

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NEIL L. BROWN and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-1017; Submitted on the Record;
Issued March 4, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of security guard represented appellant's wage-earning capacity.

In the present case, the Office has accepted that appellant, a pipefitter, sustained a crush injury to his right hand on March 27, 1991 while loading a truck at work. The Office has also determined that appellant had a 60 percent permanent loss of use of the right arm resulting from this injury. On October 17, 1996 the Office determined that appellant had the wage-earning capacity of a security guard and reduced appellant's compensation benefits accordingly.

Once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation.¹

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

Pursuant to section 8115(a) of the Federal Employees' Compensation Act,² in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity, as appears reasonable under the circumstances, is determined with due regard to the nature of the injury; his 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.

¹ *Sheila A. Johnson*, 46 ECAB 323 (1994).

² 5 U.S.C. § 8115.

In the present case, the Office referred appellant to vocational rehabilitation on June 30, 1995. Appellant's vocational rehabilitation file was closed on June 25, 1996 as appellant was not cooperative in applying for jobs to which he was referred. On June 13, 1996 the vocational rehabilitation specialist completed Office forms CA-66 for the positions of security guard and deliverer-outside. Regarding the selected position of security guard, the form indicated that the position was light in nature with lifting of 20 pounds; that the position required on-the-job training of 30 days to 3 months; that the position was being performed in sufficient numbers so as to make it reasonably available to claimant within his commuting area; and that the average weekly wage of the position was \$240.00 to \$260.00. An addendum noted that the job description of security guard required the performance of any combination of duties including patrolling buildings and grounds of industrial plants or commercial establishments, examining doors, windows and gates to determine that they are secure; warning violators of rule infractions; apprehending or expelling miscreants; inspecting equipment and machinery to ascertain if tampering had occurred.

The Board finds that the Office properly determined that the position of security guard was within appellant's vocational qualifications and was reasonably available within appellant's commuting area. On appeal appellant alleges that the position required up to three months of training and that, therefore, appellant was not qualified to assume the position. The Board notes, however, that the position description stated that on-the-job training would be provided to meet this requirement. There was no requirement that appellant have completed any training program prior to assumption of the position, therefore, appellant was vocationally qualified to assume the position at any time.

The Board finds the Office did not properly determine appellant's medical ability to perform this position. On June 30, 1995 appellant's treating physician, Dr. John Taras, a Board-certified hand surgeon, completed a work restriction evaluation wherein he indicated that appellant could work 8 hours a day in a light-duty position, with lifting up to 20 pounds. Dr. Taras indicated that appellant was restricted to lifting, climbing and kneeling, each for four hours a day. He also indicated that appellant did have hand restrictions and could not perform simple grasping and fine manipulation. The Board notes that while on July 3, 1996 Dr. Taras did review and approve a position description for a security guard position at the Episcopal Hospital, this position varied in significant detail from rated position. The security guard position description which was approved by Dr. Taras indicated that the job duties required keeping watch as visitors and patients entered and exited the hospital; advising the public on where they may need to go within the building; patrolling briefly outdoors; notifying proper authorities if trouble arose; and keeping a brief activity log. The position description for the rated security guard position required much more extensive use of the hands. The rated position description required examination of doors, windows and gates to determine that they were secure; inspection of equipment and machinery to ascertain if tampering had occurred; and most significantly required apprehension and expulsion of miscreants. Given appellant's limited use of his right hand, the Board is unable to ascertain from this record whether appellant would be able to perform all of the duties of the rated position.

As the Office bore the burden of proof to ascertain that the rated position was within appellant's medical restrictions, the Office should have developed the record sufficiently to

determine whether appellant could perform all of the required duties of the position, given his physical limitations. The Office did not obtain a medical opinion that appellant could in fact medically perform all of the duties of the selected security guard position including manual inspection of equipment for tampering and apprehension of suspects as required. The Board thus finds that the Office did not meet its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated October 17, 1996 is hereby reversed.

Dated, Washington, D.C.
March 4, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member