

federal employment. OWCP accepted the claim for bilateral lateral epicondylitis of the elbow. Appellant returned to modified employment until July 15, 2003, when he stopped work and did not return. He underwent left elbow surgeries on December 18, 2003, February 15, 2005 and June 19, 2007 and right elbow surgery on September 6, 2005. OWCP placed appellant on the periodic rolls beginning August 10, 2003.

On September 6, 2007 OWCP referred appellant to Dr. William A. Somers, a Board-certified orthopedic surgeon, for a second opinion evaluation. On October 3, 2007 Dr. Somers diagnosed chronic and unremitting bilateral lateral epicondylitis, to rule out bilateral radial nerve entrapment and to rule out bilateral C6 radiculopathy. He found that appellant was disabled from his usual employment as he “cannot use his hands in an unsupported manner. Dr. Somers would have trouble doing even light, very light, work holding things with his hands because of the lateral epicondylar pain.” He asserted that appellant was a candidate for vocational rehabilitation and could use a computer if he had hand support. In an accompanying work restriction evaluation, Dr. Somers advised that appellant could perform no reaching, repetitive movements of the wrists and elbows, pushing, pulling, lifting or climbing.

On November 29, 2007 appellant underwent a revision of a lateral epicondyle release of the right elbow and an excision of a right elbow osteophyte.

On January 8, 2008 OWCP referred appellant for vocational rehabilitation. In an initial report dated February 18, 2008, the rehabilitation counselor noted that he had graduated high school and “took some business courses” in the military. She asserted that a transferable skills analysis revealed that appellant could work in areas such as a surveillance system monitor or clerk.

In a report dated March 11, 2008, a physician’s assistant for Dr. Jerry Barron, a Board-certified orthopedic surgeon, indicated that appellant could work lifting 10 pounds occasionally and performing no repetitive movement.

On April 29, 2008 Dr. Barron noted that appellant was probably “not employable based upon his current disability.” He diagnosed chronic pain of the elbow, neck and back.

OWCP’s rehabilitation specialist approved 90 days of job placement services to assist appellant finding a job as a customer service representative or surveillance system monitor. On October 17, 2008 the rehabilitation counselor completed a job classification form for the position of surveillance system monitor. The job description from the Department of Labor’s *Dictionary of Occupational Titles (DOT)* indicated that the physical demands were sedentary with occasional reaching, occasional lifting up to 10 pounds and frequent handling, fingering and feeling. The rehabilitation counselor determined that appellant met the specific vocational preparation of six months to a year through his military background. She confirmed with the state employment commission that the job was reasonably available within his commuting area at wages of \$8.50 to \$10.00 per hour.

On October 21, 2008 Dr. Barron advised that he had released appellant to return to work with restrictions but that he “may not be employable based upon his restrictions, education level and requirement of pain management.”²

On April 28, 2009 OWCP requested that Dr. Barron review the enclosed job description and physical requirements for the positions of customer service representative and surveillance system monitor and indicate by checkmark whether appellant could perform the duties of either job full time. On June 4, 2009 Dr. Barron indicated that appellant had the physical capacity to work as a surveillance system monitor but not a customer service representative.

In a report dated August 17, 2009, Dr. Barron noted that appellant related that he was unable to work because of his elbows and also had symptomatic human immunodeficiency virus (HIV). He noted that appellant “has been infected with the [acquired immunodeficiency virus] for some time but has not been symptomatic.” Dr. Barron related that his opinion had not changed from November 24, 2008.³ He stated, “I recommended at that time that [appellant] be treated with acupuncture and pain management. I also stated then that he might not be employable based upon his chronic pain management. This opinion is even stronger at this time because [appellant] now is apparently being treated for HIV symptoms. In summary I feel that he is unemployable and his current work status is unchanged.”

In a report dated September 14, 2009, the rehabilitation counselor related that the state employment security commission advised her that the unemployment rate was high at the present time but that there were “periodic positions in customer service as well as security (involving surveillance monitoring) listed....” She noted that there were two positions currently available in surveillance monitoring with the state employment commission and that she had located another position independently.

On September 18, 2009 OWCP’s rehabilitation specialist advised that the rehabilitation counselor had confirmed that the positions of customer service representative and surveillance system monitor remained reasonably available within appellant’s commuting area at wages of \$320.00 per week.

On December 9, 2009 OWCP notified appellant of its proposed reduction of his compensation based on its finding that he had the capacity to earn wages as a surveillance system monitor.

