United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 08-2270**
	)	**Issued: August 19, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Alton, IL, Employer	)	

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 August 15, 2008 appellant filed a timely appeal from a May 14, 2008 wage-earning capacity determination of the Office of Workers' Compensation Programs based on a constructed position. 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 reduced appellant's compensation effective November 26, 2006 based on its finding that he had the capacity to earn wages as a security officer.

FACTUAL HISTORY

The Office accepted that on January 2, 1984 appellant, then a 31-year-old clerk, sustained a cerebral concussion, postconcussion headaches, a brain stem concussion, traumatic eschenue, optic neuropathy with a loss of vision in the left eye and recurrent vagal hypotonia when he slipped and fell on a wet floor. It assigned the claim file number xxxxxx122.

On December 14, 1990 appellant, while working as a distribution clerk, sustained a second injury when he injured the left side of his face and head when he struck his head. The Office accepted his claim, assigned file number xxxxxx993, for a contusion of the head, cervical strain with radiculopathy at C5 and left ulnar neuropathy. Appellant stopped work on December 15, 1990, returned to part-time work on April 15, 1991 and to full-time work on April 5, 1992. He sustained intermittent periods of total disability.[1] The Office doubled the claims into master file number xxxxxx993.[2]

On April 23, 2004 appellant underwent an authorized anterior cervical microdiscectomy and fusion at C4-5 and C5-6. On March 9, 2005 the Office accepted that he sustained a recurrence of disability on October 20, 2004. It further expanded acceptance of the claim to include a herniated nucleus pulposus at C7-T1 on the left side.

In a report dated May 31, 2005, Dr. Faisal J. Albanna, a Board-certified neurosurgeon, found that appellant could return to work beginning at four hours per day and progressing to eight hours per day over the course of six weeks with restrictions on lifting over 25 pounds and no sorting, grasping, writing or prolonged fine motor work.

On August 26, 2005 the Office referred appellant for vocational rehabilitation.[3] On October 19, 2005 the rehabilitation counselor completed a job classification form for the position of deliverer/outside courier. In an accompanying vocational rehabilitation report, he noted that appellant was a high school graduate and described his physical restrictions. The rehabilitation counselor identified his goal as placing him to work as a driver/courier.

On November 8, 2005 the rehabilitation counselor completed a job classification form for the positions of signal alarm operator and security officer.[4] He found that working as a security officer required a sedentary level of strength, occasional reaching, handling, fingering and feeling and constant hearing. The rehabilitation counselor indicated that the specific vocational preparation required was only a short demonstration period of 30 days. He noted that appellant could obtain a security guard permit and train on the job.

In a report dated November 30, 2005, Dr. Albanna listed restrictions of no repetitive movement of the wrist and elbows, pushing, pulling and lifting up to 25 pounds two to three

[1] By decision dated May 23, 1994, the Office granted appellant a schedule award for a 33 percent permanent impairment of the left arm.

[2] By decision dated June 28, 1999, the Office reduced appellant's compensation based on its finding that his actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity. On October 16, 2000 it reduced his compensation to zero after finding that he had no loss of wage-earning capacity based on his actual earnings as a modified distribution clerk effective June 5, 2000.

[3] On August 4, 2005 the employing establishment informed the rehabilitation counselor that it did not have a position within appellant's work restrictions.

[4] The Office placed appellant on the periodic rolls effective October 30, 2005.

hours daily, walking eight hours, sitting two to three hours and kneeling, squatting and climbing two to three hours daily.[5]

On April 6, 2006 the rehabilitation counselor noted that appellant and the job placement services company was attempting to locate suitable positions for him as a driver. He noted that if a job search for a position as a driver was not successful the company would search for security officer or security alarm monitor positions.

On May 17, 2006 appellant began working as a driver with a private company. He contacted the rehabilitation counselor on May 19, 2006 and asserted that he was working outside of his restrictions. The rehabilitation counselor advised him to stop work if the duties were outside his physical capabilities. He telephoned the employer and found out that the lifting requirements were up to 40 pounds. Appellant stopped work on May 24, 2006. He informed the Office that he would "now be interested in a security officer type job, if a job could be located within a reasonable distance from his home."[6]

On August 11, 2006 the rehabilitation counselor noted that appellant informed an interviewer that he had "profound hearing loss." In a report dated August 18, 2006, the rehabilitation counselor indicated that he was not "putting forth a sincere effort on his job search" and was "continually sabotaging employment interviews." On August 22, 2006 the Office rehabilitation specialist recommended that the Office issue a constructed wage-earning capacity determination.

