U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL C. PETERSON and LIBRARY OF CONGRESS, Washington, D.C.

Docket No. 97-1592; Submitted on the Record;
Issued April 22, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits, effective March 31, 1996 based on its determination that the selected position of telemarketer fairly and reasonably represented appellant's wage-earning capacity.

On October 11, 1994 appellant, then a copyright technician, filed a traumatic injury claim (Form CA-1) alleging that on October 7, 1994 he injured his lower back while pulling records from shelves. The Office accepted appellant's claim for a low back strain and a herniated lumbar disc at L4-5 and L5-S1.

In a March 21, 1995 supplemental attending physician's report, (Form CA-20a), Dr. Albert P. Galdi, a Board-certified neurologist and appellant's treating physician, indicated that appellant had two herniated lumbar discs and polyneuropathy, and that appellant had reached maximum medical improvement. Dr. Galdi also indicated that appellant could work six to eight hours per day with physical restrictions which included no bending, squatting, climbing, kneeling, twisting, no lifting more than 10 pounds and no pushing or pulling 10 to 15 pounds.

By letter dated January 26, 1995, the Office referred appellant along with a medical history and a list of specific questions to Dr. Frasier Henderson, a neurosurgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Henderson of the referral.

In a February 23, 1995 medical report, Dr. Henderson provided a history of the October 7, 1994 employment injury, his findings on physical examination and a review of medical records. He diagnosed long-standing peripheral polyneuropathy, chronic low back pain resulting from degenerative disc disease with disc bulges at L4-5 and L5-S1, and left L5 radiculopathy possibly resulting from the L4-5 disc bulge. Dr. Henderson opined that these symptoms represented an aggravation of a preexisting condition, degenerative disc disease,

which was clearly evident on a magnetic resonance imaging (MRI) scan. Dr. Henderson further opined that the polyneuropathy was not preventing appellant's return to modified duty. Dr. Henderson concluded that with further conservative measures it was possible that appellant could return to his former position as a copyright technician.

On July 7, 1995 the Office referred appellant along with a list of specific questions, a statement of accepted facts and medical records to Dr. Stephen F. Mazer, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter of the same date, the Office advised Dr. Mazer of the referral.

In an August 3, 1995 work capacity evaluation for musculoskeletal conditions, Dr. Mazer indicated that appellant could work four hours per day with restrictions which included minimal kneeling, bending, twisting, walking and sitting, and no lifting greater than 10 pounds. In an August 7, 1995 medical report, Dr. Mazer provided a description of appellant's work duties, a history of the October 7, 1994 employment injury and medical treatment, his findings on physical examination and a review of medical records. Dr. Mazer diagnosed severe chronic polyneuropathy with superimposed herniated lumbar disc and bilateral L5 radiculopathy. Dr. Mazer opined that appellant's symptoms were related to the October 7, 1994 employment injury based on the fact of acute onset of symptoms at that time with the fact that the radicular pattern of leg pain was consistent with the MRI appearance of a herniated disc, as well as, with the electrodiagnostic studies. Dr. Mazer further opined that appellant had preexisting degenerative disc disease. Dr. Mazer concluded that appellant's present state did not allow him to be active in any capacity. Dr. Mazer further concluded that he did not foresee any improvement without surgery and that it was questionable whether surgery would make a significant improvement in appellant's condition.

By letter dated November 3, 1995 the Office referred appellant to a vocational rehabilitation counselor. On September 28, 1994 the vocational rehabilitation counselor identified the positions of security guard and telemarketer.

By letter dated November 9, 1995, the Office advised appellant that it proposed to reduce his compensation to reflect his capacity to perform the position of telemarketer. In a December 4, 1995 letter, appellant disagreed with the Office's proposed reduction.

By decision dated March 11, 1996, the Office found that the position of telemarketer was medically and vocationally suitable for appellant. Accordingly, the Office reduced appellant's compensation effective March 31, 1996. In a March 26, 1996 letter, appellant requested an oral hearing before an Office representative.

By decision dated February 18, 1997, the hearing representative affirmed the Office's decision.

The Board finds that the Office properly reduced appellant's compensation benefits, effective March 31, 1996 based on its determination that the selected position of telemarketer fairly and reasonably represented 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 of compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[1] 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 and vocational qualifications, and the availability of suitable employment.[2] Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and 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.[3]

The Office determined that appellant could perform the duties of a telemarketer which included solicitation of orders for merchandise or services over the telephone, calls to prospective customers to explain the type of service or merchandise offered, quotation of prices and attempts to persuade a customer to buy using prepared sales talk, record keeping of names, addresses, purchases and reactions of prospects solicited, referral of orders to other workers for filing, keying of data from order card onto a computer using a keyboard, possible development of lists of prospects from city and telephone directories, possible typing of reports on sales activities, and possible contact of driver and sales routes to arrange delivery of merchandise. The physical demands of the position included sedentary work with lifting up to 10 pounds and work performed inside 75 percent or more. The position required 30 days to 3 months of experience. Appellant's duties as a copyright technician involved searching for requested information, inputting search commands and reference terms into an on-line database system, preparing written reports, making telephone reports to other parts of the employing establishment, and maintaining card catalogs. Appellant's employment history, therefore, indicates that he had the vocational ability and preparation to perform the duties of a telemarketer. Dr. Mazer's physical restrictions included minimal kneeling, bending, twisting, walking and sitting, and no lifting greater than 10 pounds. The position of telemarketer, therefore, is within appellant's physical limitations. The vocational rehabilitation counselor included the classified section of a newspaper indicating that telemarketer positions were available in appellant's commuting area. Thus, the Office met its burden of proof in reducing appellant's compensation.

The July 9, 1996 medical report of Dr. Francis D. Fowler, a Board-certified orthopedic surgeon, revealed that appellant was totally disabled as a result of the October 7, 1994 employment injury is insufficient to establish total disability because he failed to provide any medical rationale explaining how or why appellant was unable to perform the duties of a

[1] *Garry Don Young*, 45 ECAB 621 (1994).

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

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

telemarketer. Further, Dr. Mazer's August 7, 1995 medical report failed to establish total disability because he did not explain why he changed his opinion that appellant was totally disabled from his earlier opinion in his August 3, 1995 evaluation that appellant could work four hours per day with restrictions.

Inasmuch as the evidence of record established that appellant could perform light work with restrictions, and as the Office followed established procedures for determining the vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Federal Employees' Compensation Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a telemarketer.

The February 18, 1997 decision of the Office of Workers' Compensation Programs hearing representative is hereby affirmed.

Dated, Washington, D.C.
April 22, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member