U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM TRUHAN and DEPARTMENT OF THE NAVY, NAVAL CONSTRUCTION BATTALION CENTER, Davisville, R.I.

Docket No. 97-1508; Submitted on the Record;
Issued May 3, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a security guard and, therefore, had a 58 percent loss of wage-earning capacity.

On August 29, 1991 appellant, then a 49-year-old maintenance worker, was helping to close a roll up door when a roller from the door fell and struck him in the neck. The Office accepted appellant's claim for acute cervical strain and aggravation of degenerative disc disease of the cervical spine. Appellant received continuation of pay from August 30 through October 13, 1991. He returned to light duty on October 21, 1991 and returned to full duty on January 6, 1992.[1]

Appellant stopped working on June 16, 1994. The Office authorized leave buy back for the period June 17 through August 6, 1994. He received temporary total disability compensation for the period August 7 through September 27, 1994. He returned to work on September 27, 1994 but stopped again on October 3, 1994. The Office again began payment of temporary total disability compensation.

In an October 18, 1996 decision, the Office found that appellant could perform the duties of a security guard/watchman and, therefore, had a 58 percent loss of wage-earning capacity. The reduction of compensation was effective November 10, 1996.

The Board finds that the Office did not meet its burden of proof in establishing that appellant could perform the duties of a security guard.

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[1] In a June 22, 1992 decision, the Office denied appellant's claim for a schedule award. In a December 23, 1993 decision, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error. In an October 27, 1994 decision, the Board affirmed the Office's decision. Docket No. 94-824 (issued October 27, 1994).

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 compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3] Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[4].

In a November 25, 1994 letter, appellant stated that after he returned to full-duty work, he did the work assigned to him but continued to complain of pain in the back of his neck and in his hands. He indicated that he was assigned a position as a warehouse worker on July 23, 1993, but did not pass the medical examination for the position and was placed back on light duty. Appellant was also selected to be a gate guard in October 1993 but was denied the position because he was taking pain medication and muscle relaxants and, therefore, was not allowed to carry a loaded weapon. He was assigned another position but became aware that he could not work in one position for an extended period due to pain.

In a February 15, 1995 report, Dr. Edwin J. Madden, a Board-certified orthopedic surgeon, selected by the Office to give a second opinion, stated that appellant had chronic cervical strain superimposed on preexisting but apparently asymptomatic degenerative arthritic changes in the cervical spine at the C5-6 and C6-7 level. He related appellant's condition to the employment injury. Dr. Madden indicated that appellant had a permanent partial disability due to his neck but was not totally disabled. He concluded that appellant could work in a light-duty capacity, in which would avoid lifting or carrying more than 10 to 20 pounds and avoid working in a constant fixed positioning of his head and neck. He commented that it would be difficult for appellant to perform on a full-time regular basis but light-duty work such as a watchman should not present a problem. In a September 14, 1995 report, Dr. Madden indicated that appellant was able to work six out of eight hours a day performing manual entries, operating a calculator or operating a computer. He noted that a five-minute break every half hour would be advisable.

In a May 3, 1995 report, Dr. Frank H. Fallon, an osteopath and appellant's treating physician, concurred with Dr. Madden's statement that light-duty work should not present any problem to appellant. However, in an October 27, 1995 report, Dr. Michael S. Olin, a Board-certified neurosurgeon, indicated that a December 9, 1991 magnetic resonance imaging (MRI) scan showed disc herniation at C5-6 and C6-7. He reported that appellant had stiffness in the

[2] *Garry Don Young*, 45 ECAB 621 (1994).