On October 6, 2006 the Office notified appellant of its proposed reduction of his compensation benefits on the grounds that he had the ability to perform the selected position of security officer. It found that the position was medically and vocationally suitable and reasonably available in his commuting area based on the opinion of the rehabilitation counselor.

By letter dated October 9, 2006, appellant described his job leads and why he believed that he could not perform each position. He noted that he had hearing loss and difficulty communicating on walkie-talkies. Appellant submitted an October 11, 2006 report from an audiologist, who indicated that he had a severe mixed hearing loss in the right ear and a profound mixed hearing loss in the left ear.

By decision dated November 14, 2006, the Office finalized its reduction of appellant's compensation effective November 26, 2006 as he had the capacity to work as a security officer.

[5] On January 26, 2006 the Office noted that appellant had refused two job interviews and provided him 30 days to resume participating in his vocational rehabilitation program in good faith or have his compensation reduced to reflect his prospective wage-earning capacity. On February 18, 2006 appellant related that he declined one job interview because of his hearing loss and another because of the hours and his need to take medication on a regular schedule. He indicated that he did want to resume work and rehabilitation efforts but desired something within his restrictions.

[6] In a report dated May 30, 2006, Dr. Albanna recommended that appellant obtain a sedentary job and wear a head set or speaker phone if the job required significant telephone work. He recommended that he not lift over 25 hours, work shift hours, perform prolonged fine motor work and be able to move at will.

On November 27, 2006 appellant requested an oral hearing. He submitted medical evidence from an audiologist regarding his hearing difficulties.

By decision dated June 8, 2007, the hearing representative affirmed the November 14, 2006 decision. He found that the evidence was insufficient to show that appellant's hearing loss would prevent him from performing the position of security officer.

On February 11, 2008 appellant requested reconsideration. He submitted additional medical evidence addressing his ability to hear. By decision dated May 14, 2008, the Office denied modification of its June 8, 2007 decision.

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 of benefits.[7] Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.[8]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.[9] 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 *Albert C. Shadrick*[10] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

In a report dated May 31, 2005, Dr. Albanna found that appellant could return to work beginning at four hours per day and progressing to eight hours a day over six weeks with restrictions on lifting over 25 pounds and prolonged fine motor work. Based on Dr. Albanna's findings, the Office referred him for vocational rehabilitation. The Office reduced appellant's

[7] *T.O.*, 58 ECAB ___ (Docket No. 06-1458, issued February 20, 2007).

[8] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[9] *James A. Birt*, 51 ECAB 291 (2000).

[10] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

compensation after determining that he had the capacity to earn wages in the selected position of security officer. In a report dated November 30, 2005, Dr. Albanna provided work restrictions of no repetitive wrist or elbow movement, pushing and pulling 25 pounds two to three hours daily, walking eight hours and sitting two to three hours. The DOT job classification provides that the security officer position is sedentary and within appellant's limitations. The weight of the evidence thus establishes that he had the physical ability to perform the position of security officer. Appellant submitted evidence from an audiologist establishing that he had some hearing loss; however, an audiologist not a physician under the Federal Employees' Compensation Act and is thus not competent to offer a medical opinion.[11] Thus, at the time the Office issued its November 14, 2006 loss of wage-earning capacity determination, the evidence showed that he could physically perform the duties of the position.

The Board, however, finds that the Office failed to properly consider whether appellant had the educational and vocational background to perform the duties of a security officer. The rehabilitation counselor found that the specific vocational preparation (SVP) or for the position of security officer required was only a short demonstration period of 30 days and on-the-job training. The DOT, however, identifies the SVP for the position of security officer as a level seven, requiring over two and up to four years of training and education.[12] The DOT defines SVP as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information and develop the facility needed for average performance in a specific job-worker situation. The training may be acquired in a school, work, military, institutional or vocational environment.[13] As the rehabilitation counselor erroneously determined that the SVP required was a short 30-day period of demonstration rather than two to four years, the Office has not shown that appellant had the SVP to perform the position of security officer.[14] Consequently, the Office did not meet its burden of proof to reduce his compensation.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective November 26, 2006 based on its finding that he had the capacity to earn wages as a security officer.

[11] 5 U.S.C. § 8101(2); *Henry T. Scott*, 27 ECAB 444 (1976).

[12] Department of Labor, DOT, 189.167-034.

[13] *Id*.

[14] On appeal, appellant contends that he is not able to hear well enough to perform the duties of a security officer. In view of the Board's disposition of the case, however, it need not address his contention.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2008 is reversed.

Issued: August 19, 2009
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