United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
	)	
and	)	**Docket No. 08-2505**
	)	**Issued: July 24, 2009**
DEPARTMENT OF DEFENSE,	)	
Fort Benning, GA, Employer	)	
	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 27, 2008 reducing his compensation based on his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation on the grounds that the selected position of security guard/merchant patroller represented his wage-earning capacity.

FACTUAL HISTORY

On March 12, 2003 appellant, then a 54-year-old custodian, filed a traumatic injury claim alleging that he sustained back and knee injuries on March 4, 2003 when he was "cleaning out under the stage." The Office accepted a lumbar strain, posterior cruciate ligament sprain left

knee, and left medial meniscus tear. Appellant stopped working on August 28, 2003. He underwent left knee arthroscopic surgery on December 10, 2003.

A functional capacity evaluation (FCE) on March 15, 2004 indicated that appellant could work eight hours at a sedentary physical demand level. He was referred for vocational rehabilitation services in September 2004.

In a report dated August 22, 2005, Dr. Gary Dawson, a physiatrist, indicated that appellant continued to have low back pain. He diagnosed lumbar osteoarthritis and degeneration of lumbar disc. Appellant received intermittent treatment from Dr. Dawson for his lumbar spine. On May 9, 2006 Dr. Dawson indicated that appellant had intermittent back pain with exercise. In a work capacity evaluation (OWCP-5c) dated May 31, 2006, he advised that appellant could work eight hours a day with restrictions. Dr. Dawson limited appellant to two to four hours of standing, one hour twisting, a half hour of 50-pound pushing or pulling and a half hour of lifting at 25 pounds. In a June 5, 2006 report, he indicated that appellant's back was unchanged.

The rehabilitation counselor identified the position of security guard/merchant patroller (*Dictionary of Occupational Titles* No. 372.667-038) and completed a Form CA-66 job classification. The job duties included patrolling assigned areas, touring buildings, inspecting doors, windows and burglar alarms, and standing guard during counting of cash receipts. The job was considered a light strength level with occasional lifting of 20 pounds. The rehabilitation counselor indicated that appellant had the specific vocational preparation for the job, based on his eight years of military service with firearms and security training, and reported the job was reasonably available in appellant's commuting area. In a May 21, 2007 memorandum, a rehabilitation specialist indicated that wages for the selected position were $7.64 to $11.77 per hour. The specialist also confirmed that the security guard/merchant patroller position was reasonably available in appellant's community area, based on state employment data.

By letter dated June 27, 2007, the Office advised appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as a security guard at $305.60 per week. Appellant was advised he could submit additional evidence or argument on the issue within 30 days. He did not respond

In a decision dated August 3, 2007, the Office reduced appellant's compensation pursuant to 5 U.S.C. § 8115. It found that the current pay rate for the date-of-injury job was $457.08 per week, and appellant was capable of earning $305.60 per week, for a wage-earning capacity of 67 percent. Appellant's net compensation was reduced to $433.00 every 28 days.

On August 30, 2007 appellant requested a hearing before an Office hearing representative. A telephonic hearing was held on December 17, 2007. Appellant submitted an October 23, 2007 report from Dr. Dawson, who indicated that appellant had not been seen in 16 months. Dr. Dawson indicated that a magnetic resonance imaging (MRI) scan showed a generalized disc bulge at L5-S1, and facet arthropathy with mild stenosis at L3-5. He stated that it was likely appellant was not "physically suitable for any type of work at this time." In a February 6, 2008 note, Dr. Dawson reiterated that appellant had degenerative lumbar osteoarthritis. On October 23, 2007 appellant was not capable of working due to his being referred for possible surgical intervention for his lumbar condition.

By decision dated February 27, 2008, the hearing representative affirmed the reduction of compensation. The hearing representative also found the evidence was sufficient to require further development on the issue of whether a modification of the wage-earning capacity determination was warranted.

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 in such benefits.[1]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent 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, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[2]

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* 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.[3] 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.[4]

ANALYSIS

The Office selected the position of security guard/merchant patroller (DOT #372.662-038), and found that it was suitable to appellant's capabilities with regard to his physical limitations, education, age and prior experience. With respect to physical limitations, the attending orthopedic surgeon, Dr. Dawson, provided an OWCP-5c dated May 31, 2006, with a limitation on standing of two to four hours, one hour twisting and a 25-pound lifting restriction. He did not provide any restriction on walking or sitting. The selected position is primarily a walking position that involves patrolling and inspecting buildings. The May 31, 2006 form report or the contemporaneous narrative reports from Dr. Dawson establish that appellant could

[1] *Carla Letcher*, 46 ECAB 452 (1995).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

perform the duties of the selected position. Appellant had notice and an opportunity prior to the August 3, 2007 decision to submit relevant medical evidence on the issue, but no evidence was submitted. The Board finds that the selected position was within his physical limitations based on the evidence of record.[5]

With respect to the vocational preparation for the position, the rehabilitation counselor found that appellant's military experience was sufficient vocational preparation, and no contrary evidence was submitted. The availability of the position in appellant's commuting area was confirmed by the rehabilitation specialist. The wage information indicated the entry level wages were $7.64 per hour or $305.60 per week. Applying the *Shadrick* principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of $305.60 per week, and a percentage of the loss of wage-earning capacity is determined. The Office determined that appellant had a 33 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of $433.00 every 28 days. The Board finds that the Office met its burden of proof to reduce appellant's compensation in this case.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation pursuant to 5 U.S.C. § 8115(a).

[5] As noted, the case is under further development regarding evidence submitted after the August 3, 2007 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 27, 2008 is affirmed.

Issued: July 24, 2009
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