United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 07-1225**
	)	**Issued: November 16, 2007**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, San Diego, CA, Employer	)	

Appearances:
Sally F. La Macchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 19, 2007 reducing his compensation. Pursuant to 20 C.F.R. §§ 501.2 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 July 11, 2004 based on its determination that the constructed position of security guard represented his wage-earning capacity.

FACTUAL HISTORY

On March 22, 2001 appellant, a 57-year-old meat wrapper, filed an occupational injury claim alleging that he injured his back as a result of employment activities. His claim was accepted for right-sided disc herniation at L4-5, with associated moderate stenosis. On

January 25, 2002 appellant underwent a lumbar laminectomy and discectomy. He was placed on the periodic rolls.

Appellant submitted a May 14, 2003 report from his treating physician, Dr. Larry D. Dodge, a Board-certified orthopedic surgeon. Physical examination revealed that appellant's active, voluntary range of motion of the thoralumbar spine was limited: he was able to forward flex to approximately 45 degrees and extend to 10 degrees before experiencing low back pain; lateral bend was limited to 15 degrees in either direction; and straight leg raising was slightly positive on the right and negative on the left. The motor examination of the feet was normal in all major muscle groups of the lower extremities. Sensory examination was normal to light touch. Quadriceps reflexes were 1-2+ and symmetrical. Achilles reflexes were 0-1+ and symmetrical. There were no pathologic reflexes evident. Hip range of motion was full bilaterally, with no groin or thigh pain experienced. Dr. Dodge noted that a May 6, 2003 magnetic resonance imaging (MRI) scan showed some foraminal narrowing at the L5 roots, but no evidence of any recurrent herniation at L4-5. He opined that appellant was a candidate for vocational rehabilitation and that he could work with restrictions that precluded heavy lifting and repetitive bending and stooping.

In a May 19, 2003 work capacity evaluation, Dr. Dodge opined that appellant was able to return to work full time with restrictions. He stated that appellant should not walk or stand for more than 5 hours at a time; should not push or pull more than 30 pounds; should not lift more than 20 pounds; and should not squat or kneel for more than 15 minutes at a time. In a June 23, 2003 attending physician's report, Dr. Dodge indicated that appellant was able to resume light work as of March 14, 2003, provided that he was restricted from prolonged standing or lifting; from lifting more than 20 pounds; or from repeated bending.

On June 20, 2003 appellant was referred for vocational rehabilitation. In a vocational rehabilitation report dated August 29, 2003, Laura Lutz Dillard, appellant's rehabilitation counselor, stated that he had no interest in a lengthy training program. She indicated that the position of security guard had been identified and agreed upon, as an area of interest, given the facts that appellant had served as a security guard for four years previously and had enjoyed the position. Ms. Dillard stated that she had reviewed the results of appellant's vocational testing with him and that a labor market survey had been conducted.

By letter dated September 23, 2003, Ms. Dillard asked Dr. Dodge to analyze two security guard position descriptions forwarded to him, for the purpose of determining appellant's ability to perform the duties of the positions. The security guard position in the Department of Labor's, *Dictionary of Occupational Titles* (DOT), No. 372.667-030, required an employee to be posted at the front gate of a building. Duties included maintaining gate security; maintaining a visitor log; arming and disarming plant alarm systems; checking the security of side buildings; traffic control and emergency notification. The position required an employee to sit 60 percent of the time; stand 20 percent of the time and walk 20 percent of the time. The position was described as light duty, which was defined as "exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently and/or a negligible amount of force constantly to move objects around." The position also required frequent lifting up to 25 pounds; occasional bending and stooping; occasional reaching; occasional handling and fingering; occasional carrying; and twisting and turning. Security guard position, DOT No. 372.667-034, required an employee to

guard an industrial property against fire, theft, vandalism or illegal entry. The employee would be responsible for patrolling on foot, by car or cart and observing the work sites. No minimum education or experience was required. Duties included patrolling the work site on foot checking doors, buildings and windows as appropriate; patrolling by car to observe and report by way of radio; responding to customer calls as needed; interacting with the public; preparing incident reports; and reading, preparing and copying daily activity reports. The position generally required an employee to sit 25 percent of the time; stand 5 percent of the time; and walk 70 percent of the time. However, the job description included a notation that the guard has the ability to sit periodically, if necessary. The position was also described as light duty and required an employee to: walk continuously while patrolling the area; reach, twist and turn the head and finger and handle frequently; carry, push and pull intermittently; and stand, sit, balance and climb occasionally. Physical demands included lifting up to 25 pounds intermittently. The position description clarified that the guard might need to lift a fire extinguisher, which ranged in weight from 10 to 20 pounds.

