

**United States Department of Labor
Employees' Compensation Appeals Board**

D.L., Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Jeffersonville, IN, Employer**

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**Docket No. 06-1732
Issued: November 30, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 24, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 2, 2005, determining his loss of wage-earning capacity, and an April 28, 2006 decision, affirming the September 2, 2005 decision. 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 met its burden of proof in reducing appellant's compensation effective September 4, 2005 based on his ability to perform the selected position of security guard/merchant patroller.

FACTUAL HISTORY

On November 24, 2003 appellant, then a 48-year-old laborer, filed a traumatic injury claim alleging that he injured his lower back while performing pallet racking. On March 11, 2004 the Office accepted his claim for a lumbosacral strain and lumbago. Effective October 31,

2004 appellant was placed on the periodic compensation rolls in receipt of compensation for temporary total disability. Effective July 15, 2005 appellant elected civil service retirement benefits over workers' compensation benefits.

In a June 24, 2004 report, Dr. Christopher B. Shields, an attending Board-certified neurosurgeon, noted that appellant had undergone physical therapy but continued to have pain in his low back. He could not perform his regular job which required lifting of 60 to 70 pounds. Appellant was limited to no lifting over 30 pounds. In a report dated September 6, 2004, Dr. Shields stated that appellant could work eight hours a day with no lifting over 30 pounds. In reports dated October 14 and December 16, 2004, he changed the lifting restriction to no more than 20 pounds.

The employing establishment stated in an April 12, 2004 letter that it could not accommodate appellant's work restrictions. The Office subsequently referred him to a vocational rehabilitation specialist and a vocational rehabilitation counselor.

In reports dated October 11, 2004 to July 27, 2005, the rehabilitation counselor noted that Dr. Shields had restricted appellant to no lifting over 20 pounds. She provided an analysis of appellant's educational background, training, work experience, job skills and the results of vocational and aptitude testing. The counselor provided a description of the position of security guard/merchant patroller and the physical and vocational requirements. The position did not require lifting over 20 pounds. The physical requirements were described as "light" and the training needed for the position could be completed within one to three months. The vocational rehabilitation counselor indicated that the position of security guard/merchant patroller best fit appellant's qualification and represented his highest wage-earning capacity. She determined that appellant was physically and vocationally qualified for the position of security guard/merchant patroller. The counselor noted that a labor market survey confirmed that the position was performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The position paid weekly wages of \$343.60.

On August 1, 2005 the Office advised appellant that it proposed to reduce his wage-loss compensation based on his wage-earning capacity as a security guard/merchant patroller at the rate of \$343.60 a week. The Office noted that the medical evidence from Dr. Shields established that he was capable of performing this position.

By decision dated September 2, 2005, the Office reduced appellant's wage-loss compensation effective September 4, 2005 based on his capacity to earn wages as a security guard/merchant patroller. The Office determined that the security guard/merchant patroller position was medically and vocationally suitable and took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which he lived.

On September 28, 2005 appellant requested an oral hearing. A telephonic hearing was held on February 14, 2006.

Appellant submitted additional evidence. In an October 13, 2005 report, Dr. Shields stated that appellant had not worked since March 1, 2004 and was currently permanently disabled.

In a February 17, 2006 report, Dr. Phillip M. Johnson, a Board-certified family practitioner, stated that he had read the job description for a security guard/merchant patroller and felt that appellant was medically unsuited for that position. He indicated that appellant was totally disabled due to his recurrent pain, his need for medications and his level of vocational training.

By decision dated April 28, 2006, the Office affirmed the September 2, 2005 decision.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹

Under section 8115(a) of the Federal Employees' Compensation Act,² 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 facts and circumstances which may affect his wage-earning capacity in his disabled condition.³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁴ 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.⁵

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 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

¹ *Sherman Preston*, 56 ECAB ____ (Docket No. 05-721, issued June 20, 2005).

² 5 U.S.C. §§ 8101-8193.

³ See *Mary E. Marshall*, 56 ECAB ____ (Docket No. 04-1048, issued March 25, 2005); *James Smith*, 53 ECAB 188 (2001).

⁴ *Id.*

⁵ *Id.*

employment service or other applicable service.⁶ Finally, the Office should apply the principles set forth in *Albert C. Shadrick* in determining loss of wage-earning capacity.⁷

ANALYSIS

In this case, the medical evidence established that appellant was only partially disabled due to the effects of his employment-related lumbosacral strain and lumbago. His only work restriction was no lifting over 20 pounds. The description of the security guard/merchant patroller position indicated that no lifting over 20 pounds was required. The vocational rehabilitation counselor determined that appellant was qualified to perform the position of security guard/merchant patroller. She determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the salary of the position was \$343.60 per week.

The Board finds that the Office considered the proper factors set forth in 5 U.S.C. § 8115(a), such as availability of suitable employment and appellant's physical limitations, usual employment, and age and employment qualifications, in determining that the position of security guard/merchant patroller represented appellant's wage-earning capacity. The evidence of record establishes that appellant had the requisite physical ability and skills to perform the position of security guard/merchant patroller and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly calculated appellant's loss of wage-earning capacity by using his date-of-injury pay rate, his current pay rate for his job and the pay rate for the selected position. Accordingly, the Office met its burden of proof to establish that the position of security guard/merchant patroller reflected appellant's wage-earning capacity effective September 4, 2005, the date it reduced his wage-loss compensation benefits.

The evidence appellant submitted after the September 2, 2005 wage-earning capacity decision is not sufficient to warrant modification of that decision. In an October 13, 2005 report, Dr. Shields stated that appellant had not worked since March 1, 2004 and was currently permanently disabled. However, he did not indicate that appellant was totally disabled, nor did he indicate that appellant's work-related condition had worsened since he determined that his only work restriction was no lifting over 20 pounds. In a February 17, 2006 report, Dr. Johnson stated that he had read the job description for a security guard/merchant patroller and appellant was medically unsuited for that position. He stated that appellant was totally disabled due to his recurrent pain, his need for medications and his level of vocational training. However, Dr. Johnson did not specifically address the duties of the selected position or provide a rationalized explanation as to why appellant could not perform that position. Due to these deficiencies, these reports are not sufficient to warrant modification of the Office's wage-earning capacity decision.

⁶ *Sherman Preston*, *supra* note 1.

⁷ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

CONCLUSION

The Board finds that in this case the Office properly calculated appellant's loss of wage-earning capacity based on his ability to earn the wages of a security guard/merchant patroller.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 28, 2006 and September 2, 2005 are affirmed.

Issued: November 30, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board