U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BARRY R. BOWMAN and DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE GROTON, New London, CT

*Docket No. 97-2530; Submitted on the Record;*
*Issued August 16, 1999*

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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 its determination that the position of gate guard/security guard fairly and reasonably represented appellant's wage-earning capacity.

On March 8, 1980 appellant, then a 45-year-old warehouseman, filed a notice of traumatic injury alleging that he injured his right hand on March 5, 1990 in the course of his federal employment. Appellant stopped working on March 6, 1990. On March 4, 1992 the Office accepted the claim for bilateral carpal tunnel syndrome, a right carpal tunnel release, a right wrist fusion and a left carpal tunnel release. Appellant subsequently received compensation for temporary total disability.

On March 6, 1992 Dr. Anthony F. Merlino, a Board-certified orthopedic surgeon, completed a work restriction evaluation. He indicated that appellant could sit, walk, bend, squat, climb, kneel, twist and stand for eight hours per day. Dr. Merlino indicated that appellant could lift 0 to 10 pounds, but that he had hand restrictions. He indicated that appellant could not perform simple grasping, pushing and pulling, fine manipulation or use his feet to perform repetitive movement. Dr. Merlino stated that appellant could not lift above his shoulder and not operate a motor vehicle on a sustained basis. He stated that there were no cardiac, visual or hearing limitations and that appellant's interpersonal relations were not effected because of a neuropsychiatric condition. Dr. Merlino stated that appellant could work eight hours per day and that he had not reached maximum improvement.

A Department of Veterans Affairs rating dated July 8, 1991 stated that appellant's service-related disabilities prevented him from gaining and holding employment. The rating indicated that appellant had a 30 percent impairment for post-traumatic stress syndrome from November 11, 1989; a 30 percent impairment from radial neuropathy, right hand, from November 11, 1989; a 30 percent impairment from residual gunshot wound, right elbow and status post fracture right scaphoid with traumatic arthritis; a 20 percent impairment from

lumbosacral sprain from November 19, 1990; and a 10 percent impairment from osteoarthritis left foot from October 27, 1987. It also noted that appellant had zero percent impairments from malaria, deafness, dermatofibroma, fracture of the right foot and status post umbilical hernia. It combined these ratings to indicate that appellant was 80 percent disabled.

Upon the Office's request, Dr. Merlino provided a second opinion evaluation on March 19, 1993. He noted appellant's injury history and the treatment he received. Dr. Merlino stated that appellant's wrists continued to be symptomatic. He reviewed both x-rays and performed a physical examination. Dr. Merlino stated that while appellant may be expected to return to some type of light sedentary activity not involving repetitive use of his hands and wrists that appellant is incapable of employment. He stated that appellant could perform some part-time work in the near future, but that he could never return to his work as a warehouseman. Dr. Merlino completed a work restriction evaluation on the same date indicating that appellant could lift 0 to 10 pounds and that he had hand restrictions involving simple grasping, pushing and pulling and fine manipulation. He stated that appellant should not reach or work above his shoulders. Dr. Merlino stated that he could not operate a motor vehicle on a sustained basis. He noted that appellant's interpersonal relationships were effected by post-traumatic stress disorder and that appellant had not reached maximum improvement. Dr. Merlino indicated that appellant could return to work eight hours per day.

On May 12, 1993 the Office requested clarification from Dr. Merlino. On May 19, 1993 Dr. Merlino indicated that he opined on March 19, 1993 that appellant was incapable of employment because there was not much of anything appellant could do if he could not use his hands or wrists. He stated that since two months had passed since that evaluation he would now clear appellant for light sedentary duty not involving repetitive use of either hand or wrist against resistance and allowing for the use of a wrist brace. Dr. Merlino completed a work restriction evaluation on May 19, 1993 indicating that appellant could sit, walk, bend, squat, climb, kneel, twist, or stand eight hours per day. He indicated that appellant could lift 0 to 10 pounds. Dr. Merlino indicated that appellant had hand restrictions involving simple grasping, pushing and pulling, and fine manipulation. He stated that appellant could not reach or perform work above his shoulders. Dr. Merlino indicated that appellant could operate foot controls and motor vehicles. He noted no cardiac, visual or hearing limitation and noted no neuropsychiatric conditions effecting interpersonal relationships. Dr. Merlino stated that appellant could work eight hours per day and that he reached maximum improvement.

