U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE W. BARRY and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 00-1735; Submitted on the Record;
Issued March 6, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective May 7, 1999 on the grounds that the constructed position of security guard represented his wage-earning capacity.

The Office accepted that on July 10, 1985 appellant, then a 35-year-old fireman, sustained back muscle spasms and a herniated L5-S1 disc when he lifted a heavy door in the performance of duty. Appellant underwent an L5-S1 laminectomy on July 31, 1985 and experienced postoperative arachnoiditis, which was also accepted as compensable.

Appellant's attending physician, Dr. Joseph V. Conroy, a Board-certified neurosurgeon, provided ongoing reports, noting that appellant continued to be totally disabled for all work due to his physical disability, lower back problems, as well as due to a psychological disability. He diagnosed arachnoiditis, chronic pain and perineural fibrosis, causally related to appellant's work injuries. On May 4, 1998 Dr. Conroy noted that appellant continued with significant back pain which radiated down both legs and that his neurological examination was unchanged, but opined that he was capable of working on a part-time basis.

The Office sought a second opinion evaluation from Dr. Richard DuShuttle, a Board-certified orthopedist and back specialist. By report dated March 6, 1996, Dr. DuShuttle reviewed appellant's factual and medical history, the statement of accepted facts and the case record; he examined appellant and diagnosed status post lumbar laminectomy and discectomy at L5-S1, and chronic lumbosacral strain. He noted that appellant demonstrated significant overreaction to even slight touch upon examination and found no evidence of arachnoiditis. Dr. DuShuttle opined that appellant was capable of performing sedentary to light-duty work with certain activity restrictions, but noted that, since appellant had been out of work for 11 years, the likelihood of getting him back to work was less than 20 percent. A work capacity evaluation done on March 6, 1996 indicated that appellant could work eight hours per day at sedentary duty with limited bending, twisting, lifting and climbing.

Following receipt of Dr. DuShuttle's report the Office determined that a conflict in medical opinion evidence was created with Dr. Conroy. The Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Donald M. Pfeifer, a Board-certified orthopedic surgeon, for resolution of the conflict.

By report dated April 7, 1997, Dr. Pfeifer reviewed appellant's factual and medical history, noted his present complaints, conducted an examination, noted his findings and diagnosed chronic lumbosacral sprain/strain syndrome and chronic musculoskeletal deconditioning status secondary to his chronic strain/sprain condition and status post laminectomy and discectomy of L4-5 and L5-S1 with decompressive laminectomy at L5-S1. He noted that appellant's subjective complaints persisted in much the same manner as the initial presentation 12 years earlier. Dr. Pfeifer indicated that, during this interval, chronic and continued musculoskeletal deconditioning had been allowed to occur resulting in contracted and weakened musculature in an obese individual which, in and of itself, could be the ongoing aggravating cause for the perpetuation of the subjective complaints. He opined that had appellant's secondary deconditioning and lack of rehabilitation been precluded, that ongoing signs and symptoms directly attributable to the initial injury would be small or nonexistent. Dr. Pfeifer opined that appellant's present condition was related to the work injury, "mostly due to the deconditioning and lack of rehabilitation during the past 12 years." He noted that the diagnosis of arachnoiditis was not supported by objective findings and that there was no evidence of muscle atrophy, loss of foot callous or similar objective findings that might be consistent with a completely sedentary lifestyle as was claimed. Dr. Pfeifer opined that it was unlikely that appellant would be motivated to return to employment and that he was permanently restricted to light-duty work, being totally impaired for moderate or heavy duty as a firefighter. He also opined that within reasonable medical probability appellant's present condition was the continued result of the initial workplace injury, influenced by the lack of rehabilitation and maintenance of the musculoskeletal system. Dr. Pfeifer opined that appellant was partially impaired to such a degree and nature that he was restricted permanently to employment defined as light work.

Dr. Pfeifer completed a work restriction evaluation on September 10, 1997 indicating that appellant could work 8 hours a day but with no lifting more than 20 pounds or carrying more than 10 pounds. He indicated that appellant was to perform no prolonged or repeated bending, and no prolonged standing or walking, stooping, squatting, pushing, climbing, twisting, running or jumping.

By report dated October 6, 1997, Dr. Conroy opined that appellant had a failed back syndrome, that the condition was not reversible, that rehabilitation would not help and that he remained totally disabled.

