



sustained a tear in the medial meniscus of his left knee and a consequential tear in the medial meniscus of his right knee. Appellant first stopped work on December 17, 2003 and received compensation for periods of disability.

On March 30, 2004 Dr. Jeffrey Levine, an attending Board-certified orthopedic surgeon, performed a partial medial meniscectomy of appellant's left knee, diagnostic arthroscopy and examination under anesthesia of his left knee and chondroplasty/coblation technique of the medial femoral condyle and patella of his left knee. On November 16, 2004 he performed chondroplasty of the patella and medial compartment of appellant's right knee and a right medial meniscectomy. The procedures were authorized by OWCP.

On June 25, 2007 Dr. Sherwood Duhon, an attending Board-certified orthopedic surgeon, performed a diagnostic arthroscopy of appellant's left knee with partial medial meniscectomy and chondroplasty of his left knee including the medial femoral condyle and the patellofemoral joint. On October 23, 2007 he performed a cemented total right knee arthroplasty using Smith & Nephew components. These procedures were also authorized by OWCP.<sup>2</sup>

On May 5, 2008 appellant was referred for participation in an OWCP-sponsored vocational rehabilitation program. He successfully completed his vocational training course, called Microsoft Certified Systems Administrator -- Security, as part of an effort to prepare him for work as a microcomputer support specialist or computer security specialist.

In a September 22, 2008 report, Dr. Duhon stated that appellant had attained permanent and stationary medical status with respect to his right and left knee conditions. He indicated that appellant had residual partial disability and noted that he agreed with most of the evaluations and opinions contained in a July 25, 2008 functional capacity evaluation. The report of the functional capacity evaluation described a 45-pound maximum of lifting/carrying, an inability to place objects on the floor, the need for self-pacing of walking tasks with frequent rest periods, frequent position changes with forward bending tasks, no crouching, no kneeling, self-pacing on stairs and use of the left hand for power gripping.

Appellant's rehabilitation counselor worked with appellant for more than 90 days to secure employment as a computer security specialist or computer support technician. In a November 7, 2008 letter, OWCP advised that these positions were suitable to his work restrictions. Appellant was informed that, at the end of the placement services, his compensation could be reduced based upon the salary of one of these positions.<sup>3</sup>

Appellant's rehabilitation counselor indicated that the computer security specialist position was categorized as a sedentary position consistent within appellant's work limitations and labor market surveys showed that the position was reasonably available in his commuting area.<sup>4</sup> The Department of Labor's *Dictionary of Occupational Titles* describes the duties of a computer security specialist as including regulating access to computer data files, monitoring

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<sup>2</sup> On January 21, 2008 Dr. Duhon made an intra-articular injection under anesthesia in appellant's right knee.

<sup>3</sup> Appellant's participation in placement services was extended on several occasions.

<sup>4</sup> Labor market surveys for these positions were first performed in late 2008.

data file use, updating computer security files, entering commands into computers to allow access to the computer system for employees who forget passwords, reading computer security files to determine proper access, modifying security files to correct errors and answering employee questions about computer security. The position requires occasional pushing, pulling and lifting of a maximum of 10 pounds, frequent fingering and occasional reaching and handling, but does not require kneeling, climbing, crouching or crawling. It allows for frequent switching between sitting, standing and walking. Despite his job search efforts, appellant did not obtain a job as a computer security specialist or computer support technician.

A labor market survey performed in July 2010 showed that the computer security specialist position continued to be reasonably available in appellant's commuting area and that the position had an average wage of \$802.69 a week.

Dr. Duhon was provided with a description of the computer security specialist position. In a July 8, 2010 report, he noted that the physical demands of the computer security specialist position were acceptable and should be tolerable given appellant's physical limitations. Dr. Duhon stated that it was a sedentary job and did not involve any significant amount of squatting, climbing, bouncing, stooping, knee crouching or crawling. He noted that the job description further indicated that appellant would not be required to stand for any extended period "which should also be tolerable given his degenerative changes as well as his total knee replacement."