Pursuant to the Office's request, Dr. Edward Akelman, appellant's treating physician and a Board-certified orthopedic surgeon, responded to Dr. Merlino's reports. On January 26, 1993 Dr. Akelman examined appellant and reviewed x-rays. He stated that appellant had the ability to do sedentary work as long as it does not involve lifting of greater than five pounds, as long as there is not repetitive use of the finger and as long as appellant can use a wrist brace.

In a vocational rehabilitation report, appellant's counselor indicated that appellant's previous work as a warehouseman involved lifting up to 55 pounds and kneeling, crouching, stooping and assuming awkward positions. In a subsequent report dated December 12, 1993, the counselor indicated that he had contacted the employing establishment and was informed that they were unable to offer alternative employment.

On February 4, 1994 Dr. Akelman again indicated that appellant had the ability to do sedentary work as long as it did not involve lifting greater than five pounds or repetitive use of the fingers and wrist. He also indicated that appellant needed to wear a wrist brace.

On April 22, 1994 the rehabilitation counselor, after conducting an extensive job search on behalf of appellant, identified three occupations listed in the Department of Labor's *Dictionary of Occupational Titles* which were within appellant's work restrictions, including parking lot attendant, production coordinator and gate guard/security guard. The counselor performed a market survey and determined the prevailing wage rate and the availability in the open market of the positions. The counselor noted that the position of gate guard/security guard required no lifting, but was classified as light due to walking involved.

On October 6, 1994 the Office proposed to reduce appellant's compensation for wage loss because the evidence established that appellant was partially disabled and had the capacity to earn wages as a security guard. Appellant was given 30 days to submit additional evidence and argument.

Appellant subsequently submitted notes from Donald R. Murphy, a chiropractor, indicating that he provided treatment for low back pain relating to a 26-year-old coccyx injury.

Appellant also submitted a June 24, 1992 report from Dr. Richard A. Dannefelser, a psychologist, indicating that appellant was unable to function in a work setting. He stated that appellant entered therapy on April 10, 1992 for post-traumatic stress syndrome marked by anxiety, depression, lack of concentration, irritability, agitation and disturbance of conduct. Dr. Dannefelser also noted disassociative episodes, amnesia, detachment and hypervigilant outbursts of anger. Appellant also submitted a September 27, 1985 report from Dr. Timothy R. Heyne indicating that appellant was unfit for retention in the armed services.

By decision dated December 5, 1994, the Office reduced appellant's compensation benefits on the grounds that the selected position of gate guard/security guard represented his wage-earning capacity.

On January 9, 1995 appellant requested an oral hearing.

On April 27, 1995 Dr. Akelman stated that he continued to believe that appellant could return to sedentary light-duty work. He noted that appellant had disabilities relating to his back and foot. Dr. Akelman further noted that appellant's post-traumatic stress disorder gave appellant less ability to handle his disabilities.

At the hearing, appellant submitted an affidavit from Richard Morrone, the chief executive officer of New England Security. He stated that his company provided gate guards and security guards for business. Mr. Morrone indicated that the guards sometimes carried firearms. He stated the position of guard required keen senses, psychological stability, physical mobility and agility. Mr. Morrone stated the position was not suitable for individuals suffering from hearing loss, post-traumatic stress syndrome, lack of mobility or agility due to injuries to the back, hands or feet and whose ability to discharge a firearm or engage in physical contact was hindered by wrist injuries. He stated that he would not employ such an individual.

At the hearing held on September 16, 1996, appellant testified that he did not see Dr. Merlino between March 19 and May 19, 1993, the date of his supplemental report, or provide him with additional information. Appellant noted that he had a hearing loss and wore hearing aids. He further stated that he was capable of performing his duties as warehouseman prior to his injury on March 5, 1990.