[3] *See generally*, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

[4] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

posterior cervical region with palpable spasm and could not perform the full range of motion of the neck. Dr. Olin stated that appellant had symptoms which were intermittently severe, depending on work activities and suggestive of possible radiculopathy. He concluded that appellant was totally disabled and recommended further testing. In a November 8, 1995 report, Dr. Jeffrey Wishik, a Board-certified neurologist, stated that an electromyogram (EMG) showed evidence of chronic denervation and reinnervation in two muscles of the left arm innervated predominantly by the C8 root. In a November 7, 1995 report, Dr. Jeffrey Chapdelaine, a radiologist, indicated that a repeat MRI scan showed posterior osteophyte formations from C2 through C7. He noted mild compression of the C5 and C6 vertebral bodies. Dr. Chapdelaine reported narrowing of the left neuroforamen at the C2-3 level and narrowing of the right neuroforamen at C5-6 and C6-7. He stated there was no evidence for herniated discs. In a November 17, 1995 report, Dr. Olin stated that appellant's expression of symptoms including intermittent stiffness of the neck, pain and numbness into the arms and difficulties with light duty or household chores were very credible based on the abnormalities found in the MRI scan and the EMG. He concluded that appellant remained disabled. In a December 1, 1995 note, Dr. Fallon concurred with Dr. Olin's conclusion that appellant was totally disabled. In an April 29, 1996 report, Dr. Fallon stated that appellant still had difficulty sitting or standing for any length of time, had decreased motion in the neck with pain and numbness radiating down both arms. He diagnosed severe degenerative arthritis with neural foraminal impingement aggravated by the August 29, 1991 employment injury.

In a March 13, 1996 report, a vocational counselor indicated that since the position of security guard was mentioned in Dr. Madden's medical report, it was assumed that appellant was physically capable of performing that position. He listed several employers within appellant's commuting area. He indicated that the position was sedentary, requiring the ability to lift up to 10 pounds and to reach, handle, finger and feel. He noted that the duties of the position included guarding property, patrolling buildings and grounds, warning violators of infractions, inspecting equipment, calling the police or fire department and recording data.[5]

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Joseph P. Zeppieri to resolve the conflict in the medical evidence between Dr. Madden on the one hand and Dr. Olin and Dr. Fallon on the other hand. In a July 24, 1996 report, Dr. Zeppieri stated that the medical evidence indicated that appellant had significant cervical spondylosis which was aggravated by the employment injury. He noted that since the injury appellant had persistent pain. Dr. Zeppieri commented that there was no objective evidence to indicate that the cervical strain aggravation was still active although there was abundant objective evidence that appellant had degenerative disc disease. He indicated that the fact appellant was able to work a full day for an extended period before the employment injury showed that the employment injury was an aggravating cause of the current disability. Dr. Zeppieri stated that he did not expect resolution of appellant's problem. He concluded that appellant could not return to work in his former position as a maintenance mechanic but could return to work as a security guard. Dr. Zeppieri related that appellant told him during the examination that he was using narcotics and, therefore, was not eligible for that job.

[5] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 372.667-034 (4th ed. rev., 1991).

Dr. Zeppieri stated that appellant used Vicodin, purchasing a bottle of 30 capsules every 2 months which meant he used less than 1 capsule a day.

The Office erred in its description of the position of security guard. While it informed Dr. Zeppieri that the position was sedentary, the position is actually classified as a light position, requiring the ability to lift up to 20 pounds. The Office also did not furnish the complete job description for the position, which includes apprehending or expelling miscreants. Dr. Zeppieri's report, therefore, has reduced probative value because it is based on inaccurate and incomplete information furnished by the Office. Dr. Zeppieri, therefore, was unable to state whether appellant could perform light duties as opposed to sedentary duties and was unable to indicate whether appellant would be able to perform the full range of duties required of a security guard. Furthermore, appellant submitted a statement that the employing establishment considered but refused to offer appellant a position as a security guard because he was taking narcotic pain medication and muscle relaxants and, therefore, would not be allowed to handle a firearm. The Office did not consider whether, on the general labor market, appellant would be required to be able to handle a firearm or would be hired if he was taking the medication prescribed for him, even if the medication was prescribed only on an "as needed" basis. The Officer, therefore, has not established that appellant can perform the duties of a security guard.

The decision of the Office of Workers' Compensation Programs dated October 18, 1996 is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
May 3, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member