

wrist, forearm and radial collateral ligament; left lateral epicondylitis and left carpal tunnel syndrome.

On November 2, 2006 appellant was referred for vocational rehabilitation services. On April 11, 2007 OWCP approved a training plan for him to receive training to become a computer security coordinator, information processing engineer or information manager. The training was stopped due to the fact that the university appellant was attending no longer had funding for his degree program.

In an October 23, 2007 report, Dr. Thomas W. Harris, an attending Board-certified orthopedic surgeon, stated that appellant was partially disabled as a result of his employment injuries. Appellant could work with permanent restrictions including no above the left shoulder level work and no forceful or repetitive activities involving pushing, pulling, lifting, gripping, grasping or torquing with the left upper extremity. In a March 26, 2008 report, Dr. Harris indicated that appellant's condition was permanent and stationary with the limitations set forth in his October 23, 2007 medical report.

Appellant's rehabilitation counselor reported that, based upon appellant's experience, education, medical restrictions and a labor market survey, he was employable as an investigator. The position was found to be reasonably available in appellant's commuting area with an average wage of \$440.00 per week. In an April 24, 2008 letter, OWCP advised appellant that the investigator position was within his work restrictions and that he would receive 90 days of placement assistance to help him locate work in such a position. Vocational rehabilitation services did not result in appellant obtaining employment.

The position of investigator required investigating cases of fraud involving the use of charge cards reported lost or stolen, cash refunds, and nonexistent accounts in retail stores. An investigator receives information from credit, sales, and collection departments regarding suspected fraud cases, interviews store personnel and questions suspected customers to obtain evidence. It is defined as a sedentary and light position with physical demands including sitting at a desk using a telephone or computer, patrolling, charting activities, and opening doors and locks.

In an August 14, 2008 letter, OWCP advised appellant of its proposed reduction of his compensation based on his capacity to earn wages in the constructed position of investigator. It provided appellant 30 days to provide evidence and argument challenging the proposed action.

In a September 15, 2008 decision, OWCP reduced appellant's compensation effective September 15, 2008 based on his capacity to earn wages as an investigator. It indicated that it did not receive evidence or argument showing that the wage-earning determination was improper.

Appellant requested a hearing before an OWCP hearing representative. At the February 23, 2009 hearing, counsel argued that the reduction of benefits was improper because OWCP had failed to exhaust all possibilities of reemployment with appellant's agency before proceeding to reemployment with a new employer. He stated that the agency had never precluded the possibility of reemployment and in fact had recently offered appellant a job.

Counsel stated that appellant declined the job offer on the basis that it was not suitable and asserted that the agency was still endeavoring to make an accommodation. He maintained that if appellant had accepted reemployment elsewhere his right to return to work with the agency would have been forfeited. Counsel argued that it was unjust for OWCP to require appellant to either pursue reemployment outside the agency or give up his right to reemployment with the agency.

In an April 27, 2009 decision, an OWCP hearing representative affirmed the September 5, 2008 OWCP decision finding that appellant was vocationally and physically capable of earning wages as an investigator. He indicated that appellant's agency did not make an offer of reemployment within a reasonable period of time and OWCP acted reasonably and responsibly from a fiduciary standpoint in moving appellant's vocational rehabilitation program towards retraining and placement with a new employer.

Appellant requested reconsideration of his claim on September 11, 2009 and continued to argue that finding work with an employer other than his agency would have jeopardized his ability to later work for the agency.

In a May 7, 2010 decision, OWCP affirmed the April 27, 2009 decision of the OWCP hearing representative. It again indicated that appellant's claim that his agency prevented him from finding outside work was an invalid argument.

LEGAL PRECEDENT

Once OWCP 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 OWCP's 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 FECA, 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

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

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).

which the employee lives.⁶ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.⁷

When OWCP 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 OWCP or to an OWCP 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 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.⁸

ANALYSIS

In the present case, it was accepted that appellant sustained contusions of the left elbow and forearm; sprains of the left elbow, wrist, forearm and radial collateral ligament; left lateral epicondylitis and left carpal tunnel syndrome. OWCP received information from his attending Board-certified orthopedic surgeon, Dr. Thomas, 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.⁹ Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of investigator and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the investigator position and a review of the evidence reveals that appellant is physically capable of performing the position. The Board notes that the limited physical requirements of the investigator position are well within the work restrictions recommended by Dr. Thomas. The investigator position is defined as a sedentary and light position with respect to physical requirements. Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the investigator position.¹⁰

⁶ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

⁷ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

⁸ 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).

⁹ Dr. Thomas indicated that appellant could work with permanent restrictions including no above the left shoulder level work and no forceful or repetitive activities involving pushing, pulling, lifting, gripping, grasping or torquing with the left upper extremity

¹⁰ Appellant argued that seeking employment outside his agency would preclude him from ever working for the agency in the future. He did not present adequate support for this argument or explain how it was relevant to the requirements for receiving compensation under FECA.

OWCP 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 investigator represented his wage-earning capacity.¹¹ The weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of investigator and that such a position was reasonably available within the general labor market of his commuting area. Therefore, OWCP properly reduced appellant's compensation effective September 15, 2008 based on his capacity to earn wages as an investigator.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective September 15, 2008 based on his capacity to earn wages as an investigator.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ See *Clayton Varner*, 37 ECAB 248, 256 (1985).