

FACTUAL HISTORY

On March 3, 2008 appellant, then a 46-year-old cook, filed a traumatic injury claim alleging that he sustained injuries to his legs and back at work on February 28, 2008 when he fell from a table while cleaning a hood vent. OWCP accepted his claim for cervical disc herniation at C3-4 and bilateral knee abrasions and placed him on the periodic rolls. On December 22, 2008 appellant underwent authorized neck surgery, which was performed by Dr. Terry C. Smith, a treating physician.

On June 4, 2009 OWCP asked Dr. Smith for an updated medical assessment regarding appellant's condition and his ability to return to work. In a June 14, 2009 work capacity evaluation, Dr. Smith advised that appellant could return to full-time employment with permanent restrictions, including climbing, lifting and reaching above the shoulder no more than four hours a day. He also restricted appellant from lifting more than 25 pounds above the shoulder. Dr. Smith noted that appellant's job description was not available for his review.

Based on Dr. Smith's work restrictions, OWCP referred appellant for vocational rehabilitation on September 10, 2009. A rehabilitation plan was developed with the objective of securing new employment as either a cashier or a short order cook, based upon the rehabilitation counselor's determination that the positions were reasonably available in the local labor market and were compatible with appellant's medical restrictions. OWCP approved the plan and advised appellant on November 19, 2009 that he would be given job placement assistance for 90 days, after which his compensation would be reduced based on the constructed position if he failed to secure employment.

The record contains a position description for short order cook (Dictionary of Occupational Titles (*DOT* #313.374.014). Duties of the position included: preparing and serving restaurant patrons at counters or tables; cooking foods requiring short preparation time; carving meats; making sandwiches; brewing coffee; and cleaning food preparation equipment work area and counter or tables. Physical requirements are described as "light," which is defined as "20 pounds, occasionally (activities or conditions exist up to 1/3 of the time); 10 pounds, frequently (activities or conditions exist from 1/3 to 2/3 of the time); 10 pounds, constantly (activities or conditions exist 2/3 or more of the time)." The position also requires frequent reaching, handling and fingering."

On February 18, 2010 OWCP 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 a short order cook at the rate of \$290.00 a week. Noting the rehabilitation counselor's conclusion that, based upon his experience, education, medical restrictions and a labor market survey, appellant was qualified for the position and that sufficient positions are reasonably available in his commuting area, OWCP found that the position of short order cook was medically and vocationally suitable and fairly and reasonably represented his wage-earning capacity. It determined that his compensation would be reduced to \$307.97 every four weeks; that his salary on February 29, 2008, the date of his injury, was \$349.97 a week; that the current adjusted pay rate for his job on the date of injury was \$433.85 a week; that he was currently capable of earning \$290.00 a week, the pay rate of a short order cook; that he had a 67 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$234.48 a week.

OWCP then determined that appellant had a loss of wage-earning capacity of \$115.49 a week. Based upon a 75 percent rate, appellant's new compensation rate was \$76.99 a week. A copy of the February 18, 2010 proposed reduction was sent to appellant, who was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. The record does not reflect that any additional information was received within the 30-day period.

By decision dated March 23, 2010, OWCP finalized the reduction of appellant's compensation benefits effective that date, in accordance with the computations contained in the February 18, 2010 notice of proposed reduction of compensation.

On May 29, 2010 appellant requested reconsideration of the March 23, 2010 decision, contending that he was physically unable to perform the duties of the constructed position. He submitted physical therapy notes, mental health records from Anthony Williams, a psychologist, unsigned notes from McKensie Institute regarding a cervical spine condition and a prescription for physical therapy from a nurse practitioner.

By decision dated August 12, 2010, OWCP denied modification of the March 23, 2010 decision, finding that the medical evidence did not establish that appellant's condition had worsened since the original decision and did not indicate that the duties of short order cook were beyond his capabilities.

On October 18, 2010 appellant again requested reconsideration, contending that his accepted condition had worsened. He submitted nursing notes dated August 5, 2010 and a disability slip from Dr. William McCutcheon, a treating physician, dated March 8, 2008.

By decision dated December 12, 2010, OWCP denied modification of the March 23, 2010 decision. The claims examiner found that the evidence was insufficient to establish that appellant was incapable of performing the duties of a short order cook with respect to his accepted employment-related condition.

LEGAL PRECEDENT

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 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 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

² 20 C.F.R. §§ 10.402, 10.403 (2006); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

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

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles (DOT)* or otherwise available in the open labor market, that fits the employee's capabilities with regards 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 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

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.⁷ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁸

ANALYSIS

The March 23, 2010 wage-earning capacity determination was premised on appellant's ability to work full time as a short order cook. The Board finds that OWCP failed to establish that the constructed position of short order cook fairly and reasonably represented appellant's wage-earning capacity. Therefore, the March 23, 2010 loss of wage-earning capacity decision was erroneous and OWCP improperly denied modification.

A rehabilitation plan was developed, and the constructed short order cook position was selected, based on work restrictions contained in Dr. Smith's June 14, 2009 work capacity evaluation. The duties of the position, however, did not comport with Dr. Smith's restrictions,

³ 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁴ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

⁷ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

which precluded appellant from climbing, lifting and reaching above the shoulder more than four hours a day or lifting more than 25 pounds above the shoulder. The constructed position required: preparing and serving restaurant patrons at counters or tables; cooking foods requiring short preparation time; carving meats; making sandwiches; brewing coffee; and cleaning food preparation equipment work area and counter or tables. These activities reasonably would involve reaching and lifting.⁹ As the physical requirements of the short order cook position, which were described as “light,” involved performing these activities frequently (from 1/3 to 2/3 of the time) and constantly (2/3 or more of the time), they exceeded appellant’s restrictions of lifting and reaching no more than four hours a day.

As noted, the medical evidence on which OWCP relies in determining appellant’s medical condition and work restrictions must provide a detailed description of his condition.¹⁰ Dr. Smith’s June 14, 2009 work capacity evaluation did not contain examination findings, an accurate factual and medical history or adequate explanation as to how he arrived at his recommendations. Dr. Smith did not express an opinion as to whether appellant could perform the duties of the constructed position, as he did not have an opportunity to review the job description for short order cook. The Board finds his June 14, 2009 report to be of limited probative value and insufficient to establish that appellant has the physical capacity to perform the duties of a short order cook.

The evidence establishes that the original March 23, 2010 loss of wage-earning capacity (LWEC) decision was erroneous. The Board finds, therefore, that a modification of the decision is warranted and OWCP’s December 10, 2010 decision must be reversed.¹¹

CONCLUSION

The Board finds that OWCP improperly determined that the constructed position of short order cook represented appellant’s wage-earning capacity.

⁹ The position description also indicated that appellant would be required to perform frequent reaching, handling and lifting.

¹⁰ See *supra* note 4.

¹¹ *Tamra McCauley*, 51 ECAB 375, 377 (2000). The Board notes that as the original decision was erroneous, it is not necessary to address whether appellant’s condition worsened to the degree that a modification of the LWEC decision was warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 18, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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