

Appellant underwent an arthroscopic partial medial meniscectomy and patellar chondroplasty with lateral release of the left knee. He received a schedule award for a 20 percent permanent impairment of his left lower extremity. In 2012, appellant underwent a left total knee arthroplasty. Thereafter, he received compensation for temporary total disability on the periodic rolls.

Dr. J.M. Jeremy Anderson, the attending osteopath and orthopedic surgeon, found in August 2012 that appellant could probably return to a sedentary position “but I am not sure this is available to him.” A month later, however, he completed a return to work form indicating that appellant was not released to work. To clarify the matter, OWCP referred appellant to Dr. Douglas D. Porter, a Board-certified orthopedic surgeon, for a second opinion.

On February 20, 2013 Dr. Porter reviewed appellant’s history and symptoms along with appellant’s medical records. He described his findings on physical examination and offered his diagnosis. Responding to questions posed by OWCP, Dr. Porter found that, while appellant could not return to his regular position as a safety and occupational health specialist, he could return to full-time work with restrictions based on his medical record review and current physical examination. He completed a work capacity evaluation detailing appellant’s limitations.

Dr. Anderson reviewed Dr. Porter’s evaluation and agreed with the restrictions outlined.

Based upon the medically determinable residuals of appellant’s injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, a vocational rehabilitation specialist found that appellant was able to perform the selected job of clerk-typist, a sedentary position. She performed a labor market survey and found that full-time jobs were being performed in sufficient numbers as to make them reasonably available to appellant within his commuting area. The vocational rehabilitation specialist confirmed through the Oregon Labor Market Information System that wages for such a position were \$578.00 a week. It is noted that appellant’s mailing address is in Hermiston, Oregon.

In a decision dated January 15, 2014, OWCP reduced appellant’s compensation for wage loss on the grounds that he was no longer totally disabled for work but rather had the capacity to earn wages as a clerk-typist, the physical requirements of which did not exceed his work restrictions.

Counsel argued that the Department of Labor’s *Dictionary of Occupational Titles*, from which OWCP selected the clerk-typist position, was an antiquated and defunct publication. “The job identified in the decision [cannot] be shown to actually exist in the present economy.” Counsel argued that OWCP reduced appellant’s compensation based on a fiction, that OWCP should have used the Occupational Information Network or O*NET.

In support of his claim, counsel submitted the first page of a May 24, 1990 correspondence from OWCP indicating that appellant had sustained an injury on December 12, 1988. OWCP File No. xxxxxx147.

During a telephonic hearing held on July 8, 2014 appellant testified that the 1988 injury involved his left wrist, for which he underwent surgery and received a schedule award. He could not remember the accepted condition and indicated that he had not received treatment for his left

wrist for at least five years. Counsel asserted that the 1988 injury would impair appellant's ability to work as a clerk-typist. He noted that OWCP did not consider this an industrial claim or preexisting condition.

In a decision dated September 22, 2014, an OWCP hearing representative affirmed the January 15, 2014 loss of wage-earning capacity determination. She noted that electronic records indicated only that the claim for the December 12, 1988 injury was retired; it did not provide further information or a diagnosis of the accepted condition. Likewise, the evidence appellant submitted regarding the 1988 injury did not identify the accepted condition, and he submitted no current medical evidence establishing that he had a left wrist condition that rendered him incapable of performing the duties of the selected position. The hearing representative found that the position of clerk-typist was medically suitable to the established restrictions and that appellant had the qualifications to perform the selected position, which was reasonably available to him within his commuting area.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² "Disability" means the incapacity, because of an employment injury,³ to earn the wages the employee was receiving at the time of injury. It may be partial or total.³

The wage-earning capacity of an employee is determined by his or her actual earnings, if actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his 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, the degree of physical impairment, his usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁴

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ When OWCP makes a medical determination of partial disability and of the 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 *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of 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

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f).

⁴ 5 U.S.C. § 8115(a).

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

service. Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁶

ANALYSIS

On February 20, 2013 Dr. Porter, the second opinion orthopedic surgeon, evaluated appellant and found that he could return to work with restrictions. Dr. Anderson, the attending osteopath, reviewed Dr. Porter's evaluation and agreed with the restrictions outlined. Accordingly, there was no dispute that appellant had the capacity to perform a full-time job within the agreed upon physical restrictions.

The vocational rehabilitation specialist found that appellant was able to perform the duties of a clerk-typist, which she selected from the Department of Labor's *Dictionary of Occupational Titles*. The job was sedentary and consistent with appellant's physical restrictions.

Appellant does not assert that the clerk-typist position is outside his work restrictions. Rather, he argues that the Department of Labor's *Dictionary of Occupational Titles* is outdated and defunct and that OWCP reduced his compensation based on a job that does not actually exist in the present economy. Despite appellant's critiques of the Department of Labor's *Dictionary of Occupational Titles*, the dispositive question is whether the selected position of clerk-typist was reasonably available to appellant.⁷

The vocational rehabilitation specialist conducted a labor market survey. She directly contacted the employing establishment in the labor market to investigate whether clerk-typist positions were available consistent with appellant's skills and physical capabilities. The vocational rehabilitation specialist found that opportunities for appellant as an office clerk did, in fact, exist. Job duties generally included greeting customers, answering phones, and operating a computer and office equipment. More specific job duties were required by some of the employing establishments, such as accounting duties, processing mail, and handling cash. Further, the vocational rehabilitation specialist found that full-time clerk-typist positions are performed in sufficient numbers as to make them reasonably available to appellant within his commuting area. This information came from both the labor market survey and the Oregon Labor Market Information System. Therefore, it is found that employers hire office clerks in the present economy. Appellant attacks the Department of Labor's *Dictionary of Occupational Titles* in general, but has offered no actual evidence to show that OWCP based its reduction of compensation on a fictional job. Such critique must fail without actual supportive evidence.

Appellant also argues that OWCP did not consider a prior claim. After, he first raised the argument, the hearing representative considered this prior claim to the extent electronic records would allow. The hearing representative found no evidence that the unidentified accepted

⁶ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403(d)-(e).

⁷ The job description for a clerk-typist includes: compiling data and operating a typewriter or computer in performance of routine clerical duties to maintain business records and reports; typing reports, business correspondence, application forms, shipping tickets, and other material; filing records and reports, posting information to records, sorting and distributing mail, answering a telephone; and performing similar duties.

condition would prevent appellant from performing the duties of the selected position. Dr. Porter and Dr. Anderson agreed that appellant could return to work with restrictions and the physical demands of the selected position, which was a sedentary position, were consistent with those restrictions.

Clearly, appellant's August 31, 2009 work injury no longer totally disabled him for work. He had the capacity to earn wages in a position that complied with his physical restrictions. OWCP properly identified such a position in the open labor market, one that was reasonably available to appellant within his commuting area. For this reason, appellant was no longer entitled to compensation for total disability. The Board finds that OWCP has met its burden to justify the reduction of appellant's compensation based on his capacity to earn wages in the selected position of clerk-typist. Accordingly, the Board will affirm OWCP's September 22, 2014 decision.

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has the wage-earning capacity of a clerk-typist.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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