

aircraft. OWCP accepted his claim for left ankle fracture and placed him on the periodic compensation rolls.²

Appellant relocated to Elmira, New York in 2000. On August 18, 2008 he was referred for vocational rehabilitation services. In a decision dated August 2, 2010, OWCP reduced appellant's compensation benefits based upon his ability to earn wages in the constructed position of gate guard. By decision dated September 15, 2010, OWCP's hearing representative set aside the August 2, 2010 decision and remanded the case for an updated medical report.

In a November 16, 2010 second opinion report, Dr. Charles Jordan, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome and residual pain and stiffness from fracture of the left ankle. Examination revealed decreased range of motion and some persistent tenderness about the ankle. Electrodiagnostic testing showed evidence of carpal tunnel syndrome. Dr. Jordan opined that appellant could work at a full time, sedentary job that would allow him to sit and change positions intermittently and did not require squatting, climbing, prolonged standing or walking on the left ankle. Appellant was also restricted from performing repetitive duties with his hands due to his complaints of carpal tunnel syndrome.

In December 2010, appellant began participating in an OWCP-sponsored vocational rehabilitation program. Based upon the results of vocational testing, his physical restrictions and his transferable skills, the rehabilitation counselor developed a rehabilitation plan. In a March 15, 2011 report, the rehabilitation counselor identified the position of surveillance system monitor (government service) (DOT No. 379.367-010) as being suitable for purposes of the rehabilitation plan. The selected position was identified as sedentary and required no squatting, climbing, prolonged standing or walking on the left ankle and no repetitive duties. The rehabilitation counselor stated that she had contacted Christian Harris, Senior Economist at the New York State Department of Labor and Statistics who noted "job openings exist for this job goal in the Southern Tier of New York." She opined, based on her "ongoing review of the want ad sections from local newspapers, ongoing contacts with prospective employers, as well as ongoing utilization of the internet," that the selected position was being performed in sufficient numbers so as to make it reasonably available in appellant's commuting area of Elmira, New York. The rehabilitation counselor reported, however, that there were no government job opportunities within commuting distance of appellant's home. The record contains a March 10, 2011 report of a labor market survey reflecting that there were three openings for the position of surveillance system monitor, one in Elmira and two in Big Flats, New York.

On March 23, 2011 OWCP informed appellant of its determination that the position of surveillance system monitor (DOT No. 379.367-010) was within his physical restrictions and that it would provide 90 days of placement services so that he could return to gainful employment in that position. After 90 days, appellant was unable to secure employment.

On June 24, 2011 OWCP notified appellant that it anticipated reducing his compensation benefits based on his ability to earn weekly wages of \$377.88 as a surveillance system monitor. It further advised that if he disagreed with the proposed reduction, he had 30 days within which

² Appellant's October 9, 1989 occupational disease claim was accepted for bilateral carpal tunnel syndrome. (File No. xxxxxx054).

to submit additional evidence or argument regarding his capacity to earn wages in the selected position.

By decision dated July 26, 2011, OWCP reduced appellant's wage-loss compensation effective July 31, 2011 based on his ability to earn wages in the selected position of surveillance system monitor. It found that the selected position was both vocationally and medically suitable.

Appellant requested a telephonic hearing, which was held on November 15, 2011. At the hearing, counsel acknowledged that the constructed position was within appellant's medical restrictions. He challenged the reduction in compensation, however, on the basis that there the constructed position was not reasonably available in the Elmira, New York area where appellant resided.

By decision dated January 18, 2012, the Branch of Hearings and Review affirmed the July 26, 2011 wage-earning capacity determination.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.³ 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.⁴

Under FECA, wage-earning capacity is determined by the actual wages received by an employee if those earnings fairly and reasonably represent his wage-earning capacity.⁵ 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 regards 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 factors and circumstances which may affect wage-earning capacity in his disabled condition.⁶

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.⁷ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.⁸ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

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

⁶ 5 U.S.C. § 8115(a).

⁷ *Id.*; *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁸ *M.A.*, 59 ECAB 624, 631 (2008).

impairment from both injury-related and preexisting conditions, but not impairment attributable to post injury or subsequently acquired conditions.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open labor market that fits the 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.¹⁰ Finally, application of the principles set forth in the *Shadrick*¹¹ decision will result in the percentage of the employee's loss of wage-earning capacity. The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides.¹²

ANALYSIS

OWCP reduced appellant's wage-loss compensation on the grounds that he had the capacity to earn wages in the constructed position of surveillance system monitor. It has the burden to establish that the position was reasonably available in his commuting area. The Board finds that OWCP failed to meet its burden of proof.

The rehabilitation counselor identified the sedentary position of surveillance system monitor (government service) (DOT No. 379.367-010) as being suitable for purposes of the rehabilitation plan, as its duties were within appellant's medical restrictions and transferable skills. Based on her "ongoing review of the want ad sections from local newspapers, ongoing contacts with prospective employers, as well as ongoing utilization of the internet," she concluded that the selected position was being performed in sufficient numbers so as to make it reasonably available in appellant's commuting area. The rehabilitation counselor stated that she had contacted a senior economist at the New York State Department of Labor and Statistics who noted "job openings exist for this job goal in the Southern Tier of New York." She reported, however, that there were no government job opportunities within the commuting distance of appellant's home, and a labor market survey reflected that there were only three openings for the position of surveillance system monitor within the commuting area.

⁹ *Id.*

¹⁰ *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (October 2009).

¹¹ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

¹² *See R.C.*, Docket No. 11-333 (issued October 4, 2011) (where the Board found that OWCP failed to meet its burden to justify reducing appellant's wage-loss compensation, as the record did not support its finding that the selected position was reasonably available in appellant's commuting area). *See also David L. Scott*, 55 ECAB 330, 335 n.9 (2004).

While a lack of current job openings does not mean that the selected position was not performed in sufficient numbers to be considered reasonably available,¹³ the record does not otherwise support OWCP's finding of availability. The rehabilitation counselor did not obtain relevant or specific employment data from the New York State Department of Labor and Statistics. As it pertained to appellant's commuting area. The statement obtained that the job opening exists in the Southern Tier of New York is not sufficient to establish the selected position as reasonably available to appellant. The rehabilitation counselor simply stated that the job was being performed in sufficient numbers and listed one individual and referred to her ongoing review of ads and websites as support. The record does not contain adequate evidence of the existence of, or the specific location of, such job openings.

Pursuant to OWCP procedures, a claims examiner may rely on the opinion of a rehabilitation specialist as to whether the job is reasonably available and vocationally suitable because she is an expert in the field of vocational rehabilitation.¹⁴ In this case, the rehabilitation counselor's report was not subjected to a review by such a specialist. Therefore, the claims examiner's reliance on the rehabilitation counselor's unsubstantiated opinion was misplaced. The Board finds that the record does not establish that the selected position of surveillance system monitor was reasonably available in the general labor market in appellant's commuting area. OWCP failed to meet its burden to justify reducing appellant's wage-loss compensation.¹⁵

CONCLUSION

OWCP improperly reduced appellant's compensation benefits based upon his ability to earn wages in the constructed position of surveillance system monitor.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (October 2009).

¹⁴ *Id.* at Chapter 2.814.8.

¹⁵ The Board expresses no opinion as to whether the selected position is either medically or vocationally suitable.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 22, 2012
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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