

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL L. HARRIS and LIBRARY OF CONGRESS,
HEALTH SERVICES OFFICE, Washington, DC

*Docket No. 99-500; Submitted on the Record;
Issued December 6, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his loss of wage-earning capacity in the constructed position of a customer service order clerk.

On March 3, 1989 appellant, then a 37-year-old police officer, filed a notice of traumatic injury and claim for compensation alleging that he sustained a low back injury while trying to close a jammed brass door in the performance of duty. The Office accepted the claim for low back strain. Appellant stopped work on March 3, 1989 and began receiving compensation benefits for total disability on the periodic roll.

Appellant first injured his back at work on October 2, 1987 and his claim was accepted by the Office for a lumbosacral strain. Appellant was treated by Dr. Stephen T. Ong, a family practitioner, for a lumbosacral strain with medication and a course of physical therapy. A computerized axial tomography (CAT) scan on November 19, 1987 revealed a bulging disc at L4-5, while a magnetic resonance imaging (MRI) scan on January 25, 1988 confirmed degenerative changes at L4-5 with no herniation.

Following his March 3, 1989 work injury, appellant was treated by Dr. Ong, with Dr. Alfred P. Pavot, a Board-certified orthopedic surgeon, and Dr. George J. Mathews, a Board-certified neurologist, for a lumbosacral strain and facet syndrome. Appellant was treated for a number of years for complaints of severe low back pain with numbness and tingling in the left leg. The record indicates that appellant also complained of his legs giving away on occasion.

In a report dated May 3, 1993, Dr. Mathews indicated that appellant would not be able to return to his job as a police officer given his continuing complaints of low back pain. He stated, however, that appellant should return to light duty, although he "showed no inclination to return to work or to proceed with corrective surgery for his back condition."¹ Dr. Mathews indicated

¹ A lumbar MRI scan dated May 25, 1993 showed evidence of severe degenerative disc disease at L4-5.

that appellant would be seeking treatment from a new physician as he could no longer justify keeping appellant off work.

By letter dated August 14, 1995, the Office referred appellant for an examination to Dr. Fredric K. Cantor, a Board-certified neurologist.

In reports dated August 29 and September 11, 1995. Dr. Cantor discussed appellant's medical records and his physical findings. He opined that appellant's back pain was due to degeneration of the L4-5 disc, but noted the possibility that appellant's work injuries had worsened the natural progression of the degenerative back condition. He further noted that appellant's physical findings were consistent with the ability to perform sedentary work.

In an OWCP form dated August 29, 1995, Dr. Cantor reported that appellant could perform sedentary work for six hours per day.²

In a September 7, 1995 report, Dr. David Dorin, a Board-certified orthopedic surgeon and Office referral physician, discussed appellant's history of injury and reviewed multiple x-rays of the lumbar spine taken on July 8, 1995. Dr. Dorin indicated that appellant had good alignment of the vertebral bodies and intervertebral disc spaces. He further noted appellant's history of seizure disorder. Dr. Dorin stated that appellant suffered from chronic pain in the lower back as a result of the March 3, 1989 work injury, degenerative disc disease and a bulging disc at level L4-5. According to Dr. Dorin, although appellant was totally disabled from his date-of-injury job, appellant was capable of performing sedentary type work.

In an OWCP form dated March 1, 1996, Dr. Dorin indicated that appellant could perform sedentary work eight hours per day.

In a May 20, 1996 report, Dr. Ong stated: "[this] letter is to certify that [appellant] is totally disabled due to seizure disorder and herniated lumbosacral disc with radiculopathy."

By letter dated March 20, 1997, the Office referred appellant, along the medical record and a statement of accepted facts to Dr. Joel L. Falik, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a May 8, 1997 report, Dr. Falik noted appellant's history of injury, symptoms of low back, and left leg pain, physical findings on examination and a family history of seizure disorders. An MRI dated April 4, 1997 showed degenerative disc disease at L4-5 but no disc herniation. Dr. Falik opined that appellant was capable of performing sedentary work from the perspective of the residuals of the employment injury. He noted, however, that he was not qualified to address whether appellant could return to work given his seizure disorder.

