

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOE E. SMITH and DEPARTMENT OF THE ARMY, NATIONAL GUARD,
COMBINED SUPPORT MAINTENANCE SHOP, Point Pleasant, WV

*Docket No. 98-372; Submitted on the Record;
Issued February 1, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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

On November 9, 1988 appellant, then a 40-year-old painter, sustained an employment-related low back strain and herniated disc at L4-5. He stopped work on November 14, 1988, returned on November 25, 1988, missed intermittent periods thereafter and returned to a limited-duty job for six hours per day on June 1, 1992. On September 13, 1993 he filed a recurrence claim and was returned to full disability by the Office. On February 1, 1994 he was referred to vocational rehabilitation and, in an October 3, 1995 work restriction evaluation, Dr. David E. Miller, an osteopathic family practitioner, advised that appellant should limit his bending, avoid sitting more than 2 hours at a time and could lift 10 pounds frequently and 20 pounds occasionally. He stated that appellant was previously released to part-time, sedentary work. On April 30, 1996 appellant was referred for a job availability survey, and in a report dated July 25, 1996, John Heathcote, a rehabilitation counselor, completed a labor market survey and determined that the positions of fast food worker, security guard and telemarketer, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities.

By letter dated July 25, 1996, the Office notified appellant that it proposed to reduce his compensation, based on the grounds that he was no longer totally disabled due to residuals of the employment injury and could perform the duties of the selected position, security guard, for 40 hours per week. The Office noted that the medical evidence of record demonstrated that he could perform the selected position and advised that if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days. In an August 9, 1996 letter, appellant disagreed with the proposed reduction and requested retraining and help in finding employment. By decision dated September 5, 1996, the Office finalized the reduction of compensation, based on his capacity to earn wages as a security guard. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity and found

that it was available in his commuting area.¹ On September 23, 1996 appellant requested a hearing and submitted additional medical evidence. At the hearing held on August 12, 1997, appellant testified, *inter alia*, that he would have a problem commuting 50 miles to the nearest available security guard positions. In a decision dated October 22, 1997 and finalized on October 23, 1997, an Office hearing representative affirmed the prior decision, finding that the position of security guard fairly and reasonably represented appellant's wage-earning capacity. The instant appeal follows.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, based on his ability to perform the duties of the selected position of security guard on a full-time basis.

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.² Under section 8115(a) of the Federal Employees' Compensation Act,³ 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 wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect the employee's wage-earning capacity in his or her disabled condition.⁴

On appeal, appellant's representative contends that appellant was not properly assessed by vocational rehabilitation, that the job market was improperly surveyed and that the security guard position is outside his physical restrictions. The record in this case, however, indicates that the rehabilitation counselor properly conducted a survey in appellant's commuting area by contacting the state employment office and determined that the security guard position was available in the general labor market.⁵ The Office is not required to actually secure employment for appellant,⁶ and the fact that he was unsuccessful in obtaining a job in the selected position does not establish that the work is not reasonably available in the area.⁷ Nonetheless, the

¹ The front page of the decision contains significant typographical errors in that it indicates that appellant could perform the position of "bank teller," that the notice of proposed termination was dated December 15, 1994 and that the reduction was to begin on March 31, 1996. The attached memorandum, dated September 5, 1996, is essentially the same as that included with the termination notice dated July 25, 1996 and identifies the position as "security guard."

² *Dorothy Lams*, 47 ECAB 584 (1996).

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

⁵ See *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁶ See *Phillip S. Deering*, 47 ECAB 692 (1996).

⁷ See *Wilson L. Clow, Jr.*, *supra* note 4.

medical reports on which the Office relied in determining appellant's wage-earning capacity are insufficient to establish that he is capable of performing the selected position of security guard on a full-time basis.

In the October 3, 1995 report, that was relied upon by the Office, Dr. Miller stated that appellant could work part time. The Board further notes that the form submitted to Dr. Miller is for cardiovascular/pulmonary conditions and appellant's employment-related condition was orthopedic in nature. In a November 4, 1996 report, Dr. Miller advised that appellant had mild muscle weakness and should not return to work without further conditioning. He requested that appellant undergo a functional capacity evaluation. In an April 10, 1997 report, Dr. Miller advised that appellant still had paresthesias and weakness in the left leg. In a July 28, 1997 report, Dr. Miller advised that appellant could "do only very light work." In an August 21, 1997 report, Dr. Miller advised: "I certainly feel that with his chronic back pain that he should not drive for long periods of time, drive or ride for long periods of time, more than about 30 minutes without taking a break."

In a duty status report dated August 25, 1997, Dr. Miller advised that appellant could not return to work and provided restrictions that appellant could sit for three hours per day, stand for one hour per day, walk for two hours per day, could not climb stairs or ladders and could kneel, bend, stoop and twist for one hour per day. He also provided lifting restrictions and stated that appellant's driving was limited to 25 miles or less per day.

The *Dictionary of Occupational Titles* contains the following description for a security guard position:

"Guards industrial or commercial property against fire, theft, vandalism and illegal entry, performing any combination of following duties: patrols, periodically, buildings and grounds of industrial plant or commercial establishment, docks, logging camp area, or work site. Examines doors, windows and gates to determine that they are secure. Warns violators of rule infractions, such as loitering, smoking or carrying forbidden articles and apprehends or expels miscreants. Inspects equipment and machinery to ascertain if tampering has occurred. Watches for report irregularities, such as fire hazards, leaking water pipes and security doors left unlocked. Observes departing personnel to guard against theft of company property. Sounds alarm or calls police or fire department by telephone in case of fire or presence of unauthorized persons. Permits authorized persons to enter property. May register at watch stations to record time of inspection trips. May record data, such as property damage, unusual occurrences and malfunctioning of machinery or equipment, for use of supervisory staff. May perform janitorial duties and set thermostatic controls to maintain specified temperature in buildings or cold storage rooms. May tend furnace or boiler. May be deputized to arrest trespassers. May regulate vehicle and pedestrian traffic at plant entrance to maintain orderly flow. May patrol site with guard dog on leash..."⁸

⁸ *Dictionary of Occupational Titles*, (4th ed., rev.) (1991).

The Board finds that Dr. Miller's reports, taken as a whole, are insufficient to meet the Office's burden of proof in establishing that appellant can perform the duties of the constructed position of full-time security guard. There is no evidence of record that the Office requested Dr. Miller to address whether appellant could perform this 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. 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 22, 1997 and finalized on October 23, 1997 is hereby reversed.

Dated, Washington, D.C.
February 1, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member