U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARRELL T. NORMAN and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 97-538; Submitted on the Record;
Issued November 20, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his wage-earning capacity as a security guard.

In the present case, the Office accepted that appellant sustained a left shoulder contusion and impingement syndrome in the performance of duty. Appellant returned to a light-duty position until his employment was terminated on June 30, 1994 due to a reduction-in-force. By letter dated July 25, 1996, the Office notified appellant that it proposed to reduce his compensation on the grounds that he was capable of performing the selected position of security guard. In a decision dated September 16, 1996, the Office determined that the position of security guard represented appellant's wage-earning capacity.

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation in this case.

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

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

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 services.[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]

In the present case, the job classification form report (Form CA-66) for the selected position of security guard requires a maximum lifting of 20 pounds. In the memorandum accompanying the July 27, 1996 notice of proposed reduction of compensation, the Office stated that both the attending physician, Dr. Lorenzo P. Archer, an orthopedic surgeon, and Dr. Sterling Williamson, an orthopedic surgeon serving as a second opinion referral physician, had "agreed that [appellant] was capable of working with restrictions." While this is true, it does not itself establish that the selected position was within appellant's physical restrictions. The Board notes that Dr. Williamson's April 21, 1995 report was well over a year old at the time of the proposed reduction in compensation. Such a report would not be sufficient to establish appellant's current work restrictions.[5]

In addition, the attending physician, Dr. Archer, continued to submit duty status reports (Form CA-17) which indicated that appellant could lift up to 10 pounds intermittently, but reported "0" for the hours per day that he could lift 10 to 20 pounds.[6] It would appear from these reports that Dr. Archer was limiting appellant to 10 pounds lifting, and yet the Office does not mention these reports in either its proposed reduction or final decision. Office procedures require that unless the medical evidence is clear and unequivocal, the job description should be sent to a physician for an opinion as to whether the claimant could perform the position.[7] The evidence was not clear in this case, since the current duty status reports of record indicated that appellant could not perform the lifting requirements of the position. The Office should have sent

[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.

[5] *See Keith Hanselman*, 42 ECAB 680, 687 (1991) (where the most recent medical evidence was over a year old and was found not to be a sufficient basis for a wage-earning capacity determination).

[6] The dates of the reports are February 9, April 16 and July 11, 1996.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

the job description to an appropriate physician and secured a current medical opinion on whether appellant could perform the position of security guard.

It is, as noted above, the Office's burden to reduce compensation. The Board finds that the Office has not met its burden in this case.

The decision of the Office of Workers' Compensation Programs dated September 16, 1996 is reversed.

Dated, Washington, D.C.
November 20, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member