A vocational counselor tested appellant and found that he had few skills and limited education.[1] On February 23 and 26, 1998 the rehabilitation counselor, Thomas L. Yohe, advised the Office that it appeared appellant was resisting the return to work effort and was unlikely to be

[1] Appellant's educational level in reading, spelling and arithmetic was tested at that of second grade. With appellant's poor scores, job availability was noted to be confined to sedentary/light unskilled repetitive work such as sedentary line work.

motivated to pursue a return to gainful employment. He identified two positions which were deemed to be light duty and within appellant's commuting area, that of assembly line worker and security guard.[2] Mr. Yohe determined that because of appellant's problems with the rehabilitation efforts, placement was not possible and the effort was terminated.

By notice of proposed termination of compensation benefits dated December 22, 1998, the Office advised that the record established that appellant had the ability to perform the duties of a security guard and that his compensation would be reduced to reflect his ability to earn wages in that position. Appellant was given 30 days within which to provide reasons why he could not perform such duties in his partially disabled state, before reduction would occur.

Appellant's representative responded claiming that the position of security guard did not take into account appellant's limitations on walking and standing. He noted that Dr. DeShuttle did not confirm that appellant could walk sufficiently long to patrol buildings and the grounds of industrial plants, commercial establishments or dock, and loading areas.

The Office requested that Mr. Yohe address these concerns. He responded that six employers had been polled and responded that walking, standing and sitting was occasional to moderate to frequent in security guard positions. They noted that these activities were intermittent and that the ability to change position was at appellant's discretion. Some security guard positions required sitting most of the day and allow patrol by driving instead of walking. Attached were six security guard positions: one required that the security guard patrol on foot and in an automobile around the campus grounds, standing and sitting were noted to be frequent but intermittent, walking was noted to be occasional to moderate. Another position required the guard to make rounds both inside and outside checking for break-ins and locked doors, escort employees to their cars and standing and sitting were noted to be frequent but intermittent, walking was noted to be occasional to moderate. A third guard position included inspecting trucks and cargo, and required periodic grounds inspection to secure plant areas by walking and driving. It required occasional to frequent standing, walking and sitting intermittently with discretion. A fourth guard position required mostly being inside a guard shack checking identification with occasional to moderate standing and occasional to frequent sitting intermittently with discretion. A fifth security guard position required patrol of the interior and exterior grounds of the building, with walking occasional to frequent intermittently and standing and sitting occasional to moderate intermittently. The final security guard position required making rounds on foot each hour of the eight floors of the condo and indicated that standing and walking were "occasional to moderate" with frequent sitting.

[2] The Department of Labor's *Dictionary of Occupational Titles*, describes the position of security guard as follows: Guards industrial or commercial property against fire, theft, vandalism, illegal entry, performing combination of the following duties; patrols periodically, buildings and grounds of industrial plant of commercial establishment, docks, logging camp area or work site; examines doors, windows and gates to determine that they are secure; warns violators of rule infractions, such as loitering, smoking or carrying forbidden articles, and apprehends and expels miscreants; inspects equipment and machinery to ascertain if tampering has occurred; watches for and reports irregularities, such as fire hazards, leaking water pipes and security doors left unlocked; observes department personnel to guard against theft of company property; sounds alarm or calls police or fire department by telephone in case of fire or presence of unauthorized persons; permits authorized persons to enter property. It was listed as a light-duty position. Vocational preparation was noted as 30 days to 3 months.

By decision dated May 7, 1999, the Office determined that the evidence was sufficient to support that appellant had the ability to perform the position of a security guard and it reduced his compensation.

On May 10, 1999 appellant, through his representative, requested an oral hearing. The hearing was held on October 25, 1999 at which appellant testified.

Appellant submitted June 16, 1999 report from Dr. Conroy also noted appellant's postoperative problems included bilateral shooting pain radiating to the ankle, arachnoiditis which would not change and perineural fibrosis secondary to the surgery. Dr. Conroy opined that appellant was disabled due to his injury-related pain, that Dr. DuShuttle stated that appellant should limit prolonged or repeated standing and walking, and that after reviewing the job description provided by the Office, Dr. Conroy felt appellant would be unable to perform the job.

Appellant's representative argued that there was never a conflict in medical opinion evidence such that Dr. Pfeifer was not an impartial medical specialist. He also argued that appellant's medical restrictions were not compatible with the duties listed for a security guard.

