United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 08-2518**
	)	**Issued: July 1, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Orlando, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 24, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 4, 2008 merit decision concerning 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 effective September 28, 2008 based on his capacity to earn wages as a security guard.

FACTUAL HISTORY

The Office accepted that on January 19, 2006 appellant, then a 38-year-old federal air marshal, sustained aggravation of spondylolisthesis and intervertebral lumbar disc disorder during defensive measures training. He stopped work on January 19, 2008 and received compensation from the Office for periods of disability.

Appellant received treatment from Dr. William A. Stolzer, a Board-certified orthopedic surgeon, who found that he was totally disabled. The findings of February 9, 2006 magnetic resonance imaging (MRI) scan testing showed disc desiccation at L2-3 and L4-5.

On June 28, 2006 Dr. Don K. Moore, an attending Board-certified orthopedic surgeon, performed laminectomy, foraminotomy and facetectomy surgery at L4-5. The procedures were authorized by the Office. Dr. Moore followed appellant's post-surgery recovery and on January 11, 2007 he indicated that appellant could return to work with restrictions such as pushing and pulling no more than 50 pounds.

On June 6, 2006 Dr. Patrick M. Gonzalez, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant continued to report on and off low back pain, mainly with any type of bending. He stated that appellant's back condition had improved significantly with a work strengthening program and indicated that he could return to work as of today June 6, 2007 with a restriction of lifting, pushing and pulling no more than 45 pounds.[1]

In September 2007 appellant began participating in a vocational rehabilitation program.[2] In a September 28, 2007 report, Dr. Gonzalez diagnosed chronic low back pain, status post L4-5 fusion surgery and L4-5 spondylosis/spondylolisthesis. He stated that appellant could work on a full-time basis (8 hours per day, 40 hours per week) with restrictions of lifting, pushing and pulling no more than 45 pounds (and no more than 25 pounds on a frequent basis). Appellant should avoid standing, walking and sitting for more than 15 minutes at the time and he could not drive continuously for more than an hour. On January 30, 2008 Dr. Gonzalez indicated that appellant's work restrictions remained the same.[3]

In February 2008 appellant's vocational rehabilitation counselor determined that appellant was able to work in the constructed position of security guard. The position was reasonably available in appellant's commuting area at an average pay rate of $436.00 per week. The physical requirements included carrying, pushing and pulling up to 20 pounds on an occasional basis and up to 10 pounds on a frequent basis. The job could include walking and/or standing frequently.[4]

On June 16, 2008 Dr. Masood Hashmi, a Board-certified neurologist who served as an Office referral physician, stated that appellant reported pain in his low back and left hip. Motor examination revealed normal bulk, tone, and strength in all muscle groups of appellant's upper and lower extremities. There was no atrophy and sensory examination was intact to all modalities in the arms and legs. Dr. Hashmi diagnosed low back pain and left sacroiliitis.

[1] Appellant had participated in a functional capacity evaluation which showed that he could lift, push and pull up to 45 pounds.

[2] Appellant was unable to find a position through his participation in the program.

[3] On January 30, 2008 Dr. Gonzalez stated that appellant had a five percent decrease in lumbosacral spine motion and mild left-sided lumbar pain upon flexion. There is mild tenderness to palpation over the left paraspinal area and in midline at L4-5 levels and straight leg testing was negative.

[4] Appellant obtained a "class D" unarmed security guard license in early 2008.

In a July 30, 2008 report, the Office advised appellant of its proposed reduction of his compensation based on its determination that he was able to work in the constructed position of security guard. It provided appellant 30 days to submit evidence or argument concerning his ability to earn wages.

In an August 5, 2008 letter, appellant argued that the security guard position did not reflect his wage-earning capacity as he was unable to obtain such a position during his job search. He asserted that the opinion of Dr. Hashmi showed that he could not work. In a September 4, 2008 decision, the Office reduced appellant's compensation effective September 28, 2008 based on his capacity to earn wages as a security guard.[5]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[6] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

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.[8] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[10] The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.[11]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized

[5] The Office calculated the reduction in appellant's compensation by using the formula found in *Albert C. Shadrick*, 5 ECAB 376 (1953).

[6] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[7] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[8] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[9] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[10] *Id.*

[11] *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

by the Office or 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 labor market, that fits that employee's capabilities with regard to 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 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.[12]

ANALYSIS

The Office accepted that on January 19, 2008 appellant sustained aggravation of spondylolisthesis and intervertebral lumbar disc disorder. Appellant stopped work on January 19, 2008 and received disability compensation from the Office.

The Office received information from Dr. Gonzalez, an attending physician of physical medicine and rehabilitation, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of security guard and that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.[13]

The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the security guard position and a review of the medical evidence reveals that appellant was physically capable of performing the position. The security guard position required carrying, pushing and pulling up to 20 pounds on an occasional basis and up to 10 pounds on a frequent basis. The job could include walking and/or standing frequently. On September 28, 2007 and January 30, 2008 Dr. Gonzalez indicated that appellant could work on a full-time basis (8 hours per day, 40 hours per week) with restrictions of lifting, pushing and pulling no more than 45 pounds (and no more than 25 pounds on a frequent basis). He stated that appellant should avoid standing, walking and sitting for more than 15 minutes at the time and he could not drive continuously for more than an hour. The Board notes that these work restrictions would allow appellant to perform the required tasks of the security guard position.[14]

Appellant did not submit evidence or argument showing that he could not vocationally or physically perform the security guard position. He argued that the security guard position did not reflect his wage-earning capacity as he was unable to obtain such a job during his job search. However, the fact that an employee has been unsuccessful in obtaining work in the selected

[12] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, *supra* note 5.

[13] The average wage for the job was $436.00 per week.

[14] There is no indication that the security guard position would prevent appellant from alternating between sitting, walking and standing or that he would be required to drive for more than an hour at a time.

position does not establish that the work is not reasonably available in his commuting area.[15] Appellant asserted that the opinion of Dr. Hashmi, a Board-certified neurologist who served as an Office referral physician, showed that he could not work. However, Dr. Hashmi did not provide any opinion on appellant's ability to work.

After determining appellant's wage-earning capacity based on the security guard position, the Office properly calculated the reduction in his compensation using the *Shadrick* formula.[16] For these reasons, the Office properly reduced appellant's compensation effective September 28, 2008.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective September 28, 2008 based on his capacity to earn wages as a security guard.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 4, 2008 decision is affirmed.

Issued: July 1, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *See supra* note 11 and accompanying text.

[16] *See supra* note 12 and accompanying text.