

FACTUAL HISTORY

This case has previously been before the Board.¹ In a November 17, 2008 decision, the Board reversed the Office's September 26, 2007 decision which reduced appellant's compensation based on the constructed position of a bookkeeping clerk. The Board found that, while the selected position was medically and vocationally suitable, the evidence was insufficient to establish the appropriate wage rate for the position and therefore the loss of wage-earning capacity was not properly determined. The facts of the case are contained in the prior decision and are incorporated by reference.² The evidence relevant from the prior appeal is set forth below.

On December 2, 2004 Dr. David E. Taylor, a treating physician, addressed appellant's status following resection of left knee medial and lateral meniscus tears and medial compartment Grade 3 degenerative osteoarthritis. He advised that appellant was capable of performing modified work with restrictions which were permanent. The restrictions included no prolonged standing, walking, working on slippery or uneven ground, bending, stooping, squatting, climbing, kneeling, twisting and jumping. Dr. Taylor indicated that appellant was restricted to lifting, carrying, pulling and pushing no more than 20 pounds.

On December 4, 2006 Dr. Taylor noted permanent restrictions including some standing and walking and no lifting, carrying, pulling and pushing more than 20 pounds intermittently. He stated that appellant's overall work restrictions were similar to those stated in the December 3, 2004 report and had not changed much.

On December 15, 2008 the vocational rehabilitation counselor conducted a labor market survey in the Mariposa, Merced and Stanislaus county areas and identified the position of accounting clerk as being within appellant's physical limitations, vocational skills and geographical area. The accounting clerk position, as it appeared in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary position. It required maintaining accounting records including calculating, posting and verifying financial data. Duties also included compiling and sorting financial documents such as checks and invoices, typing vouchers, checks, invoices, reports, account statements and other records. The physical requirements included sedentary strength that involved lifting up to 10 pounds occasionally, reaching, handling, near acuity and fingering frequently and hearing occasionally. No feeling, climbing, balancing, stooping, kneeling, crouching, crawling, tasting/smelling, far acuity, depth perception, accommodation, color vision and field of vision were required. Vocational requirements for the position of accounting clerk were six months to one year of specific vocational preparation, which the vocational rehabilitation counselor noted were met by

¹ Docket No. 08-547 (issued November 17, 2008).

² On June 2, 2004 appellant, then a 54-year-old maintenance mechanic, injured his left knee while changing heating, ventilation and air conditioning filters. The Office accepted the claim for left knee strain, left knee lateral cartilage or meniscus tear and authorized arthroscopic surgery, which was performed on September 1, 2004, and a total left knee arthroplasty on July 25, 2006. Appellant returned to modified work on October 25, 2004. The employing establishment informed the Office that it could not accommodate his permanent restrictions and requested referral to vocational rehabilitation. By letter dated January 24, 2005, the Office placed appellant on the periodic rolls for temporary total disability.

appellant's training program. The vocational rehabilitation counselor listed the average weekly earnings of a bookkeeper as \$360.00 to \$600.00. He found that the position was available in sufficient numbers on a full-time basis and in appellant's commuting area based on a labor market survey.

On March 10, 2009 the Office requested that an Office medical adviser review the reports of Dr. Taylor and the position description for an accounting clerk to determine whether it was suitable for appellant. On March 11, 2009 the Office medical adviser reviewed the medical evidence and accounting clerk position description and concluded that it was within the restrictions provided by Dr. Taylor.

On March 17, 2009 the Office proposed to reduce appellant's wage-loss compensation, noting that the medical and factual evidence established that he was no longer totally disabled but had the capacity to earn wages as an accounting clerk at the rate of \$360.00 per week.

In a letter dated April 2, 2009, appellant disagreed with the proposal to reduce his compensation. He contended that neither Stanislaus, nor Merced counties were within his commuting areas as Stanislaus County was located 60 miles away and Merced County was 50 miles away. Considering the state of the economy, appellant doubted whether there were sufficient positions available and that his training was stagnant as it was four years ago.

