

**United States Department of Labor
Employees' Compensation Appeals Board**

M.W., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS)
ENFORCEMENT, San Antonio, TX, Employer)

Docket No. 09-1845
Issued: March 22, 2010

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2009 appellant filed a timely appeal from an April 1, 2009 merit decision of the Office of Workers' Compensation Programs reducing his compensation benefits. 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 benefits effective April 12, 2009 on the grounds that he had the capacity to earn wages as a jailer.

FACTUAL HISTORY

On May 31, 2007 appellant, then a 36-year-old immigration enforcement agent, filed a claim alleging that he injured his right knee in the performance of duty. He did not stop work. The Office accepted appellant's claim for right knee enthesopathy and a right iliofemoral hip sprain.

On August 21, 2007 Dr. Andrew P. Kant, a Board-certified orthopedic surgeon, performed a partial lateral meniscectomy and chondroplasty of the trochlea. The Office paid appellant compensation for disability on the periodic rolls beginning August 13, 2007.

On February 20, 2008 Dr. Kant discussed appellant's continued complaints of pain and swelling in the right knee. He determined that he had reached maximum medical improvement. Dr. Kant opined that appellant was unable to perform the duties of his regular employment and "should be retrained in a different job." In a duty status report of the same date, he listed restrictions of no lifting or carrying over 30 pounds. Dr. Kant found that appellant could sit eight hours per day, twist for six hours per day, stand and walk for four hours per day and bend or stoop for one hour per day.

On March 13, 2008 the Office referred appellant for vocational rehabilitation. In an April 30, 2008 report, the rehabilitation counselor noted that he had completed high school and received training at the correction academy and police academy. Appellant had work experience as a detention officer, a messenger guard, a police officer and in the security field. A transferable skills analysis, conducted on May 6, 2008, identified various positions within appellant's vocational and physical ability available without retraining, including jailor, bailiff, customs inspector and hotel officer.

In a June 10, 2008 labor market survey, the rehabilitation counselor identified the position of jailer as within appellant's physical limitations. She noted that the Department of Labor's *Dictionary of Occupational Titles* (DOT) identified the physical demands of the position as light requiring occasional lifting up to 20 pounds and frequent lifting of up to 10 pounds. The specific vocational preparation of the position was three to six months, which the rehabilitation counselor determined that appellant met by transferable skills. Based on a state workplace commission report, she found that the position had weekly wages of \$670.00. In a letter to the Office dated June 16, 2008, the rehabilitation counselor related that a labor market survey confirmed that the position was readily available within appellant's geographical area.

In a closure report dated November 7, 2008, the rehabilitation counselor related that rehabilitation efforts were not successful and that appellant appeared unsatisfied with the rehabilitation plan. She discussed positions identified as medically and vocationally suitable, including that of jail attendant.

On December 12, 2008 the Office notified appellant of its proposed reduction of his compensation based on its finding that he was only partially disabled and had the capacity to earn wages as a jailer.

In a report dated March 6, 2009, Dr. Kant evaluated appellant for right knee pain. In a March 9, 2009 state workers' compensation status report, he indicated that appellant could return to work without restrictions.¹

By decision dated April 1, 2009, the Office finalized its reduction of appellant's compensation effective April 12, 2009 based on its finding that he was partially disabled and had

¹ The form is nearly illegible.

the capacity to earn wages as a jailor. The Office calculated his new wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.²

On appeal appellant argues that the position of jailer is outside of his work restrictions as it requires prolonged standing and walking and lifting up to 40 pounds.

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.³ 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 or circumstances which may affect wage-earning capacity in his or her disabled condition.⁴

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.⁵ 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 *Albert C. Shadrick*⁶ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

Appellant received compensation for total disability beginning August 13, 2007 due to his accepted right knee enthesopathy and a right iliofemoral hip sprain. Dr. Kant performed a partial right knee lateral meniscectomy and chondroplasty on August 21, 2007. On February 20, 2008 he opined that appellant had reached maximum medical improvement. Dr. Kant listed work restrictions of no lifting or carrying over 30 pounds, sitting up to eight hour per day, twisting up to six hours per day, standing and walking for four hours per day and bending and stooping for one hour per day. The Board finds that the Office properly referred appellant for

² 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

³ *T.O.*, 58 ECAB 377 (2007).

⁴ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁵ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

⁶ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

vocational rehabilitation as Dr. Kant's February 20, 2008 report establishes that he was no longer totally disabled due to residuals of his employment injury.⁷

The Office properly found that appellant has the capacity to perform the duties of a jailer. The position is classified as light work requiring occasional lifting up to 20 pounds and frequent lifting up to 10 pounds, which is within the restrictions set forth by his physician. Following the Office's proposed reduction of his compensation, appellant submitted a report dated March 6, 2009 from Dr. Kant, who treated him on that date for right knee pain. Dr. Kant, however, did not address his ability to work and thus his opinion is of diminished probative value. In a state workers' compensation form, a physician found that appellant could return to work and listed no work restrictions. The medical evidence, consequently, establishes that he has the requisite physical ability to earn wages as a jailer.

In assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background.⁸ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of jailer based on his transferable skills, which included work experience as an immigration enforcement agent, detention officer and police officer. She further found that the position was reasonably available within the appropriate geographical area at a wage of \$670.00 per week. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, the Office may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available.⁹ The Board finds that the Office considered the proper factors, including the availability of suitable employment, appellant's physical limitations and employment qualifications in determining that he had the capacity to perform the position of jailer.¹⁰ The Office further properly determined his loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.¹¹ The Office, therefore, properly found that the position of jailer reflected his wage-earning capacity effective April 12, 2009.

On appeal appellant argues that the position is outside of his physical capacity as it requires long periods of standing and walking and lifting up to 40 pounds. The DOT, however, identified the position of jailer as light work with lifting up to 20 pounds. Appellant submitted

⁷ See *N.J.*, 59 ECAB ____ (Docket No. 07-45, issued November 14, 2007).

⁸ *Id.*

⁹ *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

¹⁰ See *N.J.*, *supra* note 7.

¹¹ See *supra* note 6. The Office divided appellant's employment capacity to earn wages of \$670.00 a week by his current pay rate of the position held when injured of \$704.96 per week to find a 95 percent wage-earning capacity. It multiplied the pay rate at the time of injury of \$684.52 by the 95 percent wage-earning capacity percentage. The resulting amount of \$650.29 was subtracted from appellant's date-of-injury pay rate of \$684.52 which provided a loss of wage-earning capacity of \$34.23 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$25.67, or \$102.69 every four weeks.

evidence on appeal in support of his contention; however, the Board has no jurisdiction to review new evidence on appeal.¹²

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits effective April 12, 2009 on the grounds that he had the capacity to earn wages as a jailer.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 1, 2009 is affirmed.

Issued: March 22, 2010
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹² See 20 C.F.R. § 501.2(c).