

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

M.P., Appellant)
and) Docket No. 06-1126
DEPARTMENT OF THE ARMY, PUEBLO) Issued: September 27, 2006
CHEMICAL DEPOT, Pueblo, CO, Employer)

)

Appearances:

Dale W. Pedersen, Esq., for the appellant
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 April 13, 2006 appellant timely appealed a March 22, 2006 merit decision of the Office of Workers' Compensation Programs concerning his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly made a retroactive determination that appellant's position of security assistant effective March 21, 2004 fairly and reasonably reflected his wage-earning capacity.

FACTUAL HISTORY

On November 25, 2002 appellant, then a 49-year-old security officer, filed a traumatic injury claim alleging that on November 14, 2002 he injured his back and experienced neck pain as a result of moving furniture. He stopped work on November 14, 2002. The Office accepted

appellant's claim for temporary aggravation of degenerative disc disease at L4-5.¹ Appellant returned to work as a security assistant effective March 21, 2004. He subsequently retired on disability effective October 15, 2005.

On August 29, 2005 and later on December 15, 2005 appellant filed a Form CA-7 claim for compensation for wage loss since November 14, 2002. In a September 2, 2005 letter, appellant's attorney stated that appellant was medically disqualified from his position as a security officer and argued that appellant sustained a loss of earnings when he was reassigned to the security assistant position. The attorney advised that as of June 23, 2003 appellant was permanently disqualified from the Chemical Personnel Reliability Program, which ended any security guard assignment. Extensive medical evidence was cited in support of his argument that appellant could no longer perform his position as a security guard.

In a July 11, 2005 medical report, Dr. Julius Budnick, an internist, opined that appellant's condition had progressed. He stated that the magnetic resonance imaging (MRI) scan of June 5, 2005 revealed anterior spondylolisthesis with movement on flexion and extension views at L4-5 with progressing disc protrusion impacting the L4 and L5 nerve root with associated marked facet arthropathy at the same level. Dr. Budnick further noted that appellant's condition was complicated by other medical conditions, such as renal insufficiency and elevated creatinine levels. He further opined that appellant could work only 4 hours a day with no prolonged standing, walking, bending, lifting or carrying greater than 10 pounds or push or pull greater than 20 pounds as it would significantly aggravate his condition.

In a letter dated September 12, 2005, the employing establishment certified that appellant had received night differential pay, Sunday premium pay, holiday pay and overtime pay for the time period one-year prior to his November 14, 2001 employment injury. In a September 29, 2005 letter, the employing establishment verified that appellant started working as a security assistant on March 21, 2004 and confirmed that appellant was removed from his date-of-injury position due to his work injury. A copy of the job description of a security assistant noted that the work was performed primarily in the office setting in a sitting position and may require some walking, standing, bending, carrying light items, such as papers and books and traversing stairways.

In a November 8, 2004 report, Dr. William Watson, a Board-certified orthopedic surgeon and Office referral physician, noted the history of injury from the statement of accepted facts, reviewed the medical evidence of record and noted his examination findings and diagnosed L4-5 degenerative disc disease, right lateral L4-5 disc herniation, L4 right radiculopathy, anterior listhesis L4 on L5 and severe facet arthropathy L4-5. He opined that appellant had evidence of continued residuals related to his work-related injury with respect to L4-5 disc degeneration with ruptured disc and evidence of continued L4 radiculopathy. Dr. Watson further opined that appellant could work 3 to 4 hours in a sedentary position with frequent rest periods and pushing and pulling no more than 20 pounds and lifting no more than 10 pounds for a duration of only 15

¹ The record reflects that appellant has four other workers' compensation cases which the Office accepted. This includes a right knee strain under claim number 120136461; an aggravation of right elbow olecranon bursitis under claim number 20191530; left shoulder, forearm and hand contusions under claim number 122016743; and contusions of the coccygeal and hands under claim number 122029484.

minutes. He also opined that appellant would have been able to continue working but for the November 14, 2002 work injury.

By decision dated March 22, 2006, the Office issued a retroactive wage-earning capacity decision for wage loss effective March 21, 2004 on the basis that his actual earnings as a security assistant fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation of benefits.² After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment.