In a letter dated October 2, 2003, Dr. Dodge reviewed the job descriptions and opined that the positions fell within appellant's physical restrictions and were reasonable and appropriate.[1]

The record contains a copy of a transferable skills report; an August 2003 labor market survey; and an October 2003 supplemental labor market survey. The labor market survey reflected that there were a sufficient number of security guard positions available in appellant's commuting area, as well as enough hiring, to reasonably expect that he would be able to obtain employment. The supplemental labor market survey reflected that there were enough companies in the area that do not require apprehension of the public as part of the position, that appellant could obtain a position that did not require this job duty.

By letter dated December 9, 2003, appellant's representative contended that the position of security guard exceeded his permanent medical restrictions. On January 13, 2004 appellant's representative again objected to the position of security guard as medically unreasonable. He stated that appellant did not intend to retire to work as a security guard and related appellant's desire to elect Office of Personnel Management (OPM) benefits in lieu of benefits under the Federal Employees' Compensation Act. In a December 28, 2003 progress report, Ms. Dillard indicated that appellant had elected to discontinue participation in vocational rehabilitation because he wanted to begin receiving OPM retirement benefits. By letter dated January 21, 2004, the claims examiner informed appellant's representative that an election of benefits could not be made until vocational rehabilitation had been completed and a formal rating decision had been issued.

In a letter to the Office dated January 27, 2004, Ms. Dillard stated that appellant had informed her on January 13, 2004 that he was no longer interested in participating in rehabilitation services. Accordingly, she submitted a final report, including labor market surveys. Ms. Dillard indicated that, based upon the medically determinable residuals of the injury in the case and taking into consideration all preexisting impairments and pertinent

[1] The record also contains a form report dated September 2, 2003, in which Dr. Dodge indicated, by placing a checkmark in the appropriate box, that appellant was able to perform the duties of a security guard.

nonmedical factors, appellant had the necessary vocational and physical skills to perform the job of security guard and that this job was performed in sufficient numbers so as to make it reasonably available within his commuting area.

In a March 17, 2004 report, Dr. Dodge provided information relating to the degree of appellant's permanent disability. With regard to work restrictions, he opined that appellant should be precluded from heavy lifting, repeated bending and stooping and prolonged or constant standing. Dr. Dodge stated that appellant should be nonweight bearing for three hours during the course of an eight-hour workday.

On May 7, 2004 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a security guard at the rate of $290.00 per week. Noting the rehabilitation counselor's conclusion that, based upon his experience, education, medical restrictions and a labor market survey, appellant was qualified for the position and that sufficient positions are reasonably available in his commuting area and that his psychiatrist had released him to work eight hours per day, the Office found that the position of security guard was medically and vocationally suitable and fairly and reasonably represented his wage-earning capacity. The Office determined that appellant's compensation would be reduced to $555.00 every four weeks. The Office indicated that appellant's salary on March 19, 2001, the date of his injury, was $444.30 per week; that the current adjusted pay rate for his job on the date of injury was $487.30 per week and that he was currently capable of earning $290.00. per week, the pay rate of a security guard. The Office determined that appellant had a 60 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $266.58 per week. The Office determined that appellant had a loss of wage-earning capacity of $177.72 per week. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was $133.29 per week, increased by the cost of living to $138.75 per week. A copy of the January 28, 2005 proposed reduction was sent to appellant and his representative. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. The record does not reflect that any additional information was received within the 30-day period.

By decision dated June 8, 2004, the Office finalized the reduction of appellant's compensation benefits effective July 11, 2004.

The record contains a letter dated June 7, 2004, received by the Office on June 11, 2004, from Raquell Krueger, legal assistant to appellant's representative, who objected to the proposed reduction of benefits, contending that the position of security guard did not represent appellant's wage-earning capacity. Ms. Krueger stated that appellant suffered from "drop foot" and had limited function of his right leg; that he was unable to walk for long periods and had constant back pain; and that, due to tremors, his penmanship was illegible and he was therefore unable to maintain logs.

