U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS L. CRAVEN and U.S. POSTAL SERVICE,
POST OFFICE, Rochester, NY

Docket No. 99-1799; Submitted on the Record;
Issued July 12, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the selected position of automobile salesperson; and (2) whether the Office properly denied appellant's request for reconsideration without merit review of the claim.

The Office accepted that appellant sustained mild distal peripheral neuropathy bilaterally and mild sensory left ulnar neuropathy, causally related to his federal employment. In a letter dated April 28, 1998, the Office proposed to reduce appellant's compensation to reflect wage-earning capacity of $413.45 a week in the selected position of automotive salesman. By decision dated August 20, 1998, the Office determined that appellant's wage-earning capacity was represented by the selected position of automobile salesperson. In a decision dated March 9, 1999, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board finds that the Office properly determined appellant's wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1]

Under section 8115(a) of the Federal Employees' Compensation Act,[2] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. 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

[1] *Carla Letcher*, 46 ECAB 452 (1995).

[2] 5 U.S.C. §§ 8101-8193.

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.[3]

When the Office makes a medical determination of partial disability and of 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* (DOT) or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[4] 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]

In this case, the rehabilitation specialist determined that appellant had sufficient vocational preparation for the position of automobile salesperson (DOT No. 250.353-010), noting that appellant had experience as a sales representative and the position provided on-the-job training. The rehabilitation specialist indicated that the position was reasonably available in the Greensboro, North Carolina area, with a starting wage of $413.46 per week.

The attending physician, Dr. James M. Love, a neurologist, submitted a May 2, 1997 report indicating that he had reviewed the job description for automobile salesman. Dr. Love opined that this was a position that "physically [appellant] could be able to perform for eight hours a day." The attending physician, therefore, offered an unequivocal opinion, after reviewing the job description, that appellant could do the job.

Dr. Love submitted an additional report dated January 28, 1998, which appellant says shows that the selected position was not appropriate for appellant. The January 28, 1998 report does not, however, discuss the selected position or provide a revised opinion on appellant's ability to perform the duties of the position. Dr. Love noted that appellant's condition is aggravated activity such as walking, stooping, bending and carrying heavy loads in his arm or shoulders. He recommended a "sedentary work style without exposure to changes in weather," without providing additional explanation. Dr. Love did not indicate that he was changing his prior opinion as to the automobile salesman position, nor did he indicate that appellant's condition had deteriorated since his May 2, 1997 report. His prior report explicitly indicated review of the job description and an opinion that appellant was physically able to perform the duties full time. The general statements in the January 28, 1998 report are not sufficient to negate the specific and relevant opinion found in the May 2, 1997 report.

Appellant also submitted a report dated December 8, 1997 from Dr. Rodney Mortenson, an orthopedic surgeon, who stated that climbing stairs would aggravate appellant's knee

[3] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[4] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[5] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

condition. He does not discuss the selected position or provide a relevant opinion on the issue presented.

The Board finds that the weight of the probative medical evidence indicates that appellant could perform the duties of the selected position. Since the position was medically and vocationally suitable, it is appropriate for a wage-earning capacity determination. Based on the wages of $413.46 per week provided by the rehabilitation specialist, the Office properly reduced appellant's compensation in this case.[6]

The Board further finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[8] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[9]

Appellant did not submit any new and relevant evidence with his request for reconsideration. He argued that the position was medically unsuitable, without providing any new medical evidence. The request for reconsideration does not meet any of the above requirements under section 10.606(b)(2). Accordingly, the Office properly denied merit review in this case.

[6] *See* 20 C.F.R. § 10.303 (currently 10.403), *supra* note 4.

[7] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

[8] 20 C.F.R. § 10.606(b)(2).

[9] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

The decisions of the Office of Workers' Compensation Programs dated March 9, 1999 and August 20, 1998 are affirmed.

Dated, Washington, DC
July 12, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member