

lateral epicondylitis of the left elbow in 2000 and received appropriate medical and wage-loss compensation. On April 29, 2001 her claim for social security disability was approved.

Appellant was treated by Dr. Corey B. Lewis, a Board-certified internist. On February 15, 2005 Dr. Lewis diagnosed left carpal tunnel syndrome, left ulnar nerve palsy and bilateral lateral epicondylitis. Examination revealed decreased sensation to light touch in appellant's fingers with flexion of bilateral wrists, ongoing numbness in the left fourth and fifth fingers, decreased flexion and extension, diminished grip strength bilaterally and tenderness to palpation over the bilateral epicondyles. Dr. Lewis opined that she should be limited to work that would not involve prolonged, repetitive use of her arms and hands, but that she had no limitations on sitting, standing or walking.

In a report dated May 15, 2006, Dr. Gregory A. Doak, a Board-certified internist, diagnosed carpal tunnel syndrome, left ulnar nerve palsy and bilateral lateral epicondylitis and opined that appellant was totally disabled from work. He explained that his diagnosis was based on appellant's reports of past multiple evaluations and the eventual judgment that she was totally disabled. Dr. Doak stated that vocational rehabilitation would be unlikely to allow her to achieve return-to-work status "based upon the nature of her pain, tenderness in her elbows and forearms, inability to drive a car for any length of time and failure of previous programs."¹ In an accompanying work capacity evaluation, he related appellant's report that she had tried and failed to work even one-hour per day with restrictions. In response to a question as to when she would be able to return to full-time employment, Dr. Doak responded, "never."

The Office referred appellant, together with the entire medical record and a statement of accepted facts, to Dr. Edward J. Prostic, a Board-certified orthopedic surgeon, for a second opinion as to whether appellant was disabled as a result of her accepted condition and, if so, the degree of her disability and recommended work restrictions. In a May 14, 2007 report, Dr. Prostic provided a history of injury and treatment and findings on examination. He related appellant's complaints of continuing difficulties in both upper extremities, the left worse than the right, soreness in her wrists and shoulders and intermittent numbness and tingling to the left ring and little fingers. Examination of the right and left upper extremities revealed satisfactory alignment on both sides. There was no heat, swelling, erythema or atrophy noted on either side. There was full range of motion and good stability of all joints. No crepitus was noted at either shoulder, but there was significant discomfort when testing the left shoulder. The crossover and impingement signs were negative bilaterally. The biceps anchors appeared intact. There was mild weakness of the supraspinatus and of external rotation on the right, but no weakness of the supraspinatus and of external rotation on the left. The only clinical abnormality noted in the right elbow was tenderness, greater at the extensor supinator origin from the lateral epicondyle than about the extensor muscle wad five centimeter (cm) distally. In the left elbow, there was significant tenderness at the lateral epicondyle and lesser tenderness of the extensor supinator wad. Dr. Prostic found no clinical abnormality about the right wrist or hand, other than weakness of grip, which was a maximum of 19 kilogram (kg). Grip strength on the left was a maximum of 10 kg. Pinch strength was normal bilaterally. Two-point sensory discrimination was normal to all digits bilaterally. Provocative tests for thoracic outlet syndrome and carpal

¹ Dr. Doak's May 15, 2006 report did not contain examination findings.

tunnel syndrome were negative. Triggering was not exhibited. X-rays of the left shoulder revealed some acromioclavicular arthritis. Left elbow x-rays showed no abnormality.

Dr. Prostic diagnosed bilateral lateral epicondylitis, left worse than right. He stated that appellant also appeared to have rotator cuff dysfunction of her shoulders, again left worse than right and symptoms of ulnar nerve entrapment without objective findings. Dr. Prostic indicated that she probably had early stenosing tenosynovitis of the left thumb that occurred subsequent to the termination of her employment. He stated that the lateral epicondylitis had not resolved but that she was capable of working with restrictions and could participate in vocational rehabilitation. In an accompanying work capacity evaluation, Dr. Prostic opined that appellant was capable of working in her usual job, provided that she is restricted from working more than 3 hours at a time with repetitive movements of the wrists and hands and from keying more than 30 minutes per hour.

Appellant was referred for vocational rehabilitation. On October 27, 2007 she signed an Individual Rehabilitation Placement Plan and Job Search Plan and Agreement, whereby she agreed to participate in a full-time job search. The stated purpose of the plan was to assist appellant in obtaining a position as office helper or general clerk. Office helper position DOT # 239.567-010 required an employee to perform a combination of duties in a business office of a commercial or industrial establishment, including furnishing workers with clerical supplies; opening, sorting and distributing incoming mail; collecting, sealing, and stamping outgoing mail, delivering oral or written messages, collecting and distributing paperwork and marking, tabulating and filing articles and records. Physical demands included occasional fingering, reaching and handling. Duties might include using office equipment, such as an envelope-sealing machine, letter opener, stamping machine and transcribing machine and delivering stock certificates and bonds within and between stock brokerage offices. The position was described as "light," which was defined as "lifting 20 pounds occasionally, 10 pounds frequently." The vocational counselor opined that, based upon medically determinable residuals of her accepted injury and taking into consideration all significant preexisting conditions and pertinent nonmedical factors, appellant was able to perform the duties of an office helper. He further indicated that the position was reasonably available in appellant's commuting area.²

On October 31, 2007 the Office informed appellant the positions of general office clerk and office helper were deemed to be within her medical restrictions, and that she would receive 90 days of assistance from it to assist her in obtaining either of those positions. Appellant was advised that, at the end of the 90-day period, her compensation would be reduced, based on her ability to earn \$16,640.00 per year.

