

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD W. WIX and DEPARTMENT OF THE ARMY,
TENNESSEE ARMY NATIONAL GUARD, Nashville, TN

*Docket No. 02-759; Submitted on the Record;
Issued March 3, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On July 16, 1995 appellant, then a 46-year-old welder, filed a claim alleging that he injured his neck and back when cribbing fell from a dump bed striking him. The Office accepted appellant's claim for neck strain, cervical herniated disc at C5-6 and C6-7 and aggravation of degenerative disc disease. Appellant stopped work on June 19, 1995 and did not return.

Appellant submitted a report from Dr. M. Robert Weiss, a Board-certified internist dated December 4, 1995 and November 19, 1998; and Dr. Zachary M. Hutchens, a Board-certified family practitioner, dated March 24, 1997. Dr. Weiss noted that appellant was doing extremely well and could return to light duty with several restrictions including no lifting over 10 to 20 pounds, no lifting overhead and no repetitive bending, stooping, pushing or pulling. Dr. Hutchens noted a history of appellant's work-related injury of 1995 indicating that he continued to work under lifting restrictions. He noted that appellant could be employed in a sedentary job.

On August 31, 1999 the Office referred appellant to Dr. John W. Lamb, a Board-certified orthopedist for a second opinion. In his report dated September 15, 1999, Dr. Lamb diagnosed appellant with status post cervical discectomy and laminectomy; lumbar laminectomy and discectomy; marked degenerative disc and joint disease of the cervical spine and marked degenerative disc and joint disease of the lumbar spine. He indicated that appellant was not able to do more than sedentary to light occupation and could not return to his job as a welder. The doctor indicated that appellant could return to sedentary to light occupation which did not require constant standing, walking, prolonged looking up or down, frequent twisting or turning; with lifting limited to 20 pounds.

On January 4, 2000 appellant was referred for vocational rehabilitation. In a report dated July 18, 2000, the counselor noted that a vocational assessment was required to proceed with rehabilitation.

Thereafter appellant submitted a report from Dr. James L. Hughes, a psychologist, for evaluation. In a report dated June 21, 2000, appellant underwent a mental status examination. Dr. Hughes determined that appellant did have a learning disability. He further noted that appellant had significant deficits in short-term auditory attention and memory.

On March 22, 2000 a vocational evaluation report noted that appellant could not return to his employment as a welder. The report indicated that Dr. Lamb's restrictions limiting appellant to light or sedentary work, no constant standing or walking, no prolonged looking up or down would have to be incorporated into a job position for appellant. Appellant was noted to have poor reading skills and was in constant pain during the evaluation. The report noted that appellant could perform various occupations including security guard, routing clerk or taxi dispatcher.

In a rehabilitation closure report dated October 27, 2000, the counselor noted that appellant was reluctant to engage in job search activities and was not an active participant in the job search efforts. He concluded that the rehabilitation job efforts were unsuccessful.

By letter dated November 21, 2000, the Office notified appellant that it proposed to reduce his compensation based on his capacity to earn wages as a security guard. The Office noted that the medical evidence of record demonstrated that he could perform the position and advised that, if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days.

In a letter dated December 7, 2000, appellant's attorney indicated that due to appellant's medication he would be unable to perform the duties of a security guard. Additionally she indicated that due to appellant's accepted back and neck conditions appellant could not fulfil the physical demands of the position.

By decision dated December 29, 2000, the Office reduced appellant's compensation pursuant to section 8113(b) of the Federal Employees' Compensation Act based on his capacity to earn wages as a security guard effective December 29, 2000. The Office further advised appellant that it would reduce his compensation for wage loss because the evidence established that the constructed position of security guard represented his wage-earning capacity.

By letter dated January 17, 2001, appellant requested a hearing before an Office hearing representative. The hearing was held on October 15, 2001. Appellant's attorney indicated that, based on appellant's medical restrictions, level of pain and learning disabilities the position of a security guard was not appropriate. Appellant testified that he experienced constant pain with and without medication and could not perform the position as a security guard.

By decision dated January 3, 2002, the hearing representative affirmed the Office's decision dated December 29, 2000.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, effective December 29, 2000, based on his ability to perform the duties of the selected position, security guard.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹

Under section 8115(a) of the Act, 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 if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.² Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.³ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁴

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 or 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 physical limitation, 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.⁵

The Board finds that 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 relied upon reports from Dr. Weiss dated December 4, 1995 and November 19, 1998; and the Office referral physician, Dr. Lamb. Dr. Weiss noted that appellant was doing extremely well and could return to light duty with several restrictions including no lifting over 10 to 20 pounds, no lifting overhead and no repetitive bending, stooping, pushing or pulling. Dr. Lamb's report dated September 15, 1999 diagnosed appellant with status post cervical discectomy and laminectomy; lumbar laminectomy and discectomy; marked degenerative disc and joint disease of the cervical spine and marked degenerative disc and joint disease of the lumbar spine. He indicated that appellant was not able

¹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

³ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁴ *Id.*

⁵ *See James Smith*, Docket No. 00-1103 (issued October 25, 2001).

to do more than sedentary to light occupation and could not return to his job as a welder. The doctor indicated that appellant could return to sedentary to light occupation which did not require constant standing, walking, prolonged looking up or down, frequent twisting or turning; with lifting limited to 20 pounds.

The selected position of security guard is described as follows:

“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.... May perform janitorial duties.... May be deputized to arrest trespassers.... May patrol with guard dog on leash....”

The position was described as inside and sedentary. The rehabilitation specialist stated that appellant was vocationally prepared for the position as it fit within the restrictions set forth by Dr. Lamb.

The Board finds that the Office has not established that the position of security guard falls within the physical restrictions for appellant’s condition, which includes employment-related neck strain, cervical herniated disc and aggravation of degenerative disc disease. In making its determination that appellant could perform the selected position, the Office relied upon a report from a Board-certified orthopedist, Dr. Lamb. He indicated that appellant was not able to do more than sedentary to light occupation and could not return to his job as a welder. Dr. Lamb indicated that appellant could return to sedentary to light occupation which did not require constant standing, walking, prolonged looking up or down, frequent twisting or turning; with lifting limited to 20 pounds. However, upon review of the above position, appellant would be required to patrol areas, remain watchful and alert and to restrain or expel disorderly individuals which is clearly outside his restrictions. Moreover, Dr. Hughes’, appellant’s psychologist, noted in a report dated June 21, 2000 that appellant had a learning disability and indicated that appellant had significant deficits in short-term auditory attention and memory. The *Dictionary of Occupational Titles* provides that a security guard requires language development at Level 2 consisting of a vocabulary of 5,000 words and the ability to read 190 to 215 words per minute, to read and follow instructions and to write compound and complex instructions. It was error for the Office to reduce appellant’s wage-loss compensation benefits on the basis of his ability to perform the duties of the position of security guard.⁶

The January 3, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
March 3, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member