. He noted that while appellant was having difficulty peeling a potato, this was a forceful activity and such forceful activities were not required by the dispatcher position.

Appellant requested a review of the written record on February 6, 2006. She submitted an EMG study which revealed abnormal electrodiagnostic testing of the right upper extremity compatible with moderate carpal tunnel syndrome. In a report dated January 27, 2006, Dr. Albano-Aluquin diagnosed bilateral carpal tunnel syndrome as well as osteoarthritis, fibromyalgia, diabetes and depression. She stated, "There is no doubt in my mind that

[appellant's] current condition precludes her from getting any gainful employment at the present time.”

The Office issued an “Amended Reduction of Compensation” on May 11, 2006. The Office stated that the finding that appellant was capable of performing the position of dispatcher remained unchanged; however, it reduced her compensation benefits based on the current pay rate with locality pay for the Philadelphia area in appellant’s date-of-injury position at the appropriate grade and step appellant held at the time of her injury. This reduction was effective March 19, 2006. The Office listed appellant’s date-of-injury pay rate as \$418.40 and the rate of pay for that position effective January 2006 as \$610.06. The Office determined that appellant was entitled to compensation for a loss of wage-earning capacity of \$106.75 per week.¹

By decision dated July 24, 2006, the hearing representative affirmed the January 12, 2006 wage-earning capacity determination. Appellant requested review of this decision by the Board. In an Order Remanding Case dated March 13, 2007,² the Board remanded the case for the hearing representative to consider the May 11, 2006 amended decision of the Office. By final decision dated July 10, 2007, the hearing representative affirmed the January 12 and May 11, 2006 decisions finding that the Office had properly determined appellant’s ability to perform the duties of the selected position of dispatcher and that the current pay rate computed on May 11, 2006 was correct.³

LEGAL PRECEDENT

Under section 8115(a) of the Federal Employees’ Compensation Act,⁴ in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. Generally wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that 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 his or her wage-earning capacity, or if 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, his or her usual employment, age, qualifications

¹ The record indicates that appellant thanked the claims examiner for the additional compensation.

² Docket No. 06-1854 (issued March 13, 2007).

³ The hearing representative issued a similar decision on July 5, 2007 which contained a typographical error regarding the name of appellant’s physician, Dr. Albano-Aluquin. She corrected this error in the July 10, 2007 decision. Following the hearing representative’s July 10, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. §§ 8101-8193, § 8115(a).

⁵ *Selden H. Swartz*, 55 ECAB 272 (2004).

for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disability condition.⁶

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 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,⁷ and codified section 10.403(d) of the Office's regulations⁸ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

Appellant's attending physicians, Dr. Kalenak, a Board-certified orthopedic surgeon, and Dr. Blackenstoos, an osteopath, opined that appellant was totally disabled for work. The Office referred appellant to Dr. Eagle, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Eagle determined that appellant was capable of light-duty work with restrictions. To resolve this conflict of medical opinion evidence, the Office referred appellant to Dr. Hely, a Board-certified orthopedic surgeon.⁹

Dr. Hely based his report on the statement of accepted facts and his physical examination of appellant. He noted that she had continued signs and symptoms of carpal tunnel syndrome, but found that the selected position of dispatcher was within appellant's work abilities. Dr. Hely provided work restrictions which encompassed the duties of a dispatcher. In response to the Office's request for a supplemental report, he addressed appellant's concerns regarding her inability to peel potatoes and explained why this activity would be more challenging to appellant than the requirements of a dispatcher. It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.¹⁰ The Board finds that Dr. Hely's reports are entitled to special weight. He provided detailed physical findings and extensive review of appellant's physical abilities in

⁶ *Harley Sims, Jr.*, 56 ECAB 320, 323 (2005).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403(d).

⁹ The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. §§ 8101-8193, 8123. The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case. 20 C.F.R. § 10.321.

¹⁰ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

his reports. Dr. Hely reasoned that appellant was capable of performing the duties of a dispatcher despite her continuing medical residuals and work restrictions due to her accepted employment injury.

Following Dr. Hely's reports, appellant submitted a series of reports from Dr. Albano-Aluquin, a Board-certified rheumatologist, who diagnosed carpal tunnel syndrome as well as fibromyalgia and osteoarthritis. Dr. Albano-Aluquin opined that appellant was totally disabled due to the conditions of fibromyalgia and arthritis. These reports are not sufficient to overcome the special weight accorded Dr. Hely's reports or to create a new conflict. Dr. Albano-Aluquin did not opine that appellant was totally disabled due to the accepted condition of carpal tunnel syndrome and did not provide a detailed analysis of the tasks of dispatcher that appellant could not perform due to her accepted employment-related condition.

The Office properly determined that appellant was capable of work based on the reports of Dr. Hely, and properly relied upon the vocational rehabilitation counselor's determination that the position of dispatcher was within appellant's education, age and prior experience. The vocational rehabilitation counselor also determined that this position was reasonably available through contact with the state employment service. Finally, the Office properly determined appellant's percentage of wage-earning capacity based on the best available source of the current wages for her date-of-injury position.

CONCLUSION

The Board finds that the Office properly determined that the position of dispatcher represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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