

schedule award for a 10 percent impairment of the right upper extremity due to an accepted August 28, 1998 biceps tendon rupture. The Board also affirmed a January 14, 2000 decision of the Office denying appellant's request for a merit review. The law and the facts of the case are set forth in the Board's prior decision and are hereby incorporated by reference.²

Dr. Peter T. Simonian, an attending Board-certified orthopedic surgeon, submitted reports dated from January 2000 to December 2001 finding a full range of right elbow motion with some loss of strength. Appellant returned to light-duty work from February to October 5, 2002, performing clerical tasks at the employing establishment. He then stopped work and received wage-loss compensation on the daily rolls beginning October 6, 2002. Appellant's case was placed on the periodic rolls in December 2002. He was removed from federal employment effective February 14, 2003 due to physical disability. Appellant continued to receive compensation for temporary total disability on the periodic rolls.

In reports from August 1, 2002 to February 6, 2004, Dr. John R. Green, III, an attending Board-certified orthopedic surgeon, noted that the September 4, 1998 distal biceps tendon repair performed by Dr. Simonian was "at complete resolution." On examination, Dr. Green observed slightly decreased elbow flexion and forearm supination strength, with intermittent subjective carpal tunnel symptoms.

In a January 13, 2004 report, Dr. Paul H. Reiss, a Board-certified orthopedic surgeon and second opinion physician, reviewed a provided statement of accepted facts and the medical record. On examination of appellant, he noted work-related residuals of diminished grip and supination strength and opined that appellant was at maximum medical improvement. Dr. Reiss found no objective evidence of carpal tunnel syndrome. He diagnosed status post distal rupture of the right biceps brachii tendon at the radial tuberosity with surgical repair. Dr. Reiss opined that appellant could work 40 hours a week with restrictions against repetitive motions of the right elbow, lifting more than 25 pounds and pushing or pulling more than 50 pounds. He noted that appellant's supination weakness precluded him from working in his date-of-injury position as a pipefitter.

In an August 10, 2004 note, Dr. Green agreed with the assessment and work restrictions of Dr. Reiss. He submitted periodic reports through September 8, 2005 noting mildly decreased elbow flexion and forearm supination strength. On November 3, 2004 Dr. Green stated that appellant's work restrictions were compatible with working as a billing specialist. In a June 7, 2005 report, Dr. Green noted encouraging appellant to "become more physically active including walking, running, biking" and using "any commercially available cardiovascular fitness apparatus."

In March 2005, the Office referred appellant for vocational rehabilitation services. The counselor reviewed vocational aptitude testing³ and noted appellant's work experience as a data

² The record contains an August 23, 2000 decision denying modification of the November 4, 1999 schedule award. This decision is not before the Board on the present appeal.

³ A previous vocational rehabilitation effort from May 2003 to March 2005 focused on retraining appellant as a medical billing specialist or dental technician. This effort did not result in employment.

entry clerk, file clerk, general office clerk and supply clerk at the employing establishment. On June 22, 2005 the Office approved a vocational rehabilitation plan, with the goals of reemployment as a general clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 209.562-010, file clerk I, DOT No. 206.387-034, or data entry clerk, DOT No. 203.582-054. Following a job search, appellant began work as a file clerk for express personnel, a private sector temporary employment agency, on October 11, 2005. Appellant worked in a temporary, part-time position for a specialty food and packaging company retained by express personnel. The Office reduced appellant's wage-loss compensation benefits from October 11, 2005 to April 29, 2006 based on his actual earnings. From October 16, 2005 to April 2, 2006, appellant worked from 9.5 to 25 hours a week, earning \$10.00 an hour.

In a December 13, 2005 closure report, the vocational rehabilitation counselor noted that appellant had been employed for 62 days as a part-time file clerk and was "doing very well." The rehabilitation counselor identified the positions of file clerk I, DOT No. 206.387-034 and general clerk, DOT No. 209.562-010, as being within appellant's medical and vocational capacities. Both jobs were classified as light physical demand positions, involving various clerical tasks requiring frequent handling and fingering, with exerting up to 10 pounds of force frequently and 20 pounds occasionally. The counselor noted that appellant had transferable skills appropriate for either position from his work at express personnel and at the employing establishment. December 2005 labor market data showed 89 projected job openings from 2004 to 2006 in appellant's commuting area, with entry level wages of \$9.85 an hour for file clerk and \$10.02 an hour for general office clerk.

In a March 7, 2006 report, Dr. Green noted that appellant had "been filing three hours a day and not having much trouble with that." He stated that appellant's right distal biceps tendon remained unchanged and that he seemed "to be doing fine at his clerical job."