In a January 2, 2008 letter to appellant, the Office addressed issues raised by her as to the weight given to the opinion of Dr. Prostic. It informed her that it relied on Dr. Prostic's opinion because it was the only fully-rationalized opinion of record explaining the degree of her residuals and work limitations. The Office reminded appellant that it was her responsibility to submit medical evidence in support of her claim of total disability.

² The vocational rehabilitation counselor also identified the position of general clerk as a possible opportunity within appellant's medical restrictions.

In a letter dated January 12, 2008, appellant contended that Dr. Prostic's report was based on incomplete information and should therefore be discounted. Arguing that the general clerk position exceeded her restrictions, she asked that Dr. Doak's May 15, 2006 report be accepted as the weight of medical evidence.

On January 16, 2008 appellant began working as an office manager three days per week, four hours per day. The position involved no repetitive work and no typing.

Appellant submitted notes and medical reports for the period May 13, 1999 to May 15, 2006, including copies of documents previously provided. She also submitted a chronology of treatment for the period May 13, 1999 to February 25, 2008.

The record contains a March 17, 2008 labor market survey, wherein the vocational rehabilitation counselor stated that the position of office helper, with a weekly wage of \$320.00 per week, was reasonably available in appellant's commuting area. In an accompanying report, he indicated that appellant accepted a part-time job, working three days per week, noting that she liked the job because it was within her restrictions and she did not want to drive more than 15 miles to work. The vocational counselor noted that appellant's medical restrictions did not include limitations on driving.

On March 25, 2008 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 an office helper at the rate of \$320.00 per week. Noting the rehabilitation counselor's conclusion that, based upon her experience, education, medical restrictions and a labor market survey, appellant was qualified for the position, and that sufficient positions were reasonably available in his commuting area and that the duties of the position were within the restriction provided by Dr. Prostic on May 14, 2007, the Office found that the position of office helper was medically and vocationally suitable and fairly and reasonably represented her wage-earning capacity. It noted that, although appellant had been receiving compensation based on her actual earnings as of January 16, 2008, the evidence established that she was capable of performing the job of office helper. The Office determined that appellant's compensation would be reduced to \$1,133.20 every four weeks. It indicated that her salary on May 2, 2000, the date of injury, was \$570.40 per week, that the current adjusted pay rate for her job on the date of injury was \$743.06 per week and that she was currently capable of earning \$320.00 per week, the pay rate of an office helper. The Office determined that appellant had a 43 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$245.27 per week. It then determined that she had a loss of wage-earning capacity of \$325.13 per week. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was \$243.85 per week, increased by the cost of living to \$293.50 per week. A copy of the March 25, 2008 proposed reduction was sent to her and she was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. Appellant did not submit additional medical evidence or argument.

By decision dated May 1, 2008, the Office finalized the reduction of appellant's compensation benefits effective May 11, 2008, in accordance with the computations contained in the March 25, 2008 notice of proposed reduction of compensation. It found that she was

physically and vocationally capable of earning the wages of an office helper and that the position was reasonably available in her commuting area.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.³ Under section 8115(a), 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 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 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.⁴

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 DOT 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*,⁵ will result in the percentage of the employee's loss of wage-earning capacity.⁶

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which it relies must provide a detailed description of appellant's condition.⁷ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁸

³ *David W. Green*, 43 ECAB 883 (1992).

⁴ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁵ 5 ECAB 376 (1953).

⁶ *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

⁷ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁸ *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

ANALYSIS

The Office determined that the selected position of office helper represented appellant's wage-earning capacity as of May 11, 2008, based upon Dr. Prostic's May 14, 2007 report. It found that the physical requirements of the office helper position did not exceed the restrictions provided by Dr. Prostic. The Board finds that the Office properly reduced appellant's compensation based on his ability to perform the duties of an office helper.

