

employment factors. OWCP accepted the claim for right medial meniscus tear. Appellant filed multiple claims under which OWCP accepted the following conditions: lumbar sprain in case number xxxxxx762; derangement of the posterior horn of the medial meniscus and chondromalacia patella, left knee in case number xxxxxx327; and right lateral collateral ligament sprain and derangement of the posterior horn of the medial meniscus in case number xxxxxx017. Appellant went off work on June 8, 2008, at which time OWCP commenced payment for compensation for temporary total disability.

In a work restriction evaluation form dated March 17, 2008, Dr. Lawrence J. Iwersen, a treating specialist in orthopedic surgery, found that appellant could work an eight-hour day. He listed the following restrictions: no more than four hours per day of sitting and walking; no more than two hours of walking, reaching, reaching above the shoulder, pushing, and pulling; no lifting for more than one hour, not exceeding 50 pounds; no more than one half an hour of bending, squatting, and kneeling and no climbing.

On August 28, 2008 OWCP referred appellant for vocational rehabilitation services, based on Dr. Iwersen's March 17, 2008 report.

In reports dated November 28, 2010 and March 11, 2011, a vocational rehabilitation counselor summarized his efforts to find vocational training or suitable alternate employment for appellant within his physical restrictions. The vocational counselor identified a position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, motel desk clerk, DOT #238.687-038. It was found to be within appellant's restrictions, his vocational and work history, education, skills and training so as to reflect his capacity to earn wages. The vocational counselor found that there were a number of motel desk clerk jobs within a reasonable commuting distance. The job was being performed in sufficient numbers as to make it reasonably available to the claimant within his commuting area and there was a positive labor market for the office clerk job.

By notice of proposed reduction dated April 22, 2011, OWCP advised appellant of its proposal to reduce his wage-loss compensation as the factual and medical evidence established that he was no longer totally disabled. Appellant had the capacity to earn wages as a motel desk clerk, DOT ##238.687-038, at the rate of \$300.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.² It calculated that appellant's compensation rate should be adjusted to \$2,056.00 each four weeks using the *Shadrick*³ formula. The case had been referred to a vocational rehabilitation counselor, who had located positions as a motel desk clerk which he found to be suitable for appellant, given his work restrictions and was available in his commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

In a July 15, 2011 decision, OWCP reduced appellant's compensation to reflect wage-earning capacity effective July 17, 2011.

² 5 U.S.C. § 8115.

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

By letter dated July 27, 2011, appellant's attorney requested an oral hearing, which was held on November 10, 2011. At the hearing, appellant testified that he had no experience working as a motel clerk. He stated that he applied for motel desk clerk jobs during the rehabilitation process; he asserted, however, that he was unable to obtain employment because it was off season for tourists, because he lacked computer experience and because there were no openings.

By decision dated January 26, 2012, an OWCP hearing representative affirmed the July 15, 2011 termination decision.

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.⁴

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.⁵ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.⁶

ANALYSIS

Dr. Iwersen indicated in his March 17, 2008 report that appellant could perform work for eight hours per day with restrictions on sitting, walking, reaching, reaching above the shoulder, pushing, pulling, lifting, bending, squatting, kneeling and climbing. The rehabilitation counselor assigned to assist appellant in placement efforts identified a position as a motel desk clerk listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on Dr. Iwersen's work restriction evaluation. OWCP used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a motel desk clerk, and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. OWCP properly applied the principles set forth in the *Shadrick*⁷ decision to determine appellant's employment-related loss of wage-earning capacity. It calculated that his compensation rate should be adjusted to \$2,056.00 using the

⁴ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

⁶ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁷ *Shadrick*, *supra* note 3.

Shadrick formula. OWCP indicated that appellant's salary as of December 12, 2007, the date he stopped working, was \$1,004.40 per week, which included \$980.49 of base pay and \$23.91 per week of premium pay. It stated his current, adjusted pay rate for the job on the date of injury was \$1,098.14, which included \$1,072.00 of base pay, and \$26.14 of premium pay. OWCP determinate that appellant was currently capable of earning \$300.00 per week, the rate of a motel desk clerk. Therefore OWCP determined that appellant had a 27 percent wage-earning capacity, which when multiplied by 2/3 amounted to a compensation rate of \$488.81. OWCP found that his current adjusted compensation rate, per four-week period, was \$2,056.00.

OWCP properly found that appellant was no longer totally disabled as a result of his accepted conditions, and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that OWCP met its burden of justifying a reduction in appellant's compensation for total disability in its July 15, 2011 decision.

Following the July 15, 2011 decision, appellant requested a hearing. He indicated that he had attempted to find motel desk clerk jobs in his local geographical area but that there were none available. The Board, however, has held that the fact that a claimant is not able to secure a job does not establish that the work is not available or suitable. If the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work.⁸ The Board therefore affirms OWCP's January 26, 2012 decision.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective July 17, 2011, based on his capacity to perform the duties of a motel desk clerk.

⁸ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 10, 2013
Washington, DC

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

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

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