By notice dated April 17, 2006, the Office advised appellant that it proposed to reduce his wage-loss compensation benefits based on the constructed position of general clerk, DOT No. 209.562-010 at the rate of \$400.80 a week. The Office found that the position was within appellant's medical and vocational capacities and was reasonably available in his commuting area. The Office accorded the weight of the medical evidence to Dr. Reiss, who opined on January 13, 2004 that appellant could work with permanent restrictions.

Appellant's attorney submitted an April 18, 2006 letter contending that appellant was unable to earn more than \$400.00 a week. In a May 1, 2006 statement, appellant asserted that it was "fair" that he work part time and not full time, as his injury-related condition had worsened and he was getting older. He acknowledged that he was able to perform the duties of a general clerk as he had been doing such work for express personnel. Appellant submitted pay slips from express personnel for April 2 to 16 and April 23 to 30, 2006, showing he worked 15 hours a week at \$10.00 an hour.

By decision dated May 19, 2006, the Office reduced appellant's wage-loss compensation effective that day based on his ability to earn wages in the constructed position of general clerk. The Office calculated that appellant had a 62 percent loss of wage-earning capacity. The Office found that the position was within his medical and vocational capacities and was reasonably

available in his commuting area. The Office found that appellant's contentions and the pay slips were insufficient to alter the proposed reduction of benefits.

LEGAL PRECEDENT

Once the Office 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 Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her 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 or her disabled condition.⁵

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 DOT or otherwise available in the open 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,⁶ will result in the percentage of the employee's loss of wage-earning capacity.⁷

ANALYSIS

Appellant received compensation for total disability beginning on October 6, 2002 due to an accepted ruptured right biceps tendon. The Office received medical evidence from Dr. Reiss, a Board-certified orthopedic surgeon and second opinion physician, that appellant was capable of performing full-time light duty as of January 13, 2004. He imposed restrictions against repetitive right elbow motion, lifting more than 25 pounds and pulling or pushing more than 50 pounds. Dr. Green, an attending Board-certified orthopedic surgeon, concurred with Dr. Reiss' assessment and restrictions. The weight of the medical evidence clearly demonstrates that appellant was no longer totally disabled for work. The Office referred him for vocational rehabilitation services in March 2005. The vocational rehabilitation counselor evaluated appellant's vocational aptitudes and conducted an assisted placement program. Appellant was hired as a part-time file clerk on October 11, 2005 and performed this position through March 2006 and continuing. The opinions of Dr. Reiss and Dr. Green, however, indicated that

⁴ *David W. Green*, 43 ECAB 883 (1992).

⁵ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁶ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403(d)-(c).

⁷ *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

appellant could work full time. Therefore the vocational rehabilitation counselor recommended that the Office select a full-time clerk position to represent appellant's wage-earning capacity.

The general clerk position was classified as light, with frequent lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Reiss and affirmed by Dr. Green. The vocational requirements were found by the counselor to be commensurate with appellant's education and experience, as he performed these duties for the employing establishment from February to October 2002 and for express personnel from October 16, 2005 through April 2006 and continuing. The specialist then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these calculations, the Office issued a May 19, 2006 decision reducing appellant's compensation based on his ability to earn \$400.80 a week as a general clerk.

The Board finds that the Office considered the proper factors, such as availability of clerk positions and appellant's physical limitations, in determining that the general clerk position represented his wage-earning capacity. Appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity as such position was part time. Dr. Reiss and Dr. Green both opined that appellant was medically capable of full-time light-duty work at the physical demand level required by the general clerk position. Appellant performed the component tasks of this position at the employing establishment from February to October 2002 and for express personnel from October 16, 2005 and continuing. The vocational rehabilitation counselor found that general clerk positions were reasonably available in appellant's commuting area. Also, the Office followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant did not contend that the Office erred in its mathematical calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

Appellant asserts that it was unfair to require him to work full time as he preferred to work part time. He acknowledged that he was vocationally able to perform the duties of a clerk. However, the weight of medical opinion clearly establishes his capacity to perform full-time light-duty work within the physical demand level of the general clerk position. Appellant did not submit medical evidence indicating that he was not capable of working eight hours a day. The Board finds that the Office properly determined that appellant was medically and vocationally capable of working eight hours a day as a general clerk. The Office's May 19, 2006 decision reducing appellant's compensation based on his ability to earn wages in the constructed position of a full-time general clerk is proper under the law and the facts of this case.

CONCLUSION

The Board finds that the Office properly found that the constructed position of a full-time general clerk represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2006 is affirmed.

Issued: February 20, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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