By letter dated December 15, 2009, appellant related that he was unable to work because of problems with his “arms, neck, back, HIV, stress, psychiatric state, body fatigue, medicines and pain management. He indicated that OWCP could obtain copies of his medical records from his physicians. Appellant maintained that his digestive system was not working and that he also had post-traumatic stress disorder.

² On November 14, 2008 Dr. Neal Taub, a Board-certified physiatrist, diagnosed bilateral chronic epicondylitis and began acupuncture treatments.

³ The record does not contain a report from Dr. Barron dated November 24, 2008.

By decision dated March 24, 2010, OWCP reduced appellant's compensation benefits based on the constructed position of surveillance system monitor. It calculated his wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.⁴

On April 11, 2010 appellant, through his attorney, requested a telephone hearing. At the hearing, held on July 13, 2010, counsel argued that the position of surveillance system monitor was not reasonably available in his area. Appellant related that he had inquired into six job openings but each position required an individual to perform duties in addition to viewing a monitor. He noted that he did not have any college education but had military service.⁵

By decision dated September 28, 2010, the hearing representative affirmed the March 24, 2010 decision.⁶

LEGAL PRECEDENT

Once OWCP 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.⁷ 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 or circumstances which may affect wage-earning capacity in his or her disabled condition.⁸

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *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.⁹ 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

⁴ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

⁵ In a report dated August 13, 2010, Dr. Taub diagnosed chronic bilateral lateral epicondylitis of the elbows. He noted that appellant was not working and performed acupuncture treatments. Dr. Taub also performed acupuncture treatments on September 1, 8, 23 and 27, 2010.

⁶ The hearing representative noted that appellant was also receiving retirement benefits from the Office of Personnel Management.

⁷ *T.O.*, 58 ECAB 377 (2007).

⁸ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁹ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

*Albert C. Shadrick*¹⁰ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained employment-related bilateral lateral elbow epicondylitis and authorized multiple surgeries. Appellant received compensation on the periodic rolls beginning August 10, 2003.

OWCP referred appellant to Dr. Somers for a second opinion examination. On October 3, 2007 Dr. Somers diagnosed chronic, unremitting bilateral lateral epicondylitis, possible bilateral radial nerve entrapment and possible bilateral C6 radiculopathy. He found that appellant "would have trouble doing even light, very light, work holding things with his hands because of the lateral epicondylar pain." Dr. Somers determined that appellant might be able to use a computer with hand support. He asserted that appellant could work full time performing no reaching, repetitive motion with the wrists and elbows, pushing, pulling, lifting or climbing. Based on Dr. Somers' report, OWCP referred appellant for vocational rehabilitation.¹¹

The Board finds that the medical evidence is insufficient to show that appellant had the physical capacity to perform the duties of a surveillance system monitor. The position is classified as sedentary work with occasional reaching, lifting up to 10 pounds and frequent handling, fingering and feeling. The restrictions of no reaching and no repetitive movement set forth by Dr. Somers, are inconsistent with the occasional reaching and frequent fingering required for the position. Further, OWCP provided a copy of the position description of surveillance system monitor to Dr. Barron for review. On June 4, 2009 Dr. Barron indicated that appellant had the physical capacity to perform the duties. On August 17, 2009, however, he found continued "significant pain along the lateral epicondyle bilateral elbows" with mild swelling and loss of motion. Dr. Barron discussed his previous finding that appellant might be unemployable due to his chronic pain and maintained that his opinion was "even stronger at this time because he now is apparently being treated for HIV symptoms. In summary I feel that [appellant] is unemployable and his work status is unchanged."¹² He does not explain the apparent inconsistencies between his June 4 and August 17, 2009 reports, which are just a little over two months apart. Consequently, at the time OWCP reduced appellant's compensation, March 24, 2010, the medical evidence did not establish that he was capable of performing the duties of the selected position. Consequently, the Board finds that OWCP did not meet its burden of proof to reduce his compensation.

¹⁰ See *supra* note 4.

¹¹ See *N.J.*, 59 ECAB 171 (2007).

¹² Dr. Barron attributed appellant's disability in part to HIV. In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider impairments both resulting from injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. See *N.J.*, *supra* note 11; *John D. Jackson*, 55 ECAB 465 (2004).

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation based on its finding that he had the capacity to earn wages as a surveillance system monitor.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2010 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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