On June 24, 2004 appellant, through his representative, requested an oral hearing. He submitted a letter dated June 6, 2004 from Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon, who opined that appellant had a one percent impairment of his left lower extremity.

In a report dated June 29, 2005, Dr. Robert E. Urrea, a Board-certified orthopedic surgeon, provided a medical history, indicating that several cases of chicken had fallen on appellant in 1986, causing him immediate back pain. He stated that, by 2000, appellant had developed right lower extremity radicular numbness on the distal anterior lower leg. Dr. Urrea noted that spinal surgery in 2002 by Dr. Dodge did not improve appellant's condition and that he now experienced constant back pain. His examination revealed full range of motion in the lumbar spine without tenderness of paraspinous muscles, but with pain on extension, right rotation or right tilt. Bilateral lower extremities had decreased sensation along the left anterior and posterior thigh, as well as on the left posterior anterior calf and right medial calf. Dr. Urrea found negative straight leg raise, Patricks, clonus and Babinski. He indicated that x-rays showed generalized osteopenia with a decreased disc height of the L4-5 and L5-S1, as well as facet arthropathy of the L3-4 and L5-S1. Dr. Urrea provided a diagnosis of lumbago/lumbar radiculopathy.

An August 9, 2005 report of an MRI scan of the lumbar spine reflected a disc herniation at L4-5 and L5-S1, with involvement of right and left nerve roots, as well as spinal stenosis at both levels. On August 19, 2005 Dr. Urrea diagnosed lumbago and lumbar internal disc derangement. Examination revealed decreased sensation of the right anterior lower leg and painful range of motion of the lower back. Dr. Urrea indicated that a lumbar MRI scan revealed an anterior and posterior herniated disc of L4-5 and L5-S1; an extruded right-sided L4-5 disc; an extruded central L5-S1 disc; and facet arthropathy of L3-4, L4-5 and L5-S1.

On April 24, 2006 appellant's representative requested a telephone hearing, in lieu of an oral hearing. The hearing was held on October 10, 2006. Appellant's representative contended that the position of security guard did not represent appellant's wage-earning capacity, either at the time of the Office's June 8, 2004 decision or at the time of the hearing, in that the duties of the position exceeded his work restrictions. She argued that there had been a change in the nature and extent of appellant's condition since the Office's decision. Appellant testified that he could not perform the duties of the job because of required bending and twisting. He also stated that his back condition was more painful and that he was unable to stand or walk for prolonged periods of time. Appellant also testified that he suffered from a separate medical condition that required him to supplement his oxygen intake 24 hours per day. His representative conceded that the position of security guard was vocationally suitable, but disagreed that it was medically suitable.

In an August 29, 2006 history and physical examination with discharge summary, Dr. John E. Lundy, a Board-certified general practitioner, stated that appellant arrived at Nimbres Memorial Hospital disoriented and exhibiting other symptoms of a low oxygen level due to emphysema. He noted appellant's complaints of leg cramps.

In a November 7, 2006 letter to the hearing representative, appellant's representative reiterated her argument that the position of security guard exceeded his work restrictions and did not otherwise represent his wage-earning capacity. She contended that the position had not been shown to be reasonably available in the commuting area.

By decision dated January 19, 2007, the Office hearing representative affirmed the June 8, 2004 decision reducing appellant's compensation effective July 11, 2004, based on his

ability to earn wages as a security guard in the amount of $290.00 per week. The hearing representative stated that appellant should file a claim for a recurrence of disability, if he would like the Office to consider evidence relating to an alleged change in the nature and extent of his work-related condition.

LEGAL PRECEDENT

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.[2] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[3]

Section 8115(a) of the Act[4] provides that, if actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) his usual employment; (4) age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his disabled condition.[5]

ANALYSIS

The Office determined that the selected position of security guard represented appellant's wage-earning capacity as of July 11, 2004, based upon Dr. Dodge's May 19, 2003 work capacity evaluation, his June 23, 2003 attending physician's report and his October 2, 2003 report demonstrating that appellant could work eight hours per day in that capacity. The Board finds that the Office properly reduced appellant's compensation based on his ability to perform the duties of a security guard.

