United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 07-346**
	)	**Issued: April 23, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Reno, NV, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2006 appellant filed a timely appeal from a September 13, 2006 decision of the Office of Workers' Compensation Programs which affirmed his wage-earning capacity.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings as a security guard fairly and reasonably represented his wage-earning capacity.

[1] The record contains a March 6, 2006 decision of the Office denying appellant's claim for a schedule award. Appellant requested review of the written record before the Office's Branch of Hearings and Review. In his appeal to the Board, he did not request an appeal of the schedule award denial. *See Douglas E. Billings*, 41 ECAB 880 (1990) (the Board and the Office may not exercise simultaneous jurisdiction over the same issue).

FACTUAL HISTORY

On July 16, 2004 appellant, then a 50-year-old transportation security screener, sustained injury to his right hip and low back while loading heavy bags onto a belt. The Office accepted his claim for a lumbar sprain/strain, sciatica and displacement of a lumbar disc. Appellant stopped work and underwent a lumbar discectomy at L5-S1 on April 24, 2005. He received appropriate compensation and medical benefits.

On August 4, 2005 Dr. James R. Rappaport, an attending Board-certified orthopedic surgeon, addressed appellant's condition following low back surgery. He noted that appellant had done well with physical therapy and listed an impression of low back pain due to lumbar spondylosis. Dr. Rappaport advised that appellant would be unable to return to his usual occupation with the employing establishment and recommended limitations of lifting no greater than 10 pounds with the opportunity to change from seated to standing at least five minutes every hour. He recommended vocational rehabilitation, noting that appellant was at maximum improvement and ratable.

The employing establishment was unable to accommodate appellant's physical limitations and he was referred for a functional capacity evaluation. On September 1, 2005 an occupational therapist advised the Office that appellant had been evaluated and that the results would be forwarded to Dr. Rappaport for review. On September 8, 2005 Dr. Rappaport provided updated work restrictions. He advised that appellant could work an 8-hour shift with sitting for 4 hours in 45-minute shifts; standing for 5 hours in 60-minute shifts, and walking for 4 to 5 hours at frequent, moderate distances. Dr. Rappaport limited appellant to occasional (zero to three hours/day) bending, crouching, kneeling, climbing and seated right foot motions. Appellant could engage in frequent (three to six hours/day) of low repetitious squatting, crawling, reaching and balancing. Frequent lifting above the shoulders was limited to 20 pounds with a maximum carrying weight of 32 pounds.[2]

The record reflects that appellant returned to full-time employment as a security guard/escort in the private sector on January 4, 2006 earning $10.00 an hour. On January 6, 2006 the rehabilitation consultant confirmed appellant's employment with the private sector employer, noting that appellant was hired as a permanent employee working in Reno at $10.00 an hour. On January 19, 2006 the Office notified appellant that it would be reducing his wage-loss benefits to reflect his actual earnings as a security guard. It determined that he had 62 percent wage-earning capacity, noting that his pay rate when disability began was $572.23 per week; the updated weekly pay rate for the job and step when injured was $584.16 and that his actual weekly wages were $400.00 per week.

Appellant was referred by the Office for a second opinion examination to Dr. M.P. Reddy, Board-certified in physical medicine and rehabilitation. In a January 23, 2006 report, Dr. Reddy reviewed appellant's history of injury and medical treatment, noting the discectomy performed by Dr. Rappaport. He noted that appellant still had complaints of chronic low back pain across the lower lumbar area without any radiation into the lower extremities. Dr. Reddy

[2] Appellant was referred to vocation rehabilitation on October 18, 2005. He filed a claim for a schedule award on that date.

noted that appellant had returned to work as a security guard in a light-duty capacity. He set forth findings on physical examination, noting there was no soft tissue tenderness over the lumbar spine or paraspinal region. Dr. Reddy listed an impression of discogenic lumbar pain following appropriate medical treatment. He found no neurological, strength or sensory deficits in the lower extremities.

On February 19, 2006 Dr. Leonard A. Simpson, an Office medical consultant Board-certified in orthopedic surgery, reviewed the medical record. Based on the report of Dr. Reddy, the medical consultant advised that appellant did not have any impairment to either lower extremity based on his accepted condition and surgery.

By decision dated March 6, 2006, the Office denied appellant's claim for a schedule award. It advised appellant that back pain was not compensable under a schedule award and that the medical evidence did not establish any permanent impairment of his lower extremities.

On April 27, 2006 the Branch of Hearings and Review received appellant's request for a review of the written record of the schedule award denial.[3]

In an April 27, 2006 decision, the Office adjusted appellant's compensation, finding that his actual earnings as a security guard fairly and reasonably represented his wage-earning capacity. Appellant requested a review of the written record.

By decision dated September 13, 2006, an Office hearing representative affirmed the April 27, 2006 decision, finding that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in benefits. Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if such earnings 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, will be accepted as such measure.[5]

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and

[3] *See supra* note 1, this issue is not before the Board in the present appeal.

[4] *Sherman Preston*, 56 ECAB 607 (2005). *See* 5 U.S.C. § 8115(a).

[5] *Lottie M. Williams*, 56 ECAB 302 (2005).

reasonably represent the employee's wage-earning capacity.[6] The procedure manual notes that reemployment may not be suitable if the job is part time, seasonal or of a temporary nature.[7] After the employee has worked for 60 days, the Office will determine whether his actual earnings represent his wage-earning capacity. In so doing, the Office will apply the *Shadrick* formula in determining the claimant's monetary entitlement.[8]

ANALYSIS

Appellant's claim was accepted for a low back injury for which he underwent a discectomy at L5-S1 on April 25, 2005. He was treated by Dr. Rappaport, who noted that appellant would not be able to return to his date-of-injury position with the employing establishment. However, Dr. Rappaport advised that appellant was not totally disabled and could return to full-time employment within specified work restrictions. Appellant was referred to vocational rehabilitation and subsequently found employment in the private sector commencing January 4, 2006 as a security guard. The evidence of record reflects that the security guard position was full time and not a part time, seasonal or a makeshift position. The Office confirmed with appellant's employer that he was a permanent employee earning $10.00 an hour. On January 19, 2006 the Office properly notified appellant that it would be reducing his compensation benefits to reflect his actual earnings.

In an April 27, 2004 decision, the Office reduced appellant's wage-loss compensation benefits, finding that his actual earnings as a security guard fairly and reasonably represented his wage-earning capacity. The Office properly applied the *Shadrick* formula, listing his pay rate when disability began as $572.23 per week; the updated weekly pay rate for the job and step when injured as $584.16 and that he had actual earnings of $400.00 per week. The Board finds that appellant's actual earnings fairly and reasonably reflect that he has a 62 percent wage-earning capacity. There is no evidence that his employment as a security guard in the private sector was a temporary, part time or makeshift position. His employer verified full-time employment in Reno as a permanent employee earning $10.00 an hour. There is no medical evidence of record which establishes that appellant remains totally disabled due to the residuals of his accepted back injury and surgery. At the time of the Office's final decision, he had worked as a security guard for well over 60 days. The evidence of record is persuasive that appellant's actual earnings as a security guard fairly and reasonably represent his wage-earning capacity.

CONCLUSION

The Board finds that the Office properly complied with its procedures in determining appellant's wage-earning capacity based on his actual earnings as a security guard in the private sector.

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[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (May 1997).

[7] *Id. See Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[8] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953). This has been codified by regulation at 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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