In his May 14, 2007 second opinion report, Dr. Prostic opined that appellant was able to work full time with restrictions. He provided a history of injury and treatment and findings on examination. Dr. Prostic related appellant's complaints of continuing difficulties in both upper extremities, the left worse than the right, soreness in her wrists and shoulders and intermittent numbness and tingling to the left ring and little fingers. Examination of the upper extremities revealed satisfactory alignment, absence of heat, swelling, erythema or atrophy, full range of motion and good stability of all joints. No crepitus was noted at either shoulder, but there was significant discomfort when testing the left shoulder. The crossover and impingement signs were negative bilaterally and the biceps anchors appeared intact. There was mild weakness of the supraspinatus, and of external rotation on the right, but no weakness of the supraspinatus and of external rotation on the left. The only clinical abnormality noted in the right elbow was tenderness, greater at the extensor supinator origin from the lateral epicondyle than about the extensor muscle wad five cm distally. In the left elbow, there was significant tenderness at the lateral epicondyle, and lesser tenderness of the extensor supinator wad. Dr. Prostic found no clinical abnormality about the right wrist or hand, other than weakness of grip, which was a maximum of 19 kg. Grip strength on the left was a maximum of 10 kg. Pinch strength was normal bilaterally and two-point sensory discrimination was normal to all digits bilaterally. Provocative tests for thoracic outlet syndrome and carpal tunnel syndrome were negative and triggering was not exhibited.

Dr. Prostic diagnosed bilateral lateral epicondylitis, left worse than right. He stated that appellant also appeared to have rotator cuff dysfunction of her shoulders and symptoms of ulnar nerve entrapment without objective findings. Dr. Prostic indicated that appellant probably had early stenosing tenosynovitis of the left thumb that occurred subsequent to the termination of her employment. He opined that appellant was capable of working eight hours per day with restrictions, which included working no more than 3 hours at a time with repetitive movements of the wrists and hands and keying no more than 30 minutes per hour.

The office helper position (DOT # 239.567-010) required an employee to perform a combination of duties in a business office of a commercial or industrial establishment, including furnishing workers with clerical supplies, opening, sorting and distributing incoming mail and collecting, sealing and stamping outgoing mail, delivering oral or written messages, collecting and distributing paperwork and marking, tabulating and filing articles and records. Physical demands included occasional fingering, reaching and handling. Duties might include using office equipment, such as an envelope-sealing machine, letter opener, stamping machine and transcribing machine and delivering stock certificates and bonds within and between stock brokerage offices. The position was described as "light," which was defined as "lifting 20 pounds occasionally, 10 pounds frequently." The Board finds that the physical requirements of the office helper position do not exceed the recommended restrictions of Dr. Prostic.

Appellant asserts that the opinion of his treating physician, Dr. Doak, represents the weight of medical evidence and establishes that she is unable to perform the duties of the selected position. On May 15, 2006 Dr. Doak diagnosed carpal tunnel syndrome, left ulnar nerve palsy and bilateral lateral epicondylitis and opined that appellant was totally disabled from work. He explained that his diagnosis was based on appellant's reports of past multiple evaluations and the eventual judgment that she was totally disabled. Dr. Doak stated that vocational rehabilitation would be unlikely to allow appellant to achieve return-to-work status "based upon the nature of her pain, tenderness in her elbows and forearms, inability to drive a car for any length of time and failure of previous programs." However, he failed to provide findings on examination or explain how appellant's alleged disability was causally related to her accepted injury. Therefore, Dr. Doak's opinion is of diminished probative value. Moreover, his report was prepared and based on an examination conducted more than a year prior to Dr. Prostic's examination and nearly two years prior to the wage-earning capacity determination. The Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹ Additionally, medical evidence contemporaneous to an injury or disability may be afforded greater probative value in the weighing of medical evidence.¹⁰ As it is well rationalized and is based on a recent physical examination, the Board finds that Dr. Prostic's May 14, 2007 report represents the weight of medical evidence.

There is no dispute that the position of office helper is vocationally suitable for appellant. The vocational rehabilitation counselor determined that appellant was able to perform the duties of the position and that the position was available in sufficient numbers so as to make it reasonably available within 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 office helper position represented her wage-earning capacity.¹¹ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of office helper as of May 11, 2008 and that such a position was reasonably available within the general labor market of her commuting area.

The Board also finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*¹² and codified at section 10.403 of its regulations.¹³ In this regard, the Office indicated that her salary on May 2, 2000, the date of injury, was \$570.40 per week, that the current adjusted pay rate for her job on the date of injury was \$743.06 per week and that she was currently capable of earning \$320.00 per week, the pay rate of an office helper. It then determined that appellant had a 43 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$245.27 per

⁹ *Supra* note 8.

¹⁰ *George Sevetas*, 43 ECAB 424 (1992)

¹¹ *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹² *Supra* note 5.

¹³ 20 C.F.R. § 10.403.

week. The Office then determined that appellant had a loss of wage-earning capacity of \$325.13 per week. It concluded that, based upon a 75 percent rate, appellant's new compensation rate was \$243.85 per week, increased by the cost of living to \$293.50 per week and that her net compensation for each four-week period would be \$1,133.20. The Board finds that the Office correctly applied the *Shadrick* formula and, therefore, properly found that the position of office helper reflected appellant's wage-earning capacity effective May 11, 2008.¹⁴

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective May 11, 2008, based on its determination that the constructed position of office helper represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2008 decision of the Office of Workers' Compensation Programs reducing appellant's compensation benefits is affirmed.

Issued: May 20, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁴ *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).