U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID A. DUDLEY and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 03-1331; Submitted on the Record;
Issued January 21, 2004

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective March 5, 2002, based on his capacity to perform the duties of a security guard.

On March 3, 1989 appellant, a 24-year-old pipefitter, injured his lower back while bending over to pick up a pump. He filed a claim for benefits on the date of injury, which the Office accepted for lumbar subluxation, herniated disc at L5-S1 and lumbar discectomy. Appellant sustained a second injury to his lower back on June 6, 1989 when he tripped and fell while carrying a hydro pump. The Office accepted the claim for lumbar strain; the two claims were combined. The Office also accepted a claim for bilateral carpal tunnel syndrome. The Office paid appellant compensation for temporary total disability for appropriate periods.

In a work restriction evaluation dated November 17, 1994, Dr. Edwin L. Laurnen, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant could only work at a sedentary job for six hours a day. He restricted appellant from lifting, carrying, pulling, pushing more than 15 pounds and stated that he could engage in moderate walking, bending, standing and sitting and stair-climbing. Dr. Laurnen precluded appellant from stooping, scaffolding, crawling, kneeling and climbing vertical ladders. In a treatment note dated May 23, 1996, he stated that appellant's examination was essentially unchanged from his previous examinations and indicated that his work restrictions were essentially unchanged since his last examination dated August 15, 1995.

On May 21, 1996 the employing establishment was no longer able to accommodate appellant's work restrictions and released him from his light-duty job. Appellant has not returned to work since that time. The Office paid him compensation for temporary total disability and placed him on the periodic rolls.

In order to clarify the nature and extent of appellant's employment-related low back condition, the Office scheduled a second opinion examination with Dr. Michael C. Bidgood,

Board-certified in orthopedic surgery. In a report dated October 16, 1996, he opined that appellant was capable of performing the full duties of sedentary computer work for eight hours a day. In a work restriction evaluation dated April 10, 1997, Dr. Bidgood reiterated that appellant could work an eight-hour day, but should limit repetitive bending, lifting and carrying. He advised that appellant was capable of light duty with limited lifting not exceeding 10 to 20 pounds.

By letter dated April 25, 1997, the Office advised appellant that it had determined that a conflict existed in the medical evidence between the opinion of Dr. Laurnen, appellant's treating physician and the opinion of Dr. Bidgood as to whether he had any continuing, residual disability in his low back causally related to his 1989 employment injuries and referred him for an impartial medical examination with Dr. Lynn Staker, a Board-certified orthopedic surgeon, pursuant to section 8123(a).[1]

In a report dated October 29, 1997, Dr. Staker indicated that she was unable to determine whether appellant could work an eight-hour day until he underwent a functional capacity evaluation, which she recommended for him; she did advise that he could work for four hours a day. Dr. Staker noted that there was a psychological component to appellant's ability to manage pain and to his motivation and recommended that he undergo psychological testing.

Appellant underwent a function capacity evaluation on May 7, 1999, an occupational therapist indicated that appellant could work an eight-hour day with restrictions of no heavy lifting and intermittent and alternating sitting, standing and walking for two to three hours a day.

In a work restriction evaluation dated November 15, 2000, Dr. David Z. Levine, an osteopath, outlined restrictions substantially similar to those reflected in the May 7, 1999 functional capacity evaluation. He indicated that appellant could work an eight-hour day, but limited him to no more than two hours of sitting, walking, standing, reaching, reaching over the shoulder, twisting, operating a motor vehicle, pushing, pulling and lifting. Dr. Levine restricted appellant from pushing or pulling no more than 10 pounds and lifting exceeding 2 pounds. He also recommended that appellant take breaks every 15 to 20 minutes, for 3 minutes duration. Dr. Levine noted that appellant also had an accepted bilateral carpal tunnel syndrome condition.

In a vocational rehabilitation report, finalized on August 3, 2001, a vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within his indicated restrictions. The vocational counselor recommended a position for appellant listed in the Department of Labor's *Dictionary of*

[1] 5 U.S.C. § 8123(a).

Occupational Titles, which, he determined, reasonably reflected appellant's ability to earn wages, that of security guard, DOT #372.667-034.[2]

Appellant underwent a second functional capacity evaluation on August 29, 2001; an occupational therapist reiterated that he could work an eight-hour day, with alternating and intermittent sitting, standing and walking.

By notice of proposed reduction dated January 30, 2002, 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[3] at the weekly rate of $364.00, in accordance with the factors outlined in 5 U.S.C. §8115.[4] The Office calculated that appellant's compensation rate should be adjusted to $866.91 using the *Shadrick*[5] formula. The Office indicated that appellant's salary on May 21, 1996 the date he began receiving compensation for temporary total disability was $815.20 a week; that his current adjusted pay rate for his job on the date of injury was $866.91 and that appellant was currently capable of earning $364.00 a week, the rate of a security guard. The Office, therefore, determined that appellant had a 42 percent wage-earning capacity, which, when multiplied by 3/4 amounted to a compensation rate of $354.62. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $388.50. 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 his commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated February 21, 2002, appellant contested the proposed reduction of compensation, contending that he was physically unable to perform the selected position. He noted that the August 29, 2001 functional capacity test contained limitations in his upper extremities pertaining to his bilateral carpal tunnel condition and stated that the medication he takes for hypertension and depression hindered his ability to accomplish the duties of the

[2] The job description indicated that appellant would be guarding industrial or commercial property, performing any combination of the following duties, among others: Patrolling, periodically, buildings and grounds of industrial plant or commercial establishment, docks, logging camp area or worksite. Examining doors, windows and gates to determine that they are secure. Warning violators of rule infractions, such as loitering, smoking or carrying forbidden articles and apprehends or expels miscreants. Watching for and reporting irregularities, such as fire hazards, leaking water pipes and security doors left unlocked. 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. Job requires occasionally applying force of 20 pounds and frequently applying force of 10 pounds.

