U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYLVESTER FEW and DEPARTMENT OF THE NAVY, CIVILIAN PERSONNEL OFFICE, New Orleans, LA

Docket No. 01-103; Oral Argument Held February 20, 2002; Issued March 21, 2002

Appearances: *Sylvester Few, pro se*; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of gate guard; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

The Board has duly reviewed the case on appeal and finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of gate guard.

Appellant, a carpenter, filed a claim alleging that on October 27, 1993 he injured his left shoulder in the performance of duty. The Office accepted his claim for a rotator cuff tear and subsequently authorized a left shoulder arthroscopy. Appellant was on detail as a painter when the Office authorized a total left shoulder replacement on August 26, 1994. Upon return to duty, appellant was again detailed as a painter and, on March 31, 1996 was reassigned to a painter position, which the employing establishment specifically designed taking into account appellant's medical limitations. On April 10, 1997 Dr. Richard E. Jones, appellant's treating orthopedic physician, released appellant to a sedentary light-duty job with restrictions on lifting and abduction of the left arm effective April 15, 1997. Following Dr. Jones' comments regarding what appellant could and could not do pertaining to the March 31, 1996 painter position, the job offer was declared invalid. Once it became clear that the employing establishment was unable to accommodate appellant's restrictions vocational rehabilitation efforts were reopened in June 1997.

In September 1997, appellant was involved in a nonwork-related motor vehicle accident and suffered multiple orthopedic traumas and underwent multiple surgeries. On July 22, 1998

the Office proposed to reduce appellant's compensation benefits. By a notice of proposed reduction of compensation dated July 22, 1998, the Office recognized that appellant had been receiving total disability compensation and proposed reduction based on the position of Gate Guard. By decision dated September 9, 1998, the Office determined appellant's wage-earning capacity based on the selected position of gate guard. Appellant requested an oral hearing. By decision dated September 17, 1999, the Office hearing representative affirmed the Office's September 9, 1998 decision.

Section 8115 of the Federal Employees' Compensation Act[1] provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity 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]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his 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, the Office should apply the principles set forth in *Albert C. Shadrick*[3] to ascertain the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[4]

The Office has stated that in some situations rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the vocational rehabilitation counselor to identify positions from the Department of Labor's *Dictionary of Occupational Titles* and proceed with information from the labor market survey to determine the availability and wage rate of the position.[5] The Office does not guarantee that an employee will obtain employment in the selected position, nor is the loss of wage-earning capacity determination erroneous if the employee is unable to secure employment in the selected position.[6]

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[1] 5 U.S.C. §§ 8101-8193, 8115.

[2] *Alfred R. Hafer,* 46 ECAB 553, 556 (1995).

[3] 5 ECAB 376 (1953).

[4] *Karen L. Lonon-Jones,* 50 ECAB 293 (1999).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.8 (December 1995).

[6] *Wilson L. Clow, Jr.,* 44 ECAB 157 (1992).

In this case, appellant's treating orthopedic surgeon, Dr. Jones, determined on April 10, 1997 that appellant was only partially disabled due to his accepted employment injuries. He indicated that appellant was able to perform a sedentary job with no lifting over 10 pounds, no overhead lifting, no abduction of the left arm over 90 degrees and no repetitive abduction beyond 60 degrees. The vocational specialist had recommended a prevocational training program, which appellant refused, in a letter dated September 19, 1997, around the time he was involved in the nonwork-related motor vehicle accident. As appellant was not able to work following the nonwork-related motor vehicle accident, the rehabilitation specialist eventually closed appellant's case and determined that the position of gate guard was within appellant's physical limitations due to his work-related injury and was available in suitable numbers to make it reasonably available to appellant within his commuting area. The position of gate guard in the *Dictionary of Occupational Titles* 372.667-030 is described as follows:

> "Guards entrance gate of industrial plant and grounds, warehouse, or other property to control traffic to and from buildings and grounds: Opens gate to allow entrance or exit of employees, truckers and authorized visitors. Checks credentials or approved roster before admitting anyone. Issues passes at own discretion or on instructions from supervisors. Directs visitors and trucks to various parts of grounds or building."

