U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DERRICK HIGGIN and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 97-992; Submitted on the Record;
Issued December 28, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to modify its determination of appellant's loss of wage-earning capacity.

On August 11, 1987 appellant, then a 37-year-old welding mechanic, filed a claim for a traumatic injury occurring on that date due to an explosion. The Office accepted appellant's claim for bilateral barotrauma, post concussion syndrome with headaches and left-sided monaural hearing loss.

Appellant returned to employment on September 10, 1987 and worked until January 15, 1988 when he was terminated due to lack of work.[1] The Office placed appellant on the periodic rolls effective March 30, 1989.

On August 2, 1991 the Office referred appellant to Dr. Harry B. Coslett, a Board-certified neurologist, for an examination.

In a report dated August 6, 1991, Dr. Coslett diagnosed "post concussion syndrome with headaches as well as dysfunction of the left cochlear apparatus or its connections," which he found was "directly related to the work injury." He opined that appellant was disabled from working in welding in dangerous or loud environments. Dr. Coslett specified that appellant could work in an environment without loud noises and where he would not be "put in high and dangerous positions where a momentary loss of balance would pose great danger to [him]."

In a work restriction evaluation (OWCP-5) dated October 16, 1991, Dr. Dewey A. Nelson, a Board-certified neurologist and appellant's attending physician, found that he could

[1] By decision dated April 12, 1989, the Office granted appellant a schedule award for a four percent monarual loss of hearing in his left ear.

work eight hours per day with restrictions on climbing above shoulder height or working with high intensity noise.

On November 13, 1991 the Office referred appellant for vocational rehabilitation. In a report dated July 7, 1992, the rehabilitation counselor identified the positions of security guard and telephone solicitor as vocationally suitable for appellant and found that both positions were available in sufficient numbers within his commuting area.

By letter dated November 9, 1993, the Office notified appellant that it proposed to reduce his compensation benefits based on his ability to perform the position of a security guard.[2]

In a letter dated November 15, 1993, appellant argued that he could not work as a security guard because he lacked the training and experience.

By decision dated December 14, 1993, the Office reduced appellant's compensation based on his capacity to perform the duties of a security guard.[3]

Appellant submitted a report dated May 12, 1994 from Dr. Nelson, who related that he had treated appellant for an employment-related head injury which caused inner ear damage and vertigo.[4] He stated that while he had released appellant for sedentary employment, appellant was "unable to work as a security guard because if he were accosted by an intruder, he would suffer damage with reasonable medical certainty." Dr. Nelson further stated that appellant "has unsteadiness of his gait, occasional vertigo and imbalance with nystagmus when his head is tilted in one direction or the other."

By decision dated March 18, 1996, the Office found that the evidence submitted was insufficient to warrant modification of its prior decision. In the accompanying memorandum to the Director, the Office found that the duties of a security guard did not require appellant to subdue an intruder because he would not be authorized to carry a gun.

In a letter dated July 19, 1996, appellant, through his representative, requested reconsideration. In support of his request, appellant submitted a report dated July 30, 1996 from Dr. Nelson. In his report, Dr. Nelson challenged the Office's finding that a security guard would not have to fight for his safety. He also noted that appellant's tinnitus might preclude him from hearing an alarm. Dr. Nelson further stated that he understood from reading newspapers that the duties of a security guard would require appellant to "climb steps, duck around obstructions such as protruding pipes or lumber, and sometimes run for the alarm box." He opined that the "post

[2] In a decision dated November 29, 1993, the Office found that appellant had an overpayment of compensation in the amount of $5,309.48, that he was without fault in the creation of the overpayment, and that he was not entitled to waiver of the overpayment.

[3] Appellant appealed the Office's December 14, 1993 decision to the Board; however, he subsequently requested that his appeal be dismissed so that he could request reconsideration of the decision by the Office. The Board dismissed the appeal on August 8, 1995 by an order. Docket No. 94-1440 (issued August 8, 1995).

[4] Appellant also submitted numerous office visit reports dated 1994 and 1995 from Dr. Nelson, who noted that appellant continued to experience problems due to post concussion syndrome, tinnitus and headaches.

concussion syndrome with internal ear damage would preclude a patient from being safe or efficient in these necessary duties."

By decision dated October 23, 1996, the Office denied modification of its prior merit decision.

The Board finds that the case is not in posture for a determination of whether the evidence warrants modification of appellant's loss of wage-earning capacity.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[5] The burden of proof is on the party attempting to show modification.[6]

In the present case, appellant submitted reports dated July 30, 1996 and May 12, 1994 from Dr. Nelson in support of his contention that the Office's loss of wage-earning capacity was erroneous. In a report dated May 12, 1994, Dr. Nelson opined that appellant could not perform the duties of a security guard because he could not subdue intruders due to employment-related problems with his gait, balance and vertigo. In a report dated July 30, 1996, Dr. Nelson stated that due to appellant's tinnitus he might not hear alarms, that he could not respond adequately if accosted on the job and that he could not adequately perform duties such as running for an alarm and avoiding objects in route.[7]

The Office, in its March 18, 1996 decision denying appellant's request for reconsideration, found that the May 12, 1994 report from Dr. Nelson was insufficient to establish that appellant could not perform the position of a security guard because the duties of the security guard position did not require subduing an intruder. However, the duties of a security guard as listed in the Department of Labor's *Dictionary of Occupational Titles* involve guarding industrial or commercial properly against theft, vandalism and illegal entry and includes the duty of "apprehend[ing] or expel[ling] miscreants."[8] Dr. Nelson's work restrictions indicate that appellant would be unable to perform the duties of the security guard position with regard to the need to apprehend or expel miscreants.[9] Dr. Nelson's reports further call into question appellant's ability to effectively patrol in view of his difficulty with balance and turning his head. Therefore, Dr. Nelson's reports, while not sufficiently detailed and rationalized to

[5] *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

[6] *Daniel J. Boesen*, 38 ECAB 556 (1987).

[7] The Office did not specifically accept that appellant sustained tinnitus causally related to his August 11, 1987 employment injury. Appellant thus has the burden of establishing that this condition is due to his accepted employment injury by submitting rationalized medical opinion evidence. *Sandra Dixon-Mills*, 44 ECAB 882 (1993).

[8] Department of Labor's *Dictionary of Occupational Titles* § 372.667-034 (4th ed. rev., 1991).

[9] *See Harvey Jacobs, Jr.*, 39 ECAB 1439 (1988).

establish that the position of security guard does not represent appellant's wage-earning capacity are sufficient to create doubt as to whether appellant can reasonably perform the duties of the security guard's position in light of residuals from his employment-related injuries. Accordingly, the Board will set aside the Office's July 30 and October 23, 1996 merit decisions and remand the case for further development and an appropriate final decision on whether a modification of appellant's loss of wage-earning capacity is warranted.

The decisions of the Office of Workers' Compensation Programs dated October 23 and March 18, 1996 are set aside and the case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
December 28, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member