U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PURVIS NETTLES and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA

Docket No. 99-2038; Submitted on the Record;
Issued April 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective April 27, 1999, based on his ability to perform the duties of the selected position of security guard.

On September 1, 1989 appellant, then a 51-year-old painter, sustained an employment-related contusion and sprain of the right knee. The Office later accepted chondromalacia of the right patella. On January 26, 1993 he underwent arthroscopic surgery. Appellant lost intermittent time from work between October through December 1989 and again January 25 to March 22, 1993, when he returned to duty.

On July 15, 1993 appellant received a schedule award for a 15 percent permanent impairment of his right lower extremity. Effective October 15, 1993 he was involuntarily removed from his job due to a reduction-in-force. After determining that appellant's employment during the period prior to the reduction-in-force was makeshift, the Office referred him to vocational rehabilitation.[1]

On September 5, 1996 a rehabilitation counselor developed an Individual Rehabilitation Placement Plan for appellant, which targeted the positions of cashier, pharmacy delivery person and security guard. On September 20, 1996 an Office claims examiner reviewed the targeted positions and disagreed with their medical suitability, stating that a cashier position may require

[1] Makeshift work is not representative of appellant's wage-earning capacity. When the evidence raises a serious question of whether a position actually performed by an employee for a limited period in the past may have been a makeshift position, the Office cannot use this position as representative of that employee's wage-earning capacity without investigating this question. The use of what may be an inappropriate position as the basis of an employee's wage-earning capacity will be more closely scrutinized where the Office applies loss of wage-earning capacity decision prospectively, that is, to a period after the employee no longer was working in the position used as representative of his or her wage-earning capacity; *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Samuel J. Chavez*, 44 ECAB 431 (1993); *James Jones, Jr.*, 39 ECAB 678 (1988).

long periods of standing, pharmacy delivery may require stair climbing and prolonged walking and a security guard may be required to stand, walk and even run.

Vocational rehabilitation efforts continued and on November 12, 1996 appellant was offered a modified janitor position. He refused the position and rehabilitation efforts ceased. It was subsequently determined. However, the modified janitor position was found to be not medically suitable because appellant would be required to walk or stand more than four hours a day. Consequently, after receiving updated medical information from appellant's treating physician, the Office reopened appellant's vocational rehabilitation file, again targeting the three positions previously identified. By letter dated September 14, 1998, the Office informed appellant that he would receive 90 days of employment placement assistance.

The rehabilitation counselor reported on November 24, 1998 that appellant had informed her that he intended to move to New York City within 30 days. The rehabilitation counselor noted that appellant had made a poor effort following up on job leads and had refused to apply for positions as a security guard on the grounds that he would not be hired due to a prior felony conviction. However, appellant had not provided a copy of his police record as requested and the employing establishment reported that a background check had not revealed any convictions. On January 20, 1999 the rehabilitation counselor determined that the positions of security guard and delivery person, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities and were readily available in the Tidewater labor market.

By letter dated March 18, 1999, the Office advised appellant that it proposed to reduce his compensation 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. The Office disagreed with its proposed action, he should submit contrary evidence or argument within 30 days.

By decision dated April 27, 1999, the Office finalized the reduction of compensation effective April 27, 1999, based on his capacity to earn wages as a security guard. The Office determined that the position represented appellant's wage-earning capacity and was available in his commuting area.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, effective April 27, 1999, based on his ability to perform the duties of the selected position of security guard.

An injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages), but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of 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 his injury, the 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.[2] Accordingly, the evidence must establish 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.

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 labor market that fits the employee's capabilities with regard to his or her 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 service. 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.[3]

In this case, the 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. The Office principally relied upon the reports of Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon and appellant's treating physician. In his most recent report dated March 9, 1998, Dr. Wardell advised that appellant could return to work within the following restrictions: No climbing or squatting, no more than four hours of walking, standing, twisting or kneeling, pushing and pulling limited to 4 hours and 20 pounds each; and lifting limited to 2 hours at a maximum of 50 pounds.

The job description for security guard contained in the *Dictionary of Occupational Titles* states, in pertinent part:

> "Stand guard at entrance gate or walk about premises of business or industrial establishment to prevent theft, violence, or infractions of rules. Guard property against fire, theft, vandalism and illegal entry. Direct patrons or employees and answer questions relative to services of establishment. Control traffic to and from buildings and grounds. Include workers who perform these functions using a patrol car."

The *Dictionary of Occupational Titles* also characterizes the position as "light," rather than "sedentary" work and describes light work as:

> "Lifting 20 pounds maximum with frequent lifting and/or carrying of objects weighing up to 10 pounds Even though the weight lifted may be only a negligible amount, a job is in this category *when it requires walking or standing to a significant degree*, or when it involves sitting most of the time with a degree of pushing and pulling of arm and/or leg controls." (Emphasis added.)

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[2] *James R. Verhine*, 47 ECAB 460 (1996); *David W. Green*, 43 ECAB 883 (1992); *Hattie Drummond*, 39 ECAB 904 (1988); *Pope D. Cox*, 39 ECAB 143 (1988); *see* 5 U.S.C. § 8115(a).

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

The Board finds that the position of security guard, which is described as possibly involving a significant degree of walking or standing is not within the restrictions prescribed by Dr. Wardell, who indicated that appellant could only walk or stand for four hours. In addition, the Office did not explain why the position, which an Office claims examiner found medically unsuitable in September 1996, was now deemed acceptable when the medical records submitted by Dr. Wardell did not show any improvement in appellant's right knee condition between November 25, 1996 and January 15, 1999.

Also, appellant reported contention that his prior felony conviction would prevent him from finding work as a security guard, but the rehabilitation relied on the employing establishment's assurance that a NCIC search did not show any criminal convictions and further noted that appellant had been given a security clearance by the employing establishment. Although technically correct, the Office did not give sufficient consideration to the possible impact that this significant factor may have had on appellant's capacity to earn wages in the selected position. Moreover, in its decision, the Office merely noted that appellant had reported he would not be hired to work as a security guard, but did not otherwise address this fact. Without further consideration and explanation, appellant's capacity to earn wages as a security guard, given his reported history of felony convictions, does not appear outwardly reasonable under the circumstances.[4]

Finally, the Board notes that unless the employee voluntarily moves to an isolated locality with few job opportunities, the availability of the selected employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of residence at the time of injury.[5]

In this case, the rehabilitation counselor made the determination of availability in December 1998 when appellant was residing in the Tidewater area of Portsmouth, Virginia. However, while it is not clear from the record exactly when appellant moved from Portsmouth to New York City, the Board notes that both the Office's March 18, 1999 notice and the April 27, 1999 final decision were mailed to appellant's New York address. Therefore, the record does not support that the availability of the selected position was properly evaluated with respect to the city of New York.

[4] *See James R. Verhine, supra* note 2.

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

The April 27, 1999 decision of the Office of Workers' Compensation Programs is reversed.[6]

Dated, Washington, DC
April 26, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[6] The Board notes that, together with his appeal to the Board, appellant submitted additional evidence in support of his claim, including a copy of what appears to be his criminal record. The Board cannot consider this evidence on appeal, however, as it was not before the Office at the time of the final decision; see *Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c). Appellant should submit any additional evidence to the Office for consideration.