In a July 5, 2010 report, Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon who served as an OWCP physician, indicated that he had reviewed the descriptions of the computer security specialist and microcomputer support specialist positions. He stated that appellant was physically capable of performing the duties of both jobs and indicated that his surgeries should not preclude him from performing either position. In a work restrictions form, Dr. Lampert indicated that appellant was limited to 30 minutes of walking or standing before a break was required. Appellant could engage in one or two steps of climbing on an occasional basis, but he could not engage in squatting or kneeling. Dr. Lampert stated that appellant was limited in repetitive use of his right hand, but had no lifting, pushing or pulling limitations.

In an August 11, 2010 letter, OWCP advised appellant that it proposed to reduce his compensation based on its determination that he had the capacity to earn wages as a computer security specialist at the rate of \$802.69 a week. It provided him 30 days from the date of the letter to submit evidence and argument challenging the proposed action.

Appellant did not submit any evidence or argument in response to OCWP's August 11, 2010 letter.<sup>5</sup>

In a September 15, 2010 decision, OWCP reduced appellant's compensation effective September 26, 2010 based on his capacity to earn wages as a computer security specialist.

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<sup>5</sup> On August 16, 2010 appellant spoke to an OWCP claims examiner on the telephone and discussed his difficulty in getting a job.

## 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.<sup>6</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

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.<sup>8</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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<sup>6</sup> *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

<sup>7</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

<sup>9</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>10</sup> *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).

<sup>11</sup> *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

<sup>12</sup> *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).

## ANALYSIS

On December 16, 2003 appellant sustained injury when he slipped on a wet floor at work and twisted his left knee. OWCP accepted that he sustained a tear in the medial meniscus of his left knee and a consequential tear in the medial meniscus of his right knee. Appellant underwent several OWCP-authorized surgeries, including a right knee replacement which was performed on October 23, 2007 by Dr. Duhon, an attending Board-certified orthopedic surgeon.

In September 2008, OWCP received information from Dr. Duhon 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. Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of computer security specialist 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 computer security specialist position<sup>13</sup> and a review of the evidence reveals that he is physically capable of performing the position.

In a July 8, 2010 report, Dr. Duhon indicated that he had reviewed the description of the computer security specialist position and noted that the physical demands of the computer security specialist position were acceptable and should be tolerable given appellant's physical limitations. He stated that it was a sedentary job and did not involve any significant amount of squatting, climbing, bouncing, stooping, knee crouching or crawling. Dr. Duhon noted that the job description further indicated that appellant would not be required to stand for any extended period and that he could tolerate the limited standing required by the position. In a July 5, 2010 report, Dr. Lampert, a Board-certified orthopedic surgeon who served as an OWCP physician, indicated that he had reviewed the description of the computer security specialist position. He stated that appellant was physically capable of performing the duties of the position and indicated that his surgeries should not preclude him from performing the position.<sup>14</sup>

Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the computer security specialist position. On appeal, he argued that another attending physician should have addressed the condition of his knees. Appellant was provided an opportunity to present probative medical evidence showing that he could not work as a computer security specialist, but he did not submit such evidence within the allotted time period. He also claimed that OWCP officials made mistakes in describing his knee

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<sup>13</sup> As part of the rehabilitation efforts, appellant successfully completed coursework designed to prepare him to work as a computer security specialist.

<sup>14</sup> In a work restriction form, Dr. Lampert indicated that appellant was limited to 30 minutes of walking or standing before a break was required. Appellant could engage in one or two steps of climbing on an occasional basis, but he could not engage in squatting or kneeling. Dr. Lampert stated that appellant was limited in repetitive use of his right hand, but had no lifting, pushing or pulling limitations. The Board notes that none of these restrictions would prevent appellant from working as a computer security specialist.

surgeries. However, there is no indication in the record that Dr. Duhon or Dr. Lampert did not base their opinions on a proper factual and medical history.<sup>15</sup>

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 a computer security specialist represented appellant's wage-earning capacity.<sup>16</sup> The weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of a computer security specialist and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, OWCP properly reduced appellant's compensation effective September 26, 2010 based on his capacity to earn wages as a computer security specialist.

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 26, 2010 based on his capacity to earn wages as a computer security specialist.

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<sup>15</sup> Appellant indicated that he had difficulty finding a job in the computer field, but 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. *See supra* note 11.

<sup>16</sup> *See Clayton Varner*, 37 ECAB 248, 256 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 29, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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