Section 8115(a) of the Act³ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earning fairly and reasonably represent his wage-earning capacity.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁵ In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.⁶ The procedures further indicate that an assessment of suitability need not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations.⁷ The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.⁸

As noted above, under Office procedures a retroactive wage-earning capacity determination may be performed if the employment fairly and reasonably represents wage-earning capacity. The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning

² See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989).

³ 5 U.S.C. §§ 8101-8193.

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

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁷ *Id.*

⁸ See *Tamra McCauley*, 51 ECAB 375 (2000); *Elbert Hicks*, 49 ECAB 283 (1998).

capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.⁹ Further, a makeshift¹⁰ or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹¹ The formula for determining loss of wage-earning capacity, developed in the *Shadrick* decision,¹² has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.¹³

ANALYSIS

In this case, appellant filed a claim for compensation for lost wages from November 14, 2002 to the present. He stopped work on November 14, 2002, returned to work as a security assistant effective March 21, 2004 and retired on disability October 15, 2005. The Office issued its loss in wage-earning capacity determination on March 22, 2006 retroactive to March 21, 2004. As noted above, there are situations, when a retroactive wage-earning capacity determination may be appropriate. The Office's procedure manual provides that a retroactive determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.¹⁴

In this case, the Office issued its wage-earning capacity determination after it received evidence that appellant's ability to work eight hours a day had changed. In a report dated July 11, 2005, Dr. Budnick, appellant's physician, opined that appellant's work-related condition had progressed and that he could work only four hours a day with restrictions. In a November 8, 2004 report, Dr. Watson, an Office referral physician, opined that appellant had evidence of continued residuals related to his work-related injury could work three to four hours a day with restrictions. The record also contains a Form CA-7 dated December 16, 2005 from appellant requesting compensation from November 14, 2002 and continuing. Appellant had also alleged in his September 2, 2005 letter that he was medically disqualified from his original position, which the employing establishment confirmed. Thus, appellant alleged that his work stoppage from November 14, 2002 until his reassignment in March 21, 2004 had occurred as a result of a change in his injury-related condition. As the Board indicated in *William M. Bailey*,¹⁵ it is

⁹ *Supra* note 6.

¹⁰ A makeshift position is a position that is specifically tailored to an employee's particular needs, and generally lacks a position description with specific duties, physical requirements and work schedule. See *William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

¹¹ See, e.g., *Michael A. Wittman*, 43 ECAB 800 (1992).

¹² *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹³ 20 C.F.R. § 10.403(c).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (July 1997); see also *Elbert Hicks*, *supra* note 8.

¹⁵ 51 ECAB 197 (1999).

inappropriate to issue a retroactive wage-earning capacity determination, when there is a pending claim for compensation from the time of the work stoppage.¹⁶ The Board notes that the procedure manual directs the claims examiner to request information from the claimant regarding the work stoppage and develop the record appropriately.¹⁷ There is no evidence that this occurred in this matter. The Office should have adjudicated the claim for compensation from November 14, 2002 through March 21, 2004, the date appellant was reassigned, based on the relevant medical evidence, rather than issuing a retroactive wage-earning capacity determination. Accordingly, the Board finds that the Office did not properly determine appellant's wage-earning capacity based on actual earnings effective March 21, 2004.

CONCLUSION

The Board finds that the Office erroneously issued a retroactive wage-earning capacity decision after appellant stopped work and filed a claim for compensation for total disability.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated March 22, 2006 is reversed and the case is remanded for further action consistent with this decision.

Issued: September 27, 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

¹⁶ *Id.*; see also *Juan A. DeJesus*, 54 ECAB 721 (2003).

¹⁷ If the reasons for the work stoppage constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical evidence will be undertaken. Federal (FECA) Procedure Manual, Part 2 - Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b) (May 1997); see also *Juan A. DeJesus*, *supra* note 16 (where the Board determined that it was inappropriate to issue a retroactive wage-earning capacity determination when the work stoppage is alleged to have occurred due to a change in an employment-related condition and there is a claim for compensation from the time of the work stoppage).