United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 09-934**
	)	**Issued: January 11, 2010**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Virginia Beach, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 25, 2009 appellant, through his representative, filed a timely appeal from the January 23, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed his wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's wage-loss compensation to reflect his capacity to earn wages in the selected position of security guard (unarmed).

FACTUAL HISTORY

On November 16, 2002 appellant, then a 41-year-old civil service mariner (boatswain) aboard the USNS Concord, sustained a traumatic injury in the performance of duty when a forklift crushed his right arm against a metal stanchion. The Office accepted his claim for a crush injury to the right arm. It paid compensation for temporary total disability on the periodic

rolls. The record indicates the Office also accepted right carpal tunnel syndrome and injury to the right median nerve. Appellant received a schedule award for a 27 percent permanent impairment of his right upper extremity.

On September 28, 2006 Dr. Joseph M. Mann, III, the attending hand surgeon, released appellant to modified work with no prolonged or repetitive use of the right hand. On November 9, 2006 he reported that appellant was permanent and stationary and could not return to his job as a boatswain. Dr. Mann noted that appellant's disability precluded forceful strength activities and repetitive manipulation. He found that appellant lost approximately half of his preinjury capacity for lifting, pushing, pulling, grasping, pinching, holding, torquing, performing other activities of comparable physical effort and activities requiring finger dexterity. Dr. Mann observed no specific impairment in appellant's ability to perform activities of daily living. On July 16, 2007 he repeated that appellant was permanent and stationary with no change on examination of the right upper extremity.

Based upon the medically determinable residuals of appellant's work injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, an Office vocational rehabilitation counselor found that he was able to perform the selected position of security guard (unarmed). She performed a labor market survey and determined that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. Through contact with employers and the California Employment Development Department, the rehabilitation counselor confirmed the average weekly wage for the selected position.

On August 22, 2007 Dr. Mann reviewed the job description for the position of security guard (unarmed) and advised that the position was physically appropriate for appellant.

On May 20, 2008 the Office notified appellant that it proposed to reduce his compensation for wage loss, as he was no longer totally disabled but rather was partially disabled and had the capacity to earn wages as a security guard (unarmed).

In an undated statement received by the Office on June 6, 2008, appellant expressed his disagreement:

> "I'm 52 years old and have a right arm that will not hold up to an eight hour shift. Guard duty requires 1. baton usage, 2. physical apprehension, 3. driving a patrol car as required. The entire above listed are not within my limitations, what if I have to defend myself? What if I had to drive more than 30 minutes per shift? My doctor is aware of my limitations. I have an appointment with Doctor Mann June 9th. Guard companies I have tried to get hired by 'because of my limitations,' and their liability if I should get reinjured has prevented me from this line of work. I'm an instructor, and the government needs instructors. My agency the Military Sea Lift Command did not even try to help in getting me a job, they just left it up to OWCP to handle my situation, I'm a Vietnam veteran and deserve either full OPM retirement, or special training due to this injury."

On June 9, 2008 Dr. Mann noted pain and numbness in the right forearm, wrist and hand of unclear etiology. He recommended repeat electrodiagnostic studies and stated that he might have to pursue specific treatment, including surgical treatment, if there was a change from a year ago. Dr. Mann completed a work status form showing that appellant could perform modified duty with no lifting on the right and no grasping or gripping with the right hand repetitively or forcefully.

In a decision dated June 27, 2008, the Office reduced appellant's compensation for wage loss to reflect his capacity to earn wages in the selected position of security guard (unarmed).

On July 23, 2008 Dr. Mann reported that electrodiagnostic studies showed a slight improvement since June 2007. "There certainly was no deterioration." He repeated his previous work status restrictions.

In a decision dated January 23, 2009, an Office hearing representative affirmed the reduction of appellant's compensation for wage loss. He found that, despite several recent medical and work status reports, Dr. Mann did not find that appellant was incapable of performing the selected position. Dr. Mann noted no medical evidence reflecting an inability to operate a motor vehicle or any restriction regarding such, nor any incapacity for physically apprehending unauthorized persons.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[1] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[2] Wage-earning capacity means the employee's ability to earn wages in his injured condition.[3]

Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity, as appears reasonable under the circumstances, is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the

[1] 5 U.S.C. § 8102(a).

[2] 20 C.F.R. § 10.5(f).

[3] *Robert H. Merritt*, 11 ECAB 64 (1959) (claim of partially disabled seaman-trainee that he should be awarded pay for 100 percent disability for as long as he was unable to find suitable employment was properly rejected, since the absence of earnings, where there is a capacity to earn, affords no basis for the payment of compensation for total disability).

availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[4]

When the Office makes a medical determination of partial disability and of the 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* or otherwise available in the open labor market, that fits the employee's capabilities in light of 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 employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[5]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[6]

ANALYSIS

The evidence establishes that appellant has the capacity to earn wages. Dr. Mann, the hand surgeon, reported in 2006 that appellant was no longer totally disabled for work. He released appellant to modified work and specified his work restrictions. An Office vocational rehabilitation counselor, who is a wage-earning capacity specialist, found that appellant was capable of earning wages as a security guard (unarmed). She conducted a labor market survey to determine the wage and availability of the selected position. Dr. Mann reviewed the job description and confirmed that the position was physically appropriate for appellant.

There is no medical evidence to the contrary. Appellant argued that his right arm would not hold up to an eight-hour shift and that certain duties, such as using a baton, physical apprehension and driving a patrol car, were not within his limitations. However, he submitted nothing from Dr. Mann to support his assertions. Dr. Mann understood appellant's limitations, as appellant noted. Moreover, Dr. Mann reviewed the physical demands of the selected position and advised the Office that the duties were physically appropriate for appellant. Appellant may disagree with that assessment, but, as to his medical restrictions, it is Dr. Mann's opinion that carries weight.

Appellant also pointed to his lack of success in obtaining placement with a new employer in the field. However, failure to obtain employment does not require the inference of impairment of wage-earning capacity.[7] The question is not whether appellant was able to land a job. The question is whether he has some capacity to earn wages and the evidence from both the

[4] 5 U.S.C. § 8115(a).

[5] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

[6] *Harold S. McGough*, 36 ECAB 332 (1984).

[7] *Ruth Lahr*, 2 ECAB 86 (1948).

vocational rehabilitation counselor and appellant's own physician establishes that he has the capacity to earn wages as a security guard (unarmed).

The Board finds that the Office met its burden of proof to reduce appellant's compensation for total disability. The Office gave due regard to relevant factors and followed standard procedures in determining appellant's wage-earning capacity as appears reasonable under the circumstances. The Board will therefore affirm the Office's January 23, 2009 decision.

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation to reflect his capacity to earn wages in the selected position of security guard (unarmed).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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