United States Department of Labor
Employees' Compensation Appeals Board

HARLEY SIMS, JR., Appellant	)	
and	)	**Docket No. 04-1916**
	)	**Issued: February 8, 2005**
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Long Beach, CA, Employer	)	

Appearances:
Harley Sims, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 26, 2004 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated August 9, 2003 in which the Office denied modification of his wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied modification of appellant's August 28, 2002 wage-earning capacity determination.

FACTUAL HISTORY

On August 21, 1992 appellant, then a 45-year-old shipwright helper, sustained an employment-related acute contusion to the left shoulder with cervical muscle strain/sprain and cephalgia. He stopped work that day and returned on October 20, 1992. He was separated from the employing establishment effective August 19, 1993 and was placed on the periodic rolls. He was thereafter referred to vocational rehabilitation and underwent computer training.

In February 1996 the Office referred appellant to Dr. Keith E. Liberman, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Liberman's reports dated February 26, March 24 and August 4, 1996, the Office on August 8, 1996 proposed to terminate appellant's compensation benefits. Appellant submitted an August 16, 1996 report in which Dr. Gerald I. Fein, an attending Board-certified orthopedist, disagreed with the proposed termination.

By decision dated September 9, 1996, the Office finalized the termination of compensation. On October 5, 1996 appellant requested a hearing that was held on April 1, 1997. He thereafter submitted an April 8, 1997 report from Dr. Fein. In a decision dated June 12, 1997, an Office hearing representative reversed the termination of compensation and directed that appellant be returned to the periodic rolls.

In February 1998 the Office determined that a conflict in medical evidence had been created between the opinions of Dr. Liberman and Dr. Fein, and referred appellant, together with the medical record, a set of questions, and a statement of accepted facts to Dr. Michael Shlens, a Board-certified orthopedic surgeon. In reports dated February 20 and March 3, 1998, Dr. Shlens advised that appellant continued to have residuals of his left shoulder injury and chronic cervical pain with degenerative cervical disc disease. He provided restrictions that appellant could not work with his left upper extremity above the shoulder and provided a 25-pound lifting restriction.

Appellant came under the care of Dr. Peter Gleiberman, a Board-certified orthopedist. By decision dated January 15, 1999, appellant was granted a schedule award for a 19 percent permanent impairment of the left upper extremity.

Appellant was referred for vocational rehabilitation services and, in a work capacity evaluation dated April 21, 2000, Dr. Gleiberman advised that he could work 8 hours per day with reaching, pushing, pulling and lifting limited to 4 hours per day at 25 pounds and no overhead work. In a memoranda dated July 26, 2000, a rehabilitation counselor advised that appellant had the necessary vocational and physical skills to perform the jobs of parking lot attendant and security guard and that these jobs were performed in sufficient numbers so as to make them reasonably available within his commuting area.

On September 21, 2000 the Office issued a notice of proposed reduction of compensation, finding that appellant had the wage-earning capacity of a security guard at $8.00 an hour. The Office noted that the constructed position required two to four years experience or education. By decision dated October 25, 2000, the Office finalized the wage-earning capacity determination. In a letter received by the Office on October 27, 2000, appellant objected to the reduction. On November 17, 2000 the Office issued an amended final reduction in compensation. The Office noted that an incorrect pay rate had been used in the October 25, 2000 decision.

In an undated letter, appellant requested a hearing. By decision dated May 10 and finalized May 16, 2001, an Office hearing representative vacated the November 17, 2000 decision, finding that the Office did not clarify whether appellant had the required two to four years experience or education needed for the security guard position. Appellant was returned to

the periodic rolls at full compensation. The Office requested updated information from its rehabilitation specialist regarding the security guard position. The memorandum noted that the security guard position did not require two years experience or education.

In a memorandum dated October 15, 2001, the Office rehabilitation specialist cited to the Department's *Dictionary of Occupational Titles* and advised that neither the security guard nor parking lot attendant positions required prior employment or training. He attached updated labor market surveys and certifications dated September 26, 2001 and advised that appellant had the vocational and physical skills to perform both positions.