In a November 15, 1999 note, Dr. Conroy stated "Please be advised that [appellant] is unable to work for a number of reasons: (1) He needs to use narcotics to manage his chronic pain syndrome; (2) He has a bad back which will prevent him from doing the type of work required of a security guard."

By decision dated January 13, 2000, the hearing representative affirmed the May 7, 1999 decision, finding that the evidence of record was sufficient to determine that appellant could perform the duties of a security guard. The hearing representative noted that Dr. Pfeiffer agreed that appellant had the physical ability to perform light duty within the restrictions he provided and that the argument about appellant not physically being able to perform the position was negated by the opinion of Mr. Yohe.

The Board finds that the Office did not meet its burden of proof in determining appellant wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age, vocational qualifications and the availability of suitable employment.[3] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[4]

[3] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

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

The Office's procedures governing cases where the wage-earning capacity is to be determined based upon a selected position, where vocational rehabilitation did not succeed, provide that a report must be prepared summarizing why rehabilitation was unsuccessful and identifying two or three jobs which are medically and vocationally suitable for the claimant. The report must include job numbers and descriptions from the Department of Labor's *Dictionary of Occupational Titles*. The duties and physical requirements of each job, pay ranges in the relevant geographical area, and a statement regarding job availability. These procedures provide that the positions listed may be those in which placement was attempted and also provide that the lack of current job openings does not equate with a finding that the position was not performed in sufficient numbers to be considered reasonably available.

In this case, Mr. Yohe indicated that appellant had transferable skills from his former employment as a fireman, but he did not explain what these skills were or how they fulfilled the vocational preparation requirement for a security guard, which was noted to be 30 days to 3 months. No physician of record has found that the duties of the position of security guard were appropriate to appellant's partially disabled condition, including the walking requirements in hourly patrolling on foot the area, grounds, campuses, docks, multiple floors of a building or work sites. Appellant's limitations as enumerated by Dr. Pfeiffer raise the question as to whether appellant could engage in activities to apprehend and expel miscreants, as he is limited in his abilities to perform prolonged or repeated bending, prolonged standing or walking, stooping, squatting, pushing, climbing, twisting, running or jumping. The physical nature of apprehending and expelling miscreants, which require running and jumping, climbing, twisting and pushing, appear to exceed Dr. Pfeiffer's work restrictions.

Dr. Pfeifer noted that appellant's subjective complaints persisted in much the same manner as the initial presentation 12 years earlier, that during this interval, chronic and continued musculoskeletal deconditioning had to occurred. He opined that appellant's present condition was related to the work injury, "mostly due to the deconditioning and lack of rehabilitation during the past 12 years," noted that the diagnosis of arachnoiditis was not supported by objective findings and that there was no evidence of muscle atrophy, loss of foot callous or similar objective findings that might be consistent with a completely sedentary lifestyle as was claimed. Dr. Pfeifer opined that within reasonable medical probability appellant's present condition was the continued result of the initial workplace injury, influenced by the lack of rehabilitation and maintenance of the musculoskeletal system. He opined that appellant was restricted permanently to employment defined as light work, which had the following limitations: appellant could work 8 hours a day but without lifting more than 20 pounds or carrying more than 10 pounds; he indicated that appellant was to perform no prolonged or repeated bending, and no prolonged standing or walking, stooping, squatting, pushing, climbing, twisting, running or jumping.

Appellant's representative argued that there was never a conflict in medical opinion evidence such that Dr. Pfeifer was not an impartial medical specialist. He also argued that appellant's medical restrictions were not compatible with the duties listed for a security guard. The Board, however, finds that the reports of appellant's treating physician, Dr. Conroy were in conflict with the reports of Dr. DuShuttle, an Office referral physician, with regard to whether appellant remained totally disabled for all employment or whether he had some working capability. Therefore, Dr. Pfeifer was properly selected as an impartial medical examiner.

However, the Board finds that the record does not establish that the selected position of security guard is consistent with the physical limitations imposed by Dr. Pfeifer, particularly the prohibition on prolonged standing, walking and running. No physician of record reviewed the security guard position description or found that the duties of the position of security guard were appropriate to appellant's partially disabled condition.

The Board finds that the position of security guard has not been demonstrated to be suitable to appellant's partially disabled position. The Office did not meet its burden of proof to reduce appellant's wage-loss compensation entitlement.

The decisions of the Office of Workers' Compensation Programs dated January 13, 2000 and May 7, 1999 are hereby reversed.

Dated, Washington, DC
March 6, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member