Appellant's physician found the position of security guard to be within appellant's physical restrictions. In a May 19, 2003 work capacity evaluation, Dr. Dodge opined that appellant was able to work full time with restrictions. He stated that appellant should not walk or stand for more than 5 hours at a time; should not push or pull more than 30 pounds; should not lift more than 20 pounds; and should not squat or kneel for more than 15 minutes at a time. On June 23, 2003 Dr. Dodge indicated that appellant was able to resume light work as of March 14, 2003, provided that he was restricted from prolonged standing or lifting; from lifting more than 20 pounds; or from repeated bending. The Office asked Dr. Dodge to review two job descriptions for security guard and to opine whether appellant was capable from a medical perspective of performing the required duties. On October 2, 2003 he opined that the position

[2] *See* 20 C.F.R. §§ 10.403, 10.520.

[3] *Id.; see Katherine T. Kreger*, 55 ECAB 633 (2004).

[4] 5 U.S.C. § 8115(a).

[5] 5 U.S.C. § 8115(a); *Sherman Preston*, 56 ECAB ___ (Docket No. 05-721, issued June 20, 2005); *Loni J. Cleveland*, 52 ECAB 171 (2000).

descriptions provided fell within appellant's physical restrictions and were reasonable and appropriate. On March 17, 2004 Dr. Dodge stated that appellant should be precluded from heavy lifting, repeated bending and stooping and prolonged or constant standing. He stated that appellant should be nonweight bearing for three hours during the course of an eight-hour workday.

Although he recommended in his May 19 and June 23, 2003 reports that appellant should lift no more than 20 pounds, Dr. Dodge approved the security guard positions on October 2, 2003, after reviewing the specific job descriptions containing a 25-pound limit, noting that the positions fell within appellant's physical restrictions and were reasonable and appropriate. The Board notes that Dr. Dodge's latest report containing restrictions indicated only that appellant should be precluded from heavy lifting; no specific weight restriction was imposed. The Board notes that the 25-pound lifting requirement contained in the position descriptions was reviewed and approved Dr. Dodge. In fact, the requirement was clarified in position description DOT No. 372.667-034 to reflect that a guard might be required to lift a fire extinguisher weighing from 10 to 20 pounds. The requirements of the positions do not exceed Dr. Dodge's recommended restrictions. The Board finds the position of security guard to be within appellant's restrictions, as delineated by Dr. Dodge.

There is no dispute that the position of security guard is vocationally suitable for appellant. The vocational rehabilitation counselor determined that appellant was able to perform the duties of the position and that the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The counselor advised that appellant's prior work experience and educational background qualified him for the position. In fact, appellant's representative conceded in the telephone hearing that the position was vocationally suitable.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the security guard position represented his wage-earning capacity.[6] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of security guard as of July 11, 2004 and that such a position was reasonably available within the general labor market of his commuting area.[7]

The Board also finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*[8] and codified at section 10.403 of the Office's regulations.[9] In this regard, the Office indicated that his salary on March 19, 2001, the date of his injury, was $444.30 per week; that the current adjusted pay rate for his job on the date of injury was $487.30 per week; and that he was currently capable of

[6] *Loni J. Cleveland, supra* note 5.

[7] The Board notes that appellant submitted evidence supporting an alleged change in his condition subsequent to the wage-earning capacity decision. However, this evidence is not relevant to appellant's ability to perform the duties of a security guard as of July 11, 2004.

[8] 5 ECAB 376.

[9] 20 C.F.R. § 10.403.

earning $290.00 per week, the pay rate of a security guard. The Office then determined that appellant had a 60 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $266.58 per week. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was $133.29, increased by the cost of living to $138.75 per week and that his net compensation for each four-week period would be $555.00. The Board finds that the Office correctly applied the *Shadrick* formula and therefore properly found that the position of medical billing clerk reflected appellant's wage-earning capacity effective July 11, 2004.[10]

Appellant contends that the Office failed to establish that the position was reasonably available in his commuting area. The Board disagrees. The labor market survey reflected that there were a sufficient number of security guard positions available in appellant's commuting area, as well as enough hiring, to reasonably expect that he would be able to obtain employment. The supplemental labor market survey reflected that there were enough companies in the area that did not require apprehension of the public as part of the position, such that appellant could obtain a position that did not require this job duty. Appellant has not submitted any evidence to the contrary. Therefore, the Board finds appellant's contention to be without merit.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective July 11, 2004, based on its determination that the constructed position of security guard represented his wage-earning capacity.

[10] *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2007 decision of the Office of Workers' Compensation Programs reducing appellant's compensation benefits is affirmed.

Issued: November 16, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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