By report dated October 12, 2001, Dr. Gleiberman noted appellant's continued complaints of neck pain and advised that there had been no significant interval change since his last examination a year previously.

On February 14 and March 18, 2002 the Office issued a notice of proposed reduction in compensation, finding that appellant had the wage-earning capacity of a security guard earning $8.00 per hour. Appellant submitted a report dated April 15, 2002 in which Dr. Robert Z. Braun, who practices sports medicine, advised that appellant could not perform heavy-duty work activities and provided a lifting restriction of 20 pounds.

On June 13, 2002 the Office referred appellant, the medical record, a set of questions, and a statement of accepted facts to Dr. Bunsri T. Sophon, an orthopedic surgeon,[1] for a second opinion evaluation. In a work capacity evaluation dated July 11, 2002, Dr. Sophon advised that appellant could work 8 hours per day with no reaching above the shoulders, reaching limited to 4 hours daily, and pushing, pulling and lifting limited to 2 hours daily with a weight restriction of 20 pounds. In a report dated July 16, 2002, the physician diagnosed traumatic avulsion of the left shoulder glenoid labrum, status post arthroscopic stabilization. He advised that appellant continued to experience residuals including painful restriction of motion of the left shoulder joint and weakness of the left grip.

By decision dated August 28, 2002, the Office finalized the wage-earning capacity, effective September 8, 2002, finding that appellant could perform the duties of a security guard. In an undated letter stamped received by the Office on July 2, 2003, appellant requested reconsideration. By decision dated August 9, 2003, the Office denied modification of the August 28, 2002 decision.[2]

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

[1] Dr. Sophon's letterhead indicates that he is a diplomate in the American Board of Orthopaedic Surgeons. However, a search of the directories of both the American Board of Medical Specialties and the American Board of Orthopaedic Surgeons fails to yield a reference to Dr. Sophon.

[2] The Office noted that appellant had submitted a request to repay a judgment in the amount of $2,322.00 for unpaid rent and found that this was irrelevant to the wage-earning capacity determination.

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[3]

Section 8115(a) of the Federal Employees' Compensation Act[4] provides that, if actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) his or her usual employment; (4) age; (5) his or her qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.[5]

The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[6]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[7] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[8]

ANALYSIS

In the present case, appellant did not submit evidence showing that the Office's August 28, 2002 wage-earning capacity determination was erroneous. The Office adjusted appellant's compensation effective September 8, 2002 on the grounds that he was capable of performing the selected position of security guard. An attending physician, Dr. Braun, provided an April 15, 2002 report in which he advised that appellant could perform no heavy work and no overhead activity with the left arm and restricted lifting to 20 pounds. In a July 11, 2002 work capacity evaluation, Dr. Sophon, an Office referral physician, found that appellant was not totally disabled and could work eight hours per day subject to specified work restrictions of no reaching above the shoulders, reaching limited to 4 hours daily, and pushing, pulling and lifting limited to 2 hours daily with a weight restriction of 20 pounds.

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[3] *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[7] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[8] *Id.*

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of security guard and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The Office rehabilitation specialist advised that no prior employment or training was necessary for this position.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the security guard position represented his wage-earning capacity.[9] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the security guard position and that such a position was reasonably available within the general labor market of his commuting area. The Office, therefore, properly based appellant's wage-earning capacity, effective September 8, 2002, on the security guard position, and the burden shifted to appellant to show that the award should be modified.[10]

In this case, appellant submitted no evidence in support of his claim that his wage-earning capacity should be modified, but merely alleged that it was in error. Appellant therefore did not show that there had been a material change in the nature and extent of his employment-related condition, that he had been retrained or otherwise vocationally rehabilitated or that the original wage-earning capacity was erroneous. He therefore did not meet his burden to show that the August 28, 2002 wage-earning capacity determination should be modified.[11]

CONCLUSION

The Board finds that the Office properly denied modification of the August 28, 2002 wage-earning capacity determination.

[9] *Loni J. Cleveland, supra* note 5.

[10] *Stanley B. Plotkin, supra* note 7.

[11] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2003 be affirmed.

Issued: February 8, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member