U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY E. SELVIN and U.S. POSTAL SERVICE,
POST OFFICE, Concord, CA

Docket No. 00-1018; Submitted on the Record;
Issued July 16, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 10, 1999, based on his capacity to perform the duties of a security guard.

On November 6, 1990 appellant, a 49-year-old letter carrier, filed a claim based on a psychiatric condition, based on anxiety, stress, headaches, loss of sleep and depression due to factors of his federal employment. On March 25, 1992 the Office accepted appellant's claims for depression, musculoskeletal neck and back pain and depression. Appellant missed work intermittently and was paid compensation. He stopping working on November 6, 1991 due to an anxiety attack.

In a work restriction evaluation dated November 10, 1992, Dr. Arthur G. Waltz, Board-certified in psychiatry and neurology, indicated that appellant could work an eight-hour day on light duty. He allowed appellant to sit for 8 hours, restricted him from walking, bending, squatting, climbing, kneeling, twisting and standing for more than 6 hours and indicated he could lift for up to 4 hours, not exceeding 50 to 75 pounds.

In a report dated January 22, 1996, Dr. Eric E. Bugna, a Board-certified orthopedic surgeon, stated that appellant had pain at his lumbosacral spine, mechanical in etiology. He concluded that appellant would most probably not be able to return to his prior job activities due to a combination of orthopedic and psychological difficulties.

In a work restriction evaluation dated December 15, 1998, Dr. Daniel G. Amen, appellant's psychiatrist, indicated that appellant could work an eight-hour day with no restrictions, except for the fact that he was prohibited from returning to the employing establishment due to psychological reasons.

On July 9, 1999 a vocational rehabilitation counselor summarized his efforts to find suitable alternate employment for appellant within his indicated restrictions. The counselor recommended the position of security guard listed in the Department of Labor's *Dictionary of*

Occupational Titles, which, he determined, reasonably reflected appellant's ability to earn wages, DOT #372.667-034.

In a memorandum dated July 30, 1999, the Office noted that appellant had originally been referred for rehabilitation services in 1993, but that these efforts were unproductive. The Office stated that Dr. Amen, appellant's treating psychiatrist, had precluded him from returning to the employing establishment and that appellant had become involved in a training program for medical technology. The Office added that appellant had refused to cooperate with the efforts of the vocational counselor, and that the rehabilitation effort was terminated without a resolution.

By notice dated August 26, 1999, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a security guard at the weekly rate of $320.00 in accordance with the factors outlined in 5 U.S.C. § 8115.[1] The Office calculated that appellant's compensation rate should be adjusted to $282.25 using the *Shadrick*[2] formula. The Office indicated that appellant's salary on November 12, 1991, the date he began receiving compensation for temporary total disability, was $433.60 per week, that his current, adjusted pay rate for his job on the date of injury was $705.29 and that appellant was currently capable of earning $320.00 per week, as a security guard. The Office therefore determined that appellant had a 45 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of $238.48. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $282.25.

The Office stated that appellant's only work restriction was his inability to return to work for the employing establishment and that he was able to work an eight-hour day. The Office stated that Dr. Waltz, in his November 10, 1992 report, had indicated that appellant was able to work an eight-hour day with restrictions and that Dr. Bugna had indicated in his January 22, 1996 report that appellant would probably not be able to return to his prior job activities due to a combination of orthopedic and psychological difficulties. The Office concluded that it would rely on the work restrictions of Drs. Amen and Waltz in light of the fact that there was no evidence to suggest appellant's status had changed since the issuance of their reports. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a security guard, which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated September 21, 1999, Dr. George M. Lewis, a specialist in psychiatry, advised the Office that he was requesting a one-month extension of time in which to submit a medical report on behalf of appellant.

By decision dated September 30, 1999, the Office reduced appellant's compensation effective on October 10, 1999 because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his November 6, 1990 employment injury, and

[1] 5 U.S.C. § 8115.

[2] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

that the evidence of record showed that the position of security guard represented his wage-earning capacity.

The Board finds that the Office properly reduced appellant's compensation for total disability effective October 10, 1999, based on his capacity to perform the duties of a security guard.

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.[3]

In this case, the Office properly found in its September 30, 1999 reduction of compensation that appellant was no longer totally disabled for work due to the effects of his November 6, 1990 employment injury. The Board notes that Dr. Amen, Board-certified in psychiatry and neurology and appellant's treating psychiatrist, indicated in a work restriction evaluation dated December 15, 1998 that appellant could perform an eight-hour workday, with the limitation only that he was precluded from returning to employment with the employing establishment due to psychological reasons.

The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the rehabilitation officer to submit a final report summarizing that placement efforts were not successful and submitting relevant information to the Office.[4]

On July 9, 1999 the vocational counselor issued a report summarizing his efforts to find suitable alternate employment for appellant in which he indicated that appellant could work as a security guard. In a memorandum dated July 30, 1999, the Office stated that appellant's case had been closed as nonrehabilitated, and that the vocational counselor's job availability report indicated that two positions were reasonably available for appellant in his local labor market and reasonably represented his wage-earning capacity.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

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.[5] 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

[3] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (April 1995).

[5] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, The Law of Workmen's Compensation § 57.22 (1989).

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.[6]

The rehabilitation counselor assigned to assist appellant in placement efforts identified two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, as appropriate for appellant. Based on the most recent work restriction evaluation, the Office selected a position as a security guard which it found suitable for appellant. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a security guard, and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. Finally, the Office applied the principles set forth in the *Shadrick*[7] decision to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his November 6, 1990 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.[8]

The decision of the Office of Workers' Compensation Programs dated September 30, 1999 is hereby affirmed.

Dated, Washington, DC
July 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

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

[7] *Albert C. Shadrick, supra* note 2.

[8] Appellant has attached a copy of an October 21, 1999 report from Dr. Amen. The Board does not have jurisdiction to consider any new evidence; however, appellant may submit such evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128. 20 C.F.R. § 501(c).