



duty following his employment injury, however, effective May 12, 1995, the employing establishment relieved him of his duties due to his ongoing disability. Thereafter, the Office paid wage-loss compensation for temporary total disability.

Appellant participated in vocational rehabilitation from June 1997 through May 2000. During that timeframe he underwent training and received a diploma in information systems technology. Additionally, the Office provided job placement assistance. Appellant, however, was unsuccessful in securing employment prior to the expiration of the Office's placement assistance in May 2000.

In a decision dated November 28, 2000, the Office found that the constructed position of computer programmer with weekly wages of \$600.00 represented appellant's wage-earning capacity. Accordingly, the Office adjusted his wage-loss compensation to reflect his ability to earn wages as a computer programmer.

Appellant requested reconsideration on November 26, 2002 which the Office denied on December 20, 2002 on the basis that the request was untimely and failed to present clear evidence of error. An appeal followed and, in a decision dated June 20, 2003, the Board set aside the Office's December 20, 2002 decision and remanded the case for merit review.<sup>1</sup> The Board noted that the Office improperly characterized appellant's November 26, 2002 letter as a request for reconsideration subject to the one-year time limitation set forth in 20 C.F.R. § 10.607(a). Appellant had, in fact, requested modification of a loss of wage-earning capacity determination and as such, he was entitled to a merit decision on that issue.

On September 15, 2003 the Office issued a notice of proposed reduction of compensation based on appellant's ability to earn wages of \$600.00 per week as a computer programmer. He was afforded 30 days within which to submit additional evidence or argument regarding his capacity to earn wages in the selected position.

Appellant responded on October 12, 2003 and stated, among other things, that the amount of keyboarding he was required to perform during the course of his vocational rehabilitation training had aggravated his bilateral carpal tunnel syndrome.<sup>2</sup> Appellant explained that both upper extremities were permanently impaired and he identified his physical limitations due to bilateral carpal tunnel syndrome as set forth by his treating physician.

In a decision dated October 21, 2003, the Office finalized the September 15, 2003 proposal and advised appellant that his compensation would be reduced effective November 28, 2000.<sup>3</sup>

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<sup>1</sup> Docket No. 03-1063. The Board's June 20, 2003 decision is incorporated herein by reference.

<sup>2</sup> The Office received appellant's October 12, 2003 letter on October 21, 2003.

<sup>3</sup> The Office stated that, "[a]s of this date, we have not received any additional evidence or argument from [appellant] in response to" the September 15, 2003 notice of proposed reduction of compensation.

## LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

## ANALYSIS

Appellant established a basis for modification of the November 28, 2000 wage-earning capacity determination in that the decision was erroneous. The Office bears the burden of proof to justify termination or modification of compensation benefits.<sup>6</sup> In order to meet that burden in a constructed position case, the Office must demonstrate, *inter alia*, that the selected position is within the employee's work restrictions.<sup>7</sup> Impairments that preexisted the employment injury, in addition the injury-related impairments, must be taken into consideration in the selection of a job within the employee's work tolerance.<sup>8</sup> However, subsequently acquired impairments unrelated to the employment injury are excluded from consideration in the determination of the employee's work capabilities.<sup>9</sup> In addition to his March 25, 1988 employment injury involving the right lower extremity, appellant also has preexisting bilateral carpal tunnel syndrome, which the Office accepted as employment related in claim No. A14-0231233.

Appellant previously underwent a right carpal tunnel release on July 22, 1988. He had a second surgery on May 24, 2002 and submitted a report of physical limitations from Dr. Michael McManus, who stated as of October 2, 2002, that appellant may use a keyboard/mouse 20 minutes at a time, 4 hours per day maximum.<sup>10</sup> Appellant also indicated that he had received a

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<sup>4</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>7</sup> The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of his condition. *Samuel J. Russo*, 28 ECAB 43 (1976). Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation. *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996). When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her 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. *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>8</sup> *William H. Woods*, 51 ECAB 619, 622 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> Dr. McManus is Board-certified in preventative medicine.

rating for a 10 percent impairment of his right upper extremity and a 13 percent impairment of his left upper extremity.

The computer programmer position the Office found vocationally and medically suitable required, among other things, frequent reaching and fingering. Appellant could reasonably be expected to perform those particular duties from 1/3 to 2/3 of the time. In both the November 28, 2000 and October 21, 2003 decisions the Office relied on the May 16, 1997 report from Dr. Irving Tobin, a Board-certified orthopedic surgeon and Office referral physician, as establishing the medical suitability of the constructed position. Dr. Tobin's physical examination was limited to appellant's lower extremities and, while he noted a prior history of bilateral carpal tunnel syndrome and surgical release on the right in 1988, the physician did not specifically address whether appellant was physically limited by his bilateral carpal tunnel syndrome. The Office did not inquire whether appellant's bilateral carpal tunnel syndrome would affect his capacity to perform the selected position. In its most recent decision, the Office noted that, at the time of the original rating decision of November 28, 2000 there was no evidence that appellant was receiving active medical treatment for his carpal tunnel syndrome. The Office also failed to specifically comment on Dr. McManus' October 2, 2002 limitations.

The Office did not seek any additional medical information regarding appellant's carpal tunnel syndrome nor does it appear that the Office attempted to retrieve his file in claim No. A14-0231233. Given the prior history of bilateral carpal tunnel syndrome and appellant's reported impairment of both upper extremities, the Office did not meet its burden of proof when it issued the November 28, 2000 wage-earning capacity determination.

It is not appellant's burden to establish that he cannot perform the duties of a computer programmer because of his bilateral carpal tunnel syndrome. The Office bears the burden to establish that the selected position is medically suitable. In this instance, the record does not establish that the selected position is within appellant's work restrictions. The Board notes that no physician of record has reviewed the selected position and offered an opinion on whether the position is medically suitable given the nature and extent of appellant's preexisting conditions and his March 25, 1988 employment injury. Accordingly, the Office failed to demonstrate that the selected position is medically suitable. The Board finds that the Office failed to meet its burden in the instant case.<sup>11</sup> As such, the Office's November 28, 2000 decision was erroneous and it erred by denying modification on October 21, 2003.

### **CONCLUSION**

The Board finds that the Office improperly denied modification of the November 28, 2000 wage-earning capacity determination.

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<sup>11</sup> *James B. Christenson, supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 21, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 16, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member