United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, AUSTIN STRAUBEL INTERNATIONAL AIRPORT, Green Bay, WI, Employer	)	**Docket No. 11-1149** **Issued: January 11, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2011 appellant, through counsel, filed a timely appeal of a February 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation based on his capacity to earn wages in the constructed position of security guard.

On appeal, appellant's counsel contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 27, 2003 appellant, then a 34-year-old transportation security screener, filed a traumatic injury claim alleging that on June 26, 2003 he hurt his right shoulder while lifting an unmarked 85-pound bag. On October 9, 2003 OWCP accepted his claim for aggravation of right shoulder degenerative joint disease. On September 3, 2003 appellant underwent a diagnostic arthroscopy followed by resection arthroplasty right acromioclavicular joint. He returned to light-duty work and was released to full-duty work on June 14, 2004. On June 28, 2006 appellant received a schedule award based on 24 percent impairment to his right upper extremity. On May 1, 2008 OWCP accepted his claim for a recurrence of the June 26, 2003 employment injury on October 22, 2007. Appellant received wage-loss compensation following the recurrence and returned to limited-duty work on December 7, 2007. By letter dated September 5, 2008, the employing establishment notified him that it could no longer accommodate limited-duty work and that the last date of his limited-duty assignment would be September 8, 2008. Appellant was again placed on the periodic rolls.

On October 17, 2008 appellant was referred to a registered nurse to assist in his recovery and facilitate his return to suitable employment. He was referred to vocational rehabilitation and was hired as a part-time security officer with Elite Security Company starting July 9, 2009. The work was sporadic and in a December 29, 2009 letter, Elite Security noted that appellant worked in a limited position and had not worked for them since November 1, 2009. Appellant was placed back on the periodic rolls.

In an October 3, 2008 medical note, Dr. Richard D. Horak, appellant's treating Board-certified orthopedic surgeon, noted that appellant may return to work on October 3, 2008 and was capable of lifting up to 20 pounds on a regular recurring basis and capable of lifting up to 70 pounds on an infrequent basis. He attached these restrictions to a work capacity evaluation dated March 6, 2009.

In an April 28, 2010 vocational rehabilitation report, the counselor found that appellant was capable of working as a security guard. The duties of a security guard included guarding industrial or commercial property against fire, theft, vandalism and illegal entry and performing a combination of other duties including patrols, examining doors, windows and gates to make sure they are secure, warning violators of rule infractions, apprehending or expelling miscreants, inspecting equipment and machinery to ascertain if tampering has occurred, watching and reporting irregularities, sounding alarm or calling police or fire department in case of fire or presence of unauthorized persons, recording data. The position required a strength rating for light work, *i.e.*, lifting and carrying up to 20 pounds maximum with frequently lifting and carrying of 10 pounds. The rehabilitation counselor found that the job was available in sufficient numbers so as to make it reasonably available to appellant within his commuting area and listed several companies that were hiring security guards. He determined that the weekly wage was $470.80.

In a notice dated June 8, 2010, OWCP proposed reducing appellant's compensation based on his ability to earn wages as a security guard at the rate of $470.80 per week. It found that this position was medically and vocationally suitable for him and represented his wage-earning capacity.

By decision dated July 23, 2010, OWCP finalized the reduction of benefits effective August 1, 2010. It found that appellant was capable of earning $470.80 per week and that his current pay rate for the date-of-injury position was $756.04 resulting in a 62 percent wage-earning capacity.

Appellant requested a telephonic hearing before an OWCP hearing representative.

In an August 3, 2010 report, Dr. Jason P. Klein, appellant's treating Board-certified orthopedic surgeon, indicated that appellant has very advanced arthritis in his shoulder and chronic baseline pain. He noted that appellant was able to manage with low demand activities of daily living and work activities. Dr. Klein opined that appellant could work as a screener with predictable work activities for his shoulder, but that any amount of lifting, pushing, pulling or overhead work is likely to exacerbate his pain. He also opined that, given the unpredictable nature of appellant's work as a security guard, he would not recommend this type of work for him, as it would likely put him in positions where he would exacerbate his shoulder pain.

At the hearing, appellant testified that, prior to working with the Federal Government, he worked armed security at a power plant and that before that he was a private investigator. He noted that both of these positions required a license and that he no longer had these licenses. Appellant discussed his injury while working with baggage for the employing establishment. He noted that the employing establishment would not let him continue to work for them due to his injuries. Appellant testified that he was employed after this in a security position, but that he quit working because there were a lot of fights and he did not want to get involved in any fights and hurt his shoulder. He noted that this job paid $9.50 an hour and that he probably worked 10 hours a week. Appellant stated that, since he left this job, he has attempted to secure other work but has not been successful. He noted that he could not do many security positions because of his injured arm. Appellant's attorney argued that the maximum appellant could earn in his area is $10.00 per hour and that, in fact, he could not work security because of his restrictions and the fact that he was not licensed to carry a gun.