By decision dated November 29, 1996, the Office hearing representative affirmed the Office's prior decision establishing that appellant was capable of performing the duties of a security guard.

Appellant subsequently requested reconsideration. In support, appellant submitted an Army disability form indicating that he was unfit for further service due a 30 percent permanent disability. This included a 10 percent impairment for pain in his right wrist status postnonunion scaphoid and degenerative joint disease; a 10 percent impairment for degenerative disc disease, right elbow; a 10 percent impairment for low back pain; a 0 percent impairment for hearing loss; and a 0 percent impairment for loss of teeth. Appellant also submitted a September 16, 1987 psychiatric report from Dr. Paul G. Yessler indicating that appellant suffered from anxiety, depression, concentration lapses and sleep disturbances. It was noted that appellant suffered a 30 percent disability as a result of his injuries. He also submitted a March 1, 1988 report from Dr. K.H. Huang, a psychiatrist, indicating that he suffered from post-traumatic stress disorder with mild social and occupational impairment. Appellant also submitted a Department of Veterans Affairs rating decision dated October 5, 1988 in which he received an award for a 10 percent impairment from residuals of a gunshot wound right elbow with traumatic arthritis, a 10 percent impairment for a status post fracture right scaphoid, a 10 percent impairment for lumbosacral sprain, a 10 percent impairment for post-traumatic stress disorder, a 10 percent impairment from osteoarthritis left foot and 0 percent impairments from malaria, radial neuropathy right hand, deafness, dermatofibroma, fracture right foot and status post umbilical hernia repair. He also submitted a March 10, 1990 report from Dr. Loren Mimless diagnosing post-traumatic stress disorder. Finally, appellant submitted a Department of Veterans Affairs rating dated May 1, 1990 indicating that appellant had post-traumatic stress disorder, radial neuropathy right hand, a residual gunshot wound right elbow with traumatic arthritis, status post fracture right scaphoid, lumbosacral sprain, osteoarthritis left foot, malaria, deafness, dermatofibroma, fracture right foot and status post umbilical hernia repair. The rating noted that the combination of these impairments was 40 percent from October 27, 1987 and 60 percent from November 19, 1989.

By decision dated May 7, 1997, the Office reviewed the merits of the case and denied modification because the application for review was not sufficient to warrant modification.

The Board finds that the Office improperly reduced appellant's compensation based on his capacity to earn wages as a gate guard or security guard.

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.[1] The

[1] *Betty F. Wade*, 37 ECAB 556 (1986).

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

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 her disabled condition.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] 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.[5]

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 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 services. 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.[6]

In the present case, the record reveals that appellant suffered several preexisting conditions prior to March 5, 1990. These conditions are initially set out in a Department of Veterans Affairs rating dated July 8, 1991 which stated that appellant had post-traumatic stress syndrome; right hand radial neuropathy; a residual gunshot wound, right elbow; status post fracture right scaphoid with traumatic arthritis; a lumbosacral sprain; osteoarthritis, left foot; malaria; deafness; dermatofibroma; fracture of the right foot; and status post umbilical hernia. The Department of Veterans Affairs indicated that these conditions rendered appellant unemployable. The Office, however, relied on the opinions of Drs. Merlino and Akelman which considered only whether appellant's March 5, 1990 injury prevented him from performing the duties of a gate guard or security guard. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his regular duties, the

[2] 20 C.F.R. § 10.303(a).

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[6] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

impairments which preexisted the injury, in addition to the injury-related impairment, must be taken into consideration in the selection of a job within his work tolerance.[7] Inasmuch as the Office failed to rely on any medical evidence addressing whether appellant's preexisting impairments precluded him from performing the duties of a gate guard or security guard, it did not properly consider all the relevant evidence in basing appellant's wage-earning capacity on the guard position and it improperly adjusted appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated May 7, 1997 and November 29, 1996 are reversed.

Dated, Washington, D.C.
August 16, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[7] *William Ray Fowler*, 31 ECAB 1817 (1980).