As the medical evidence established that appellant could perform work with restrictions on lifting and movement of his left shoulder and the employing establishment was unable to accommodate appellant's restrictions, the Board finds that the Office's determination that appellant was no longer totally disabled for work was proper. The Office then relied on an Office vocational rehabilitation counselor's determination that the position of gate guard was reasonably available within appellant's commuting area and that he had the necessary vocational training for the position. The Office further found that the position was within appellant's physical capabilities based on appellant's employment injury alone.[7] The Board notes that the Office is not required to consider medical conditions or diseases arising subsequent to the work-related injury in determining an employee's wage-earning capacity.[8] The Office, therefore, concluded that appellant had the capacity to earn wages as a gate guard and calculated his loss of wage-earning capacity following the principles set forth in the *Shadrick* decision.[9] As the Office followed established procedures for determining the vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a gate guard.

Appellant argued that he was never provided with a position description and that such positions were not available in the civilian community. The Office is not obligated to secure a

[7] The position included occasional reaching, however, appellant's movement restrictions apply only to his left arm.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

[9] *Albert C. Shadrick*, *supra* note 4.

job for a claimant. The Board has held that a lack of current job openings does not equate to a finding that the position is not performed in sufficient numbers to be considered reasonably available.[10]

Appellant also contended that he never received notice to reduce his compensation. The record contains a July 24, 1998 Form CA-110 (report of phone call). The report noted that appellant called regarding the prereduction letter and that he talked over and over about his new medical evidence and how he could not work as a gate guard. The report reflects that appellant was informed that he could provide new medical evidence with medical rationale to support such contention. The report noted that appellant was involved in a serious car accident and appellant was advised that the prereduction letter does not take into account any injuries which occurred subsequent to the work injury.

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

In this case, by decision dated January 21, 2000, the Office refused to reopen appellant's case for further review of the merits of his claim.[11]

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.[12] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.[13] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.

Appellant's November 24, 1999 request for reconsideration, did not show that the Office erroneously applied a point of law, nor did it advance a point of law not previously considered by the Office. In an earlier statement, which the Office received November 9, 1999, appellant argued that the decision of the Office hearing representative contained wrong dates and wrong information. He followed this with a letter dated November 29, 1999, wherein he specified dates of specific operations he had for his left shoulder and advised that the cause of his injury was a result of a fall whereby he broke his rotator cuff on his left shoulder. Appellant further stated that he was not offered another job within the employing establishment and that he had refused

[10] *Alfred R. Hafer*, *supra* note 3.

[11] The record contains a September 6, 2000 decision of the Office, issued after appellant filed his appeal with the Board on August 14, 2000, which addresses a denial of a reconsideration request. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions, which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

[12] 20 C.F.R. § 10.606(b) (1999).

[13] 20 C.F.R. § 10.608(b) (1999).

to resign from the employing establishment due to his work injury. Appellant alleged that he had numerous qualifications which the rehabilitation counselor did not consider. Appellant stated that he retired on October 25, 1998. He asserted that when he was notified in September 1998 of the proposed reduction due to his ability to perform work as a gate guard, he was still employed by the employing establishment and did not understand how he could be offered another job when he was still employed at the employing establishment.[14] Appellant's contentions, however, do not add anything new and do not address the particular issue involved. Accordingly, this evidence and contentions do not constitute a basis for reopening the case.

A December 8, 1999 medical report from Dr. Jones notes that appellant has had his impairment rating and was retired at 40 percent. It further noted that appellant was complaining of the same discomfort and advised that he was ready for another injection. There is no indication, however, that he was referencing appellant's left shoulder and there was no discussion regarding appellant's disability. Accordingly, this report offers nothing new and does not constitute a basis for reopening the case.

Appellant did not show that the Office erroneously applied a point of law, advance a new and relevant point of law or fact, or submit new and relevant evidence. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

[14] Appellant was in a leave-without-pay status with the employing establishment at the time due to residuals of the employment injury since approximately March 1997.

The January 21, 2000 and September 17, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 21, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member