In a report dated June 10, 1997, appellant's rehabilitation specialist noted that appellant had been released for full-time sedentary work, but after a long period of rehabilitation services had not returned to work. He recommended that the Office make a determination of appellant's wage-earning capacity based on the constructed position of a customer service order clerk listed

² In a September 11, 1995 report, Dr. Cantor stated that appellant's seizure disorder made him unfit for work.

in the Department of Labor's *Dictionary of Occupational Titles* (DOT 249.362-026) at a full time weekly wage of \$328.00. The rehabilitation specialist indicated that the position was medically suitable for appellant and was considered reasonably available in his commuting area as verified by the state employment service.

A job classification (Form CA-66) submitted with the June 10, 1997 rehabilitation report stated the following job description for a customer service order clerk (DOT 249.362-026):

Processes orders for material or merchandise received by mail, telephone or personally from customer or company employee, manually or using computer or calculating machine: Edits order received for price and nomenclature. Informs customers of unit prices, shipping dates, anticipated delays and any additional information needed by customer using mail or telephone. Writes or types order form or enters data into computer.

On September 15, 1997 the Office requested clarification from Dr. Falik as to whether appellant was limited to six or eight hours of sedentary work per day. He responded on September 16, 1997 that appellant was released to full-time sedentary work for eight hours a day based on-the-job description of a customer service order clerk.

On November 13, 1997 the Office issued a notice of proposed reduction of compensation advising appellant that the factual and medical evidence of record indicated that he had the capacity to earn wages in the constructed position of a customer service order clerk at the rate of \$328.00 per week. Appellant was given 30 days to submit additional evidence or argument if he disagreed with the Office finding.

In a decision dated January 16, 1998,³ the Office reduced appellant's compensation benefits effective February 1, 1998 to reflect his wage-earning capacity as a customer service order clerk

On February 10, 1998 appellant requested an oral hearing.

In a decision dated October 2, 1998, an Office hearing representative affirmed the Office's January 16, 1998 decision.

The Board finds that the Office properly reduced appellant's wage-loss compensation.

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 of benefits.⁴

³ The January 16, 1998 Office decision amended an Office decision issued on January 14, 1998.

⁴ *James B. Christens*, 47 ECAB 775 (1996); *Wilson L Clow, Jr.*, 44 ECAB 157 (1992).

Under Section 8115(a) of the Federal Employees' Compensation Act,⁵ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee's disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷

The Office procedures pertaining to vocational rehabilitation services emphasize returning partially disabled employees to suitable employment. If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.⁸ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.⁹

In this case, the Board finds that the Office properly determined that appellant was capable of performing sedentary work on an eight-hour basis. The Office correctly found a conflict in the medical record between appellant's treating physician and the Office referral physician as to whether appellant was disabled by his employment injury and the number of hours he was capable of working. The Office then properly referred appellant for an impartial medical evaluation with a Board-certified medical specialist.¹⁰

In reports dated May 8 and September 16, 1997, Dr. Falik, the impartial medical specialist, opined that appellant was not totally disabled as a result of his employment injury and could perform sedentary work for eight hours per day. Because Dr. Falik's opinion was reasoned and based on an accurate understanding of the medical and factual record, the Office properly accorded special weight to his opinion on appellant's work capacity.

⁵ 5 U.S.C. § 8115(a).

⁶ See *Richard Alexander*, 48 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1995).

⁹ *Id.*

¹⁰ Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a). The report of impartial medical specialist if rationalized and based upon a proper factual background must be given special weight; see *Gary R. Sieber*, 46 ECAB 215 (1994).

Upon receipt of Dr. Falik's work restrictions, the Office sought a recommendation for a constructed position from the rehabilitation specialist. In a report dated June 10, 1997, appellant's rehabilitation specialist determined that appellant was able to perform the position of customer service order clerk based on his medical capacity to perform sedentary work, that the position was available in sufficient numbers so as to make it reasonably available with appellant's commuting area and that the minimum wage of the position was \$328.00 per week.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of order clerk represented appellant's wage-earning capacity.¹¹ The weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the duties of an order clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly determined that the position of order clerk reflected appellant's wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated October 2 and January 16, 1998 are hereby affirmed.

Dated, Washington, DC
December 6, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

¹¹ See *Sylvia Bridcut*, 48 ECAB 162 (1996); *Clayton Varner*, 37 ECAB 248 (1985).