

bilateral carpal tunnel syndrome and authorized right carpal tunnel surgery. By letter dated January 18, 2002, it placed appellant on the periodic rolls for temporary total disability.

On July 26, 2002 the Office referred appellant for vocational rehabilitation services.

On July 26 and 27, 2005 the vocational rehabilitation counselor identified the position of social services aid as within appellant's knowledge, training and physical capabilities. The vocational rehabilitation counselor noted that appellant successfully completed his training program at Spokane Community College.

By decision dated November 7, 2005, the Office reduced appellant's wage-loss compensation based on his ability to earn \$346.25 a week as a social services aid. It noted that the decision did not affect his medical benefits, which remained open for coverage of treatment.

In an order dated June 14, 2006, the Board set aside the November 7, 2005 decision reducing appellant's wage-loss compensation and remanded the case to the Office. The Board found that the Office failed to consider all the relevant evidence at the time of its November 7, 2005 decision.

On February 20, 2007 the Office again advised appellant that it proposed to reduce his compensation because the medical and factual evidence of record established that he was no longer totally disabled. It found that he had the capacity to earn the wages of a residence counselor.

By decision dated March 26, 2007, the Office reduced appellant's wage-loss compensation based on his ability to earn \$318.00 a week as a residence counselor. It noted that the decision did not affect his medical benefits, which remained open for coverage of treatment.

On November 21, 2007 the Board remanded the case for further development of the evidence as the Office failed to consider appellant's preexisting conditions and any impact these conditions would have on his ability to work.

On December 17, 2007 the Office referred appellant for a second opinion evaluation with Dr. Eric Petrie to determine whether appellant's preexisting anxiety condition had any impact on appellant's ability to work. In a report dated January 26, 2008, Dr. Petrie diagnosed social anxiety disorder, panic disorder, claustrophobia and major depression in remission. He concluded that appellant was not partially or totally disabled due to his panic disorder.

In March 16, 2008 labor market survey, the rehabilitation counselor determined that appellant was capable of performing the duties of an eligibility worker for government programs. The duties of the position included determining whether individuals were eligible to "receive government assistance, such as welfare, unemployment benefits, Social Security benefits, and public housing." In reaching this conclusion, the rehabilitation counselor noted under special vocational preparation that appellant's 15 years of working as a licensed registered nurse "in a variety of nursing positions, including working in community mental health, behavioral health and home health, which demonstrate her transferable skills for this position." In the summary section, he stated that appellant was capable of performing the entry level duties of an eligibility worker as the position was sedentary in nature and in keeping with his physical limitations. The

rehabilitation counselor noted that appellant had vocational training as appellant “completed 18 months of a social services program at Spokane Falls Community College in 2005.” Under availability, he noted for the Spokane area there were nine annual projected job openings and two annual projected job openings for the Eastern Washington area.

On March 28, 2008 the Office advised appellant that it proposed to reduce his compensation because the medical and factual evidence of record established that he was no longer totally disabled. It found that he had the capacity to earn the wages of an eligibility worker. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

By decision dated April 28, 2008, the Office reduced appellant’s wage-loss compensation based on his ability to earn \$730.40 a week as an eligibility worker. It noted that the decision did not affect his medical benefits, which remained open for coverage of treatment.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.²

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 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 his wage-earning capacity in his disabled condition.³

The Office must initially determine appellant’s medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant’s condition.⁴ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁵

¹ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006).

² 20 C.F.R. §§ 10.402, 10.403.

³ 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB ____ (Docket No. 07-45, issued November 14, 2007); *T.O.*, 58 ECAB ____ (Docket No. 06-1458, issued February 20, 2007); *Dorothy Lams*, 47 ECAB 584 (1996).

⁴ *See William H. Woods*, 51 ECAB 619 (2000).

⁵ *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

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, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fit the employee's capabilities with regard to his 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*⁶ and codified by regulation at 20 C.F.R. § 10.403⁷ should be applied. Subsection(d) of the regulations provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by the Office, by the current pay rate for the job held at the time of the injury.⁸

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 impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post-injury or subsequently acquired conditions.⁹ 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. Additionally, 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.¹⁰

ANALYSIS

The Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome and placed him on the periodic rolls for temporary total disability by letter dated January 18, 2002. It reduced his compensation based on its finding that he had the capacity to earn wages in the constructed or selected position of eligibility worker.

The Board finds that the Office did not properly reduce appellant's compensation based on the position of eligibility worker.

Office procedures are clear in providing that a federal or other civil service position in which the claimant was not actually employed may not be used to make a loss of wage-earning determination based on a constructed position.¹¹ The position of eligibility worker for

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

⁸ 20 C.F.R. § 10.403(d).

⁹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁰ *Id.*

¹¹ See *Ann Rich*, 34 ECAB 277; *Rudy Solovic*, 28 ECAB 105 (1976); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

government programs is a state or government position as it concerns determining the eligibility of applicants for various government-sponsored programs. There is no evidence as to whether this position is available in the general labor market. The record shows that appellant currently does not hold and has never held a position in which he determined the eligibility of individuals for government assistance programs. Therefore, it was inappropriate for the Office to base appellant's wage-earning capacity on the constructed position of eligibility worker.

CONCLUSION

The Board finds that the Office did not meet its burden to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 28, 2008 is reversed.

Issued: March 3, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board