By decision dated April 22, 2009, the Office reduced appellant's compensation benefits effective May 10, 2009 based upon its determination that the position of accounting clerk represented his wage-earning capacity. It noted that appellant's weekly pay rate when injured was \$846.04 and that the current pay rate for the job and step when injured was \$942.76. The Office found that appellant was capable of earning \$360.00 per week, that the adjusted wage-earning capacity per week was \$321.50, that the percentage of new wage-earning capacity was 38 percent, that the loss in wage-earning capacity amount per week was \$524.24, leaving appellant with a compensation rate of \$393.41 per week or \$435.00 per week when increased by applicable cost-of-living adjustments. This resulted in a new compensation rate every four weeks of \$1,740.00, less health benefits premium of \$457.52, basic life insurance premium of \$14.40, postretirement basic life insurance premium of \$40.32 and optional life insurance premium of \$54.42, for a net compensation every four weeks of \$1,173.44 beginning on May 10, 2009.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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.⁴

³ *T.F.*, 58 ECAB 128 (2006).

⁴ 20 C.F.R. §§ 10.402, 10.403.

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.⁵

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.⁶ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁷

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*⁸ and codified by regulation at 20 C.F.R. § 10.403⁹ 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.¹⁰

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.¹¹ 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

⁵ 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB ___ (Docket No. 07-45, issued November 14, 2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

⁶ *See William H. Woods*, 51 ECAB 619 (2000).

⁷ *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

⁸ 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403.

¹⁰ *Id.* at § 10.403(d).

¹¹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

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.¹²

ANALYSIS

The Office accepted that appellant sustained left knee meniscus tears and degenerative arthritis due to a June 2, 2004 employment injury. Appellant received wage-loss compensation for total disability beginning January 23, 2005. The Office determined that the selected position of accounting clerk represented his wage-earning capacity as of May 10, 2009, based upon Dr. Taylor's reports, which outlined his permanent work restrictions. Dr. Taylor advised that appellant could not engage in prolonged standing, walking, working on slippery or uneven ground, bending stooping, squatting, climbing, kneeling, twisting and jumping and no lifting, carrying, pulling and pushing more than 20 pounds. He advised that appellant was no longer totally disabled and was capable of performing sedentary work within these restrictions. There is no other medical evidence of record to establish that appellant remains totally disabled. The Board finds that the Office properly reduced appellant's compensation based on his ability to perform the duties of an accounting clerk as the duties conform to the restrictions provided by his attending physician.

In assessing the claimant's ability to perform the selected position, the Office must consider not only the physical limitations, but also take into account work experience, age, mental capacity and educational background.¹³ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of accounting clerk based on his Associate's Degree. He further found that the position was reasonably available within the appropriate geographical area. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, the Office may rely on his opinion in determining whether the job is vocationally suitable and reasonably available.¹⁴

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*¹⁵ and codified at section 10.403 of the Office's regulations.¹⁶ The Office stated that appellant's salary on the date he was injured was \$846.04 per week; that the current adjusted pay rate for his job was \$942.76 per week; and that he was currently capable of earning \$360.00 per week, the rate of an accounting clerk. The Office then divided \$360.00 by \$942.76 resulting in a 38 percent wage-earning capacity. This resulted in an adjusted wage-earning capacity of \$321.50 per week. It

¹² *Id.*

¹³ *W.D.*, 60 ECAB ____ (Docket No. 09-188, issued August 21, 2009); *N.J.*, 59 ECAB ____ (Docket No. 07-45, issued November 14, 2007); *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹⁴ *W.D.*, *supra* note 13; *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (October 2009).

¹⁵ *See supra* note 9.

¹⁶ 20 C.F.R. § 10.403.

concluded that, based upon a 75 percent rate, appellant's new compensation rate was \$393.41, increased by the cost of living to \$435.00 per week, and that his net compensation for each four-week period would be \$1,740.00. The Board finds that the Office correctly applied the *Shadrick* formula and therefore properly found that the position of accounting clerk reflected appellant's wage-earning capacity effective May 10, 2009.¹⁷

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's compensation effective May 10, 2009 based on its determination that the constructed position of accounting clerk represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 22, 2009 is affirmed.

Issued: July 8, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley L. Plotkin*, 51 ECAB 700 (2000).