U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIJAH SMALL and DEPARTMENT OF THE ARMY, ARMY DEPOT, Anniston, Ala.

Docket No. 96-2277; Submitted on the Record;
Issued October 6, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on May 1, 1996.

The Board has duly reviewed the case on appeal and finds that the Office properly determined appellant's wage-earning capacity.

Appellant filed a claim alleging that he injured his left shoulder. The Office accepted appellant's claim for left shoulder strain on August 7, 1986. The Office accepted the condition of torn rotator cuff on October 21, 1986. The Office also accepted that appellant sustained a consequential aggravation of right rotator cuff syndrome on December 5, 1990 and entered appellant on the periodic rolls. On September 29, 1995 the Office proposed to reduce appellant's compensation benefits as it found he was capable of earning wages as a security guard. By decision dated November 1, 1995, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity. Appellant requested reconsideration on December 15, 1995 and by decision dated May 1, 1996, the Office declined to reopen appellant's claim for review of the merits.

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of his wage-earning capacity.[1]

In its November 1, 1995 decision, the Office informed appellant that it was adjusting his wage-loss compensation as he was no longer totally disabled and was capable of performing the position of security guard in accordance with 5 U.S.C. § 8115.

Section 8115(a) of the Federal Employees' Compensation Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings

[1] *Anthony W. Warden,* 40 ECAB 168, 181-82 (1988).

fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or 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, his age, his 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.[2]

In the instant case, the Office determined that appellant was no longer totally disabled based on the reports of Dr. Joseph A. Sherrill, a Board-certified orthopedic surgeon, who reported that appellant could work eight hours a day with specified physical restrictions. Dr. Sherrill relied upon the functional capacity evaluation which found that appellant was capable of heavy work if loads were kept below shoulder height. He opined that appellant could not return to his former position as a concrete finisher but could work a job fitting his physical limitations. The Board finds the Office's determination that appellant was no longer totally disabled for work and capable for some type of employment was proper, based on the reports of Dr. Sherrill.

The Office then relied on an Office vocational rehabilitation counselor's determination that the position of security guard was within appellant's work restrictions; that it was reasonably available within appellant's commuting area; and that appellant had the necessary vocational training for the position.[3] This position included light lifting of up to 20 pounds, the ability to reach, handle, finger and feel, and a vocational preparation period of 30 days to 3 months. The evidence establishes that the Office properly selected the job of security guard in determining appellant's wage-earning capacity. His compensation was adjusted to reflect his capacity to earn $4.75 an hour in the position of a security guard.[4]

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on May 1, 1996.

Appellant requested reconsideration of the Office's November 1, 1995 decision on December 15, 1995. In support of his reconsideration request, appellant submitted a January 1, 1996 report from Dr. Sherrill. By decision dated May 1, 1996, the Office declined to reopen appellant's claim for review of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that when an application for review of the merits of a

[2] *Pope D. Cox*, 39 ECAB 143, 148 (1988).

[3] *Dictionary of Occupational Titles* (4th ed. rev., 1991), DOT No. 372.667-038.

[4] *Thomas Taylor*, 49 ECAB ___ (Docket No. 95-1483, issued October 16, 1997).

[5] 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6]

In his January 1, 1996 report, Dr. Sherrill noted that on October 8, 1995 he had approved the position of optometry clerk. He stated that appellant reported this position was not provided for him and that appellant was provided with the position of security guard. Dr. Sherrill stated appellant reported "a significant discrepancy in the work requirements." He stated that appellant should be provided with work which would not exceed his capacities as outlined in the prior functional capacity evaluation.

This report repeats Dr. Sherrill's earlier conclusion that appellant is not totally disabled and could work within the restrictions as provided in the functional capacity evaluation. It does not provide any new evidence regarding appellant's inability to perform the duties of a security guard, as Dr. Sherrill does not indicate that he reviewed this position, only that appellant stated it exceeded the duties of an optometry clerk. The record reflects, however, the Office rehabilitation counselor noted that the modified security guard position conformed with the functional capacity evaluation approved by Dr. Sherrill. This evaluation noted appellant had the capacity for lifting within the 20-pound restriction of the security guard position and could reach, handle, finger and feel objects with limitation on overhead heights. As Dr. Sherrill did not directly address appellant's capacity to perform the duties of a security guard and merely reiterated his opinion that the functional capacity evaluation properly provided appellant's work abilities, his January 1, 1996 report does not add any relevant new evidence not previously considered by the Office in reaching its November 1, 1995 decision. The Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

The decisions of the Office of Workers' Compensation Programs dated May 1, 1996 and November 1, 1995 are hereby affirmed.

Dated, Washington, D.C.
October 6, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[6] 20 C.F.R. § 10.138(b)(2).