

cyst and authorized a right carpal tunnel release, which was performed on July 21, 2004.¹ Appellant received compensation benefits for all periods of disability.

Appellant came under the treatment of Dr. Yoav Gershon, Board-certified in occupational medicine. In reports dated June 22 to September 13, 2004, Dr. Gershon provided a history of his work-related injury and diagnosed right wrist tendinitis, rule out carpal tunnel syndrome and right wrist ganglion cyst. He noted that appellant underwent right carpal tunnel release and excision of the right wrist dorsal ganglion cyst and was progressing well postoperatively. Dr. Gershon advised that appellant was totally disabled through October 3, 2004 and recommended use of a wrist splint at night. On November 5, 2004 he noted that appellant returned to work at modified duty and had an exacerbation of his condition when he slipped and fell at home, striking his left palm. Appellant was totally disabled from November 4 to 19, 2004.

On November 8, 2004 the Office referred appellant to its nurse intervention program for medical management services. The nurse noted that appellant was returned to work full-time limited duty on November 28, 2004. However, the employing establishment indicated that it could not accommodate appellant's restrictions long term. On November 29, 2004 the nurse filed a closure report.

On December 3, 2004 Dr. Gershon opined that appellant reached maximum medical improvement. Due to persistent pain in the right wrist, appellant was unable to resume his usual baggage screener duties. Dr. Gershon advised that appellant was permanently precluded from forceful grasping with the right hand, with a lifting restriction of 25 pounds. In a letter dated May 19, 2005, the employing establishment advised that it would be unable to accommodate appellant's medical restrictions. The Office reinstated appellant's wage-loss compensation beginning May 29, 2005.

On June 27, 2005 appellant was referred for vocational rehabilitation. In an October 18, 2005 plan, the rehabilitation counselor recommended a 90-day job placement effort. It was noted that appellant could work a sedentary position but was restricted from repetitive, forceful gripping and grasping activities with the upper right extremity in excess of 25 pounds and restricted from lifting in excess of 25 pounds. Appellant had a post-high school education and was employed for 20 years by a succession of private sector employers with job titles of computer systems operator and customer service engineer or programmer. The counselor noted the skills appellant possessed were not compatible with the needs and requirements of the current private sector technology marketplace and recommended short-term retraining so that he could learn clerical and office support skills. A rehabilitation plan was prepared and approved by the Office with the objective of obtaining an audit clerk or accounting clerk position based on Dr. Gershon's restrictions. The counselor noted that the annual salary was \$20,000.00. The rehabilitation counselor noted that the positions were reasonably available in appellant's commuting area and attached job classifications for both positions.

¹ On July 21, 2004 Dr. Caren R. Ires, a Board-certified orthopedist, performed a right carpal tunnel release and excision of right deep dorsal wrist mass and diagnosed right carpal tunnel syndrome and right deep dorsal wrist mass.

An electromyogram dated July 14, 2005 revealed no evidence of median neuropathy in the upper extremities and mild conduction slowing of the left ulnar motor nerve across the elbow segment.

On October 20, 2005 the Office notified appellant that the vocational rehabilitation plan was within his work limitations. It advised that, after the necessary training was completed, he would be provided with 90 days of placement services. The Office noted that at the end of the rehabilitation program, whether appellant was employed or not, it would reduce his compensation based on his wage-earning capacity. The record indicates that appellant completed a training course in the computerized office and accounting specialist program on January 17, 2006 and began pursuing a job search. In vocational rehabilitation reports dated May 4 and June 19, 2006, the rehabilitation counselor requested a 30-day placement extension which was approved.

Dr. Andrew Hsing-Yu Guo, Board-certified in occupational medicine, reported on February 21 and April 10, 2007 that appellant experienced reexacerbation of pain over the right volar wrist affecting all fingers. He diagnosed carpal tunnel syndrome. Dr. Hsing-Yu noted appellant's complaints of discomfort after completing physical therapy. He opined that appellant was permanent and stationary as of April 6, 2007 and could return to work under the existing physical restrictions. An accompanying April 6, 2007 work restriction summary noted that appellant was permanent and stationary but did not list any specific work restrictions.

