

April 21, 2005. He sustained a recurrence of disability on September 14, 2005. On October 30, 2005 appellant returned to limited duty for four hours per day.

On June 29, 2006 appellant underwent a second opinion examination with Dr. Davidson Curwen, a physical medicine and rehabilitation specialist, who recommended that he undergo a functional capacity evaluation. The evaluation was performed on July 20, 2006 which indicated that he should restrict lifting to 30 pounds with occasional lifting of no more than six to eight times per hour. Dr. Curwen had no restrictions for sitting, walking or standing. In a July 30, 2006 work restriction form, he placed limitations on lifting more than 30 pounds (no more than six to eight times per hour) and pushing or pulling more than 50 pounds.

In September 2006, the employing establishment indicated that it did not have a full-time light-duty job to offer appellant. Thereafter, the Office referred him for vocational rehabilitation services. In December 2006, the employing establishment withdrew appellant's part-time light-duty work and the Office commenced payment of compensation for total disability.

In a June 12, 2007 decision, the Office reduced appellant's compensation to reflect his wage-earning capacity in the selected position of security guard under 5 U.S.C. § 8113(b) and 5 U.S.C. § 8104 based on his failure to cooperate with vocational rehabilitation. In a May 28, 2008 decision, an Office hearing representative reversed the June 12, 2007 decision and remanded the case for further development with regard to vocational rehabilitation services and a determination of appellant's wage-earning capacity.

In an April 7, 2008 report, Dr. Melvin P. Payne, III, an attending Board-certified general surgeon, indicated that appellant could work eight hours per day, lift up to 30 pounds and lift this weight for six to eight times per hour.

On August 28, 2008 appellant was again referred for vocational rehabilitation services. On October 3, 2008 the employing establishment advised him that it was unable to provide employment accommodating his lifting limitations. Appellant's vocational rehabilitation counselor, Gregory Price, made recommendations for job placement and the Office approved a job search for the period December 21, 2008 to April 3, 2009. Mr. Price submitted reports stating that appellant indicated that he already had a job with the employing establishment and would not cooperate with placement efforts. In December 2008, he found that based upon appellant's experience, education, medical restrictions and a labor market survey, he was employable as a check cashier with earnings of \$370.00 per week. The position was deemed reasonably available in appellant's commuting area. It required lifting, carrying and pushing up to 10 pounds on an occasional basis and was primarily sedentary in nature.

In an April 29, 2009 letter, the Office advised appellant that it proposed to reduce his compensation based on the fact that he was no longer totally disabled, but rather was only partially disabled with the capacity to earn wages in the constructed position of check cashier at the rate of \$370.00 per week. It provided him 30 days from the date of the letter to submit evidence and argument challenging the proposed action.

In a May 15, 2009 letter, appellant objected to the proposed reduction of monetary compensation benefits. He questioned why he was being pressured to take another job when he

had not been terminated from the employing establishment and that he was also concerned about the fringe benefits which he would lose if he took employment outside of federal service. Appellant contended that the Office failed to provide any answers to his concerns. He indicated that the employing establishment could charge him with abandonment of his position and he would lose his entitlement to his retirement benefits. Appellant asserted that the employing establishment did not have a program in place for full-time light-duty employment.

In a June 17, 2009 decision, the Office reduced appellant's compensation effective June 11, 2009 on the basis that the position of check cashier represented his capacity to earn wages.

Appellant requested a hearing before an Office hearing representative. At the October 21, 2009 hearing, he contended that the Office still had not answered the questions he had raised regarding his claim. Appellant was still employed by the employing establishment and had serious reservations about taking full-time employment because he had been advised by counsel that this could be construed as abandonment of his employment with the employing establishment. He noted that he did not know why the employing establishment stopped offering him limited duty. Appellant also noted that the Office, in its June 17, 2009 decision, stated that his benefits were going to be reduced to \$1,412.00 per month, but it then started sending him checks for \$1,200.00 per month without explanation. He spoke about the difficulty of getting and maintaining employment in the current recession and indicated that he had been working as a check cashier in 2007 for \$10.00 an hour. Appellant noted that this was a part-time position as the employer would not hire any full-time employees and he indicated that he lost the position after seven or eight months when the employer hired someone else for \$8.00 an hour. He stated that he is 61 years old and had physical limitations due to his work injury. Appellant indicated that his age and physical condition made it very difficult to find employment in the present labor market.

In a January 5, 2010 decision, the Office hearing representative affirmed the June 17, 2009 wage-earning capacity determination, as modified to reflect a correction of his pay rate. He determined that the evidence showed that appellant was physically and vocationally capable of working as a check cashier and that the position was reasonably available in his commuting area. With respect to appellant's pay rate, the Office hearing representative found that the Office had improperly used his date-of-injury pay rate of \$784.57 instead of his recurrence of disability pay rate of \$818.67. He then applied the principles set forth in the *Shadrick* decision to determine the percentage of appellant's loss of wage-earning capacity.¹

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 Its

¹ See *infra* note 7.

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

burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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 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.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.

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, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that 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 open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

ANALYSIS

The Office accepted that on December 19, 2004 appellant sustained a right inguinal hernia while helping to install a feed belt. Appellant received surgical repair of this condition on March 18, 2005 and was released to return to full duty on April 21, 2005. He sustained a recurrence of disability on September 14, 2005 and continued to receive compensation for periods of partial and total disability.

The Office received information from Dr. Curwen, a physical medicine and rehabilitation physician serving as an Office referral physician, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. On July 30, 2006 Dr. Curwen completed a work restriction form for appellant indicating that he could lift up to 30 pounds (no more than six to eight times per hour)

³ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

and push or pull up to 50 pounds. He did not place any other restrictions of appellant.⁷ On April 7, 2008 Dr. Payne, an attending Board-certified general surgeon, indicated that appellant could work eight hours per day, lift up to 30 pounds and lift this weight for six to eight times per hour.

In December 2008, appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of check cashier and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the check cashier position and a review of the evidence reveals that he is physically capable of performing the position.⁸ Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the check cashier position.⁹

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of check cashier represented appellant's wage-earning capacity.¹⁰ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of check cashier and that such a position was reasonably available within the general labor market of his commuting area.

Appellant argued that the adjustment of his compensation was improper because due to his age and the slow job market he would have difficulty in finding work. The Board notes that the fact that an employee is unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹¹ On appeal, appellant indicated that he had been advised that taking full-time work would be construed as abandonment of his employment with the employing establishment. Before the Office, he also expressed concerns about losing benefits if he took full-time employment. However, appellant did not explain how these concerns related to the adjustment of his compensation based on his capacity to earn wages as a check cashier.

For these reasons, the Office properly reduced appellant's compensation effective June 11, 2009 based on his capacity to earn wages as a check cashier.¹²

⁷ Dr. Curwen had recommended that appellant undergo a functional capacity evaluation. It was determined during the July 20, 2006 evaluation that appellant should restrict lifting to 30 pounds with occasional lifting of no more than six to eight times per hour.

⁸ The position only required lifting, carrying and pushing up to 10 pounds on an occasional basis.

⁹ Moreover, appellant testified that he worked on a part-time basis as a check cashier for seven or eight months in 2007. The part-time nature of the job was due to availability rather than any work restrictions.

¹⁰ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

¹¹ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹² It should be noted that appellant has not challenged the Office hearing representative's favorable adjustment of his pay rate and the matter is not currently before the Board.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective June 11, 2009 based on his capacity to earn wages as a check cashier.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2010 decision of the Office of Workers' Compensation Program is affirmed.

Issued: November 26, 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