[3] The heading of the proposed notice of reduction of compensation erroneously states that his wages would be based on those of a computer operator. The accompanying memorandum, however, clearly states that the selected position was that of a security guard and the Office calculated appellant's adjusted compensation based on this position.

[4] 5 U.S.C. § 8115.

[5] *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).

selected position. In addition, appellant asserted that the functional capacity test, which tested him for only a few hours, did not reflect his work abilities over an eight-hour day.

By decision dated March 5, 2002, the Office advised appellant that it was reducing his compensation effective March 5, 2002, because the weight of the medical evidence showed that he was no longer totally disabled for work due to the effects of his 1996 employment injury and that the evidence of record showed that the position of security guard represented his wage-earning capacity.

By letter dated March 15, 2002, appellant requested an oral hearing, which was held on October 22, 2002. At the hearing, appellant alleged that the Office erred by stating on the pretermination notice that the proposed reduction in compensation would be based on appellant's ability to earn wages as a computer operator, while stating, in the March 5, 2002 decision that the reduction was based on the selected position of security guard. Appellant also asserted that the security guard job was not suitable for appellant because it required the ability to apprehend and expel miscreants; he submitted an October 10, 2001 report from Dr. Levine, upon whose restrictions the position was selected, in which Dr. Levine stated that appellant was incapable of apprehending and ejecting malefactors from both a physical and mental standpoint.

Appellant testified that he felt unable to perform the security guard position because it required him to carry a firearm, which he was unable to do because he had recently been convicted of assault and had subsequently violated his parole. Appellant contended that he was additionally unable to perform the security guard duties because he has emotional problems and takes two medications for his back problems, both of which make him drowsy.

At the hearing, appellant also submitted an August 5, 2002 report from Dr. Geary A. Heine, a specialist in anesthesiology, in which he stated that he had been treating appellant since November 10, 2000 and had diagnosed bipolar type I disorder, with a recent manic episode.

By decision dated March 31, 2003, an Office hearing representative affirmed the Office's March 5, 2002 decision, reducing appellant's compensation based on his capacity to perform the duties of a security guard.

The Board finds that the Office did not meet its burden to reduce appellant's compensation effective March 5, 2002, based on his capacity to perform the duties of a 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.[6] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

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

[7] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Under section 8115(a) of the Federal Employees' Compensation 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-earnings 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.[8] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9] The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[10]

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 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, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[11]

A review of the medical evidence in the present case indicates that there is insufficient medical evidence to support a finding that the selected position as a security guard was within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a selected position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[12] In his November 15, 2000 report, Dr. Levine did return appellant to an eight-hour workday, but with limitations of two hours of sitting, walking, standing, reaching, reaching over the shoulder, twisting, operating a motor vehicle, pushing, pulling and lifting. He advised appellant to take breaks every 15 to 20 minutes, for 3 minutes duration and also noted that he had an accepted bilateral carpal tunnel syndrome condition. In addition, Dr. Levine restricted appellant from pushing or pulling more than 10 pounds and lifting more than 2 pounds. Based on these work restrictions, a vocational rehabilitation counselor selected a job as a security guard for appellant on August 3, 2001. However, there were duties entailed by this position, listed on the job description, which

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

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

[10] *Id*. The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[11] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, *supra* note 5.

[12] *Robert Dickinson*, 46 ECAB 1002 (1995).

conflicted with Dr. Levine's work restrictions. The security guard job description stated that appellant was required to apprehend or expel miscreants and was, where necessary, "deputized to arrest trespassers." More specifically, the job description stated that the "[j]ob requires occasionally applying force of 20 pounds and frequently applying force of 10 pounds" -- a requirement which directly contradicted and exceeded Dr. Levine's restrictions of pushing and pulling no more than 10 pounds and lifting not to exceed 2 pounds. Thus, notwithstanding the attending physician's explicit restrictions, the employing establishment selected a position as a security guard whose duties, by their very nature, necessitated a level of physical exertion and mobility which exceeded his physical restrictions.[13] Once appellant raised the issue of whether the security guard job was too physically demanding, thereby conflicting with the restrictions imposed by Dr. Levine, the Office did not submit any medical opinion or factual evidence indicating that the position involved alternate tasks which would diversify appellant's duties and prevent him from engaging in activities contrary to Dr. Levine's restrictions.[14] For these reasons, the Board finds that the Office, in its March 5, 2002 decision, failed to meet its burden to show that the job requirements of the security guard position did not exceed appellant's work restrictions.[15]

[13] In addition, the Office gave disproportionate weight to the May 7, 1999 and August 29, 2001 functional capacity tests in determining appellant's ability to perform alternate employment. It was improper of the Office to rely on these tests in light of the fact that they were administered by physical therapists and, therefore, do not constitute medical evidence pursuant to section 8101(2) of the Act.

[14] The Board further notes that the Office's March 5, 2002 decision was not adequately supported for the further reason that the medical evidence it relied on was somewhat dated at the time of its March 5, 2002 termination decision.

[15] In his October 31, 2002 report, Dr. Levine explicitly stated that appellant would not be able to perform one of the duties of the position, namely apprehending and ejected malefactors from the premises, from both a physical and a mental standpoint. The Board further notes that Dr. Staker, the impartial medical examiner, had noted in her October 29, 1997 report that there was a psychological component to appellant's ability to manage pain and to his motivation and had recommended psychological testing and that appellant also submitted evidence from Dr. Heine indicating that he had been treated for a bipolar type I disorder for more than two years.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 31, 2003 is reversed.

Dated, Washington, DC
January 21, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member