In a July 13, 2007 closure memorandum, the rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for an audit clerk and that the position was vocationally appropriate and readily available in sufficient numbers both full and part time in appellant's commuting area. The rehabilitation counselor provided a job description for the position of an audit clerk DOT #210.382.010 at a weekly wage of \$420.00. Also submitted was the job classification for an audit clerk. The rehabilitation counselor noted that appellant participated actively in the training phase of his rehabilitation placement; however, he was somewhat selective as to the specific jobs he would consider. As the placement effort continued, appellant appeared to become less invested and the effort essentially timed out. The counselor noted that the selected position was sedentary, with lifting of no more than 10 pounds and consistent with the medical restrictions provided by Dr. Gershon.

On August 28, 2007 the Office issued a proposed reduction of compensation on the grounds that the evidence established that appellant was no longer totally disabled, but rather partially disabled and had the capacity to earn wages as an audit clerk at the rate of \$420.00 per week. It noted that this position was in compliance with Dr. Gershon's restrictions. Appellant did not respond to the proposed reduction of compensation.

By decision dated October 24, 2007, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as an audit clerk.

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,³ 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.⁴ 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.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ 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.⁷ In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.⁸

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, 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.⁹ Finally, application of the principles set forth

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

³ 5 U.S.C. § 8115.

⁴ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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

⁶ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁷ *Id.*

⁸ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁹ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

ANALYSIS

Appellant received compensation for total disability beginning in May 2005 when the employing establishment could no longer accommodate his work restrictions due to his accepted right arm condition. The Office received medical evidence from Dr. Gershon establishing that appellant could work with restrictions with no forceful right hand grasping or lifting more than 25 pounds. As the medical evidence demonstrated that appellant was not totally disabled for work, the Office referred him to a vocational rehabilitation counselor where he underwent a course of training and job placement assistance.

When job placement did not succeed, the Office rehabilitation counselor, determined that appellant was able to perform the position of an audit clerk. The rehabilitation counselor identified the position listed in the Department of Labor's *Dictionary of Occupational Titles*, DOT #210.382.010 and provided the required information concerning the position description, the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. The counselor determined that the audit clerk position conformed with appellant's background, education and experience. The rehabilitation counselor noted that the labor market survey revealed the market was favorable as the audit clerk position was readily available in sufficient numbers both full and part time in appellant's commuting area. The counselor noted that the average weekly wage of an audit clerk was \$420.00 with hiring occurring regularly. The position was sedentary in nature and consistent with appellant's medical restrictions as set forth by Dr. Gershon. The Board notes the sedentary duties of an audit clerk are within the restrictions set forth by Dr. Gershon. In a July 13, 2007 closure report, the rehabilitation counselor also advised that appellant received 90 days of job placement but did not find employment. The counselor advised that an updated labor market survey revealed that the market remained favorable but that appellant did not find employment because he was somewhat selective as to the specific jobs he would consider and as the placement effort continued he appeared to become less invested and the placement effort essentially timed out.

The Board notes that the reports from Dr. Hsing-Yu Guo noted treatment of appellant for an exacerbation of pain located over the volar right wrist affecting all fingers. Dr. Hsing-Yu Guo diagnosed carpal tunnel syndrome and recommended physical therapy. He opined that appellant was permanent and stationary as of April 6, 2007 and could return to work under the existing permanent and stationary restrictions. Dr. Hsing-Yu Guo did not find that appellant was totally disabled or unable to perform a sedentary position. His April 6, 2007 work restriction summary did not list any specific extra restrictions.

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 audit clerk represented appellant's

¹⁰ *Id.* See *Shadrick* at 5 ECAB 376 (1953).

wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of audit clerk 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 audit clerk reflected appellant's wage-earning capacity effective October 24, 2007. Because it followed proper procedures in determining appellant's loss of wage-earning capacity, the Office properly reduced appellant's compensation.

CONCLUSION

The Board finds that the Office properly determined that the position of audit clerk reflects appellant's wage-earning capacity effective October 24, 2007.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated October 24, 2007 is affirmed.

Issued: October 9, 2008
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