In a January 5, 2011 letter, the employing establishment argued that most security guards are not required to apprehend or detain an individual; rather he would sound an alarm or call the police or fire department. The employing establishment also contended that positions in the Green Bay area for security have entry positions at an hourly rate of $8.91 but that the average wage level was $11.76 per hour and an experienced security guard could make $13.91 per hour. The employing establishment noted that appellant would qualify for average or experienced salary as he had prior experience as a police officer, an armed security guard and a private investigator. The employing establishment also noted that he has a bachelor's degree in criminal justice. In support of its argument, the employing establishment attached pages from Wisconsin's work net web site indicating average salaries for security guards.

By letter dated January 17, 2011, appellant argued that he was capable of working light duty at the employing establishment, but that his supervisor will not let him do so. He contended that he could not carry a gun because that would carry a greater risk of confrontation, something he cannot do because of his shoulder injury. Appellant contended that, even with his experience, he could not get hired because of his injury and that he belonged at the employing establishment and was being punished for his injury.

By decision dated February 23, 2011, the hearing representative found the position of security guard represented appellant's wage-earning capacity and affirmed OWCP's February 23, 2011 decision.

LEGAL PRECEDENT

Section 8115(a) of FECA[2] provides 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[3] 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 factors and circumstances which may affect his wage-earning capacity in his disabled condition.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] 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.[6] In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.[7]

When OWCP 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 OWCP or to an OWCP 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 that employee's capabilities with regard to his physical limitation, 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.[8] 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.[9]

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[2] *Supra* note 1 at § 8115(a).

[3] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[4] *Pope D. Cox*, 39 ECAB 143, 148 (1988); *supra* note 2.

[5] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[6] *Id.*

[7] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[8] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[9] *Id. See Shadrick*, 5 ECAB 376 (1953).

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[10] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[11] Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.[12]

ANALYSIS

OWCP accepted appellant's claim for aggravation of right shoulder degenerative joint disease. Appellant returned to limited-duty work, but effective September 5, 2008, the employing establishment terminated his limited-duty position. He returned to sporadic work as a part-time security officer, but this position did not result in permanent work.

Appellant's treating orthopedic surgeon, Dr. Horak, indicated that appellant could work eight hours a day with restrictions of lifting limited to 20 pounds and 70 pounds infrequently. Appellant was referred to vocational rehabilitation and the counselor determined that the position of security guard was suitable. The vocational counselor determined that appellant was able to perform the position of security guard and that the position was available in sufficient numbers so as to make it reasonably available within his commuting area. Appellant also has the requisite work experience for the security guard position. He has prior experience as a security guard, police officer and private detective and has a bachelor's degree in criminal justice. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of security guard and that such position was reasonably available within the general labor market of his commuting area. The Board finds that OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the security guard position and a review of the evidence reveals that he was physically capable of performing the position.[13]

There is no medical evidence that appellant is unable to perform the duties of a security guard. He argued that he was reluctant to work as a security guard because of the risk of confrontation which might hurt his arm. However, the position was within appellant's medical restrictions as set by his physician. Although Dr. Klein indicated that appellant would not recommend work as a security guard due to the unpredictable nature of the work, there is no indication that Dr. Klein understood the specific duties of a security guard. Appellant also points 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.[14]

[10] *Supra* note 2; *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, *supra* note 4 at 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

[11] *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975); *D.G.*, Docket No. 11-360 (issued October 25, 2011).

[12] *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

[13] *D.M.*, Docket No. 10-751 (issued November 26, 2010).

[14] *Ruth Lahr*, 2 ECAB 86 (1948); *W.B.*, Docket No. 09-934 (issued January 11, 2010).

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 vocational rehabilitation counselor and appellant's physician established that he has the capacity to earn wages as a security guard.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the security guard position represented his wage-earning capacity. The evidence of record establishes that he had the requisite physical ability, skill and experience to perform the duties and that the position is reasonably available within the general labor market of her commuting area.

The wage information as set forth by the vocational counselor indicated that the wages for the position of security guard was $470.80 per week. Applying the *Shadrick*[15] principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of $470.80 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had a 62 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of $715.56 every 28 days. The Board finds that OWCP met its burden of proof to reduce his compensation in this case.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation based on his capacity to earn wages in the constructed position of security guard.

[15] *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2011 is affirmed.

Issued: January 11, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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