

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BABATU RUDO and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

*Docket No. 97-1989; Submitted on the Record;
Issued December 29, 1999*

DECISION and ORDER

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

The issue is whether the position of sales manager represented appellant's wage-earning capacity as of September 20, 1992.

On April 28, 1981 appellant, then a 34-year-old letter carrier, submitted a claim for an ulcer condition which he attributed to his federal employment. Following development of the claim, the Office of Workers' Compensation Programs accepted the conditions of anxiety, reactive depression and gastritis. Appropriate compensation for temporary total disability was paid until appellant returned to full-time limited duty on February 15, 1988 as a modified maintenance control and stock clerk. On April 3, 1989 appellant filed a claim attributing an emotional reaction to his limited-duty work. The Office accepted the claim for a post-traumatic stress disorder and appellant was reinstated on the periodic rolls.

Appellant was referred to vocational rehabilitation and in a September 21, 1988 report, an Office rehabilitation counselor noted appellant's interest in self-employment in his own jewelry, clothing and crafts business. In a January 24, 1990 report, Dr. Willie T. Hamlin, appellant's attending psychiatrist, opined that appellant's self-employment would be positive and appropriate therapy and that he would function well in such endeavor. On September 4, 1990 the Office rehabilitation counselor recommended that the Office fund appellant's business enterprise. In an October 9, 1990 medical report, Dr. Hamlin reiterated his opinion that appellant possessed the intellect, desire, necessary coping skills and background experience to be self-employed in a small business enterprise. The medical evidence was reviewed by Dr. Bruce Smoller, a Board-certified psychiatrist and Office medical consultant. He noted that self-employment was medically recommended as suitable for appellant, indicating the only restriction was working under minimal supervision.

On December 5, 1990 the Office approved funding appellant's self-employment enterprise. The store opened on May 25, 1991. In subsequent reports to the Office, appellant noted the amount of time he was working at the business enterprise and what it would cost him

to hire someone to perform the work he did. In an October 25, 1991 EN-1032 report to the Office, appellant described his work as a “retail sales manager” at his business.

In a July 15, 1992 report, the Office rehabilitation counselor reviewed appellant’s medical treatment and rehabilitation efforts. She noted that appellant’s store had been operational for over one year and that, due to varying sales levels on a month to month basis, there was continual variation in the monthly earnings expected from appellant’s self-employment. The rehabilitation counselor conducted a labor market review to determine appellant’s wage-earning capacity and noted that the position of “Sales Manager” as listed in the *Dictionary of Occupational Titles* (DOT No. 163.167-018) most closely matched appellant’s actual duties in operating his business.¹ The rehabilitation counselor set forth the job requirements of the position, noting that appellant met all the experience requirements for the position and had operated his self-employment. She indicated that appellant’s prior business and educational experiences were equivalent to six years training in the field. Based on the labor market survey, the rehabilitation counselor indicated appellant had the capacity to earn \$25,833.33 annually as a sales manager.

In a July 21, 1992 notice, the Office advised appellant that it proposed to reduce his compensation based on the finding that he was partially disabled and that the position of sales manager represented his wage-earning capacity. By decision dated September 3, 1992, the Office reduced appellant’s compensation effective September 20, 1992, finding that he had a 78 percent wage-earning capacity as a sales manager. The Office found that appellant had the required four-year minimum vocational preparation for the position of sales manager based on his educational and employment experiences.

In an October 2, 1992 EN-1032 form, appellant indicated that he continued to be self-employed and listed his hours of work and expected earnings.

Appellant requested a hearing before an Office hearing representative which was held on January 28, 1993. Appellant appeared and testified at the hearing. He indicated that his business closed at the end of December 1992.

By decision dated March 31, 1993, the Office hearing representative affirmed the Office’s September 3, 1993 decision. He found that the position of sales manager fairly and

¹ The position is described as including among the following duties: “[m]anages sales activities of establishment; [d]irects staffing, training and performance evaluations to develop and control sales program; [c]oordinates sales distribution by establishing sales territories, quotas, and goals, and advises dealers and distributors concerning sales and advertising techniques; [a]ssigns sales territory to sales personnel; [a]nalyzes sales statistics to formulate policy and to assist dealers in promoting sales; [r]eviews market analyses to determine customer need, volume potential, price schedules, and discount rates and develops sales campaigns to accommodate goals of company; [d]irects product simplification and standardization to eliminate unprofitable items from sales line; [r]epresents company at trade association meetings to promote product; [c]oordinates liaison between sales department and other sales-related units; [a]nalyzes and controls expenditures of division to conform to budgetary requirements; [a]ssists engineering division to prepare manuals and technical publications; [p]repare periodic sales report showing sales volume and potential sales; [m]ay direct sales from manufacturer, retail store, wholesale house, jobber, or other establishment; [m]ay direct product research and development; and [m]ay recommend or approve budget, expenditures, and appropriations for research and development work.”

reasonably represented appellant's wage-earning capacity, and was supported by the medical evidence of record. The hearing representative addressed appellant's arguments pertaining to his prior work experience and training. He noted that appellant had submitted contradictory statements of record pertaining to his education and work experience and set forth specific findings pertaining to appellant's experience as a bookkeeper in the military for 2 years, 700 hours of business school classroom instruction, 15 hours of class work at Bowie State College, certifications from SBA and SCORE, and a Degree from Pima Community College amounting to 7 years of specific vocational preparation for the position of sales manager.

Appellant requested reconsideration and submitted additional medical evidence from Dr. George E. Everly, Jr., a psychologist, Dr. Hamlin, his attending psychiatrist, and the June 28, 1993 letter of Charles Smolkin, president of Charles Smolkin Vocational Services. In decisions dated August 6, 1993, January 4 and April 7, 1994, the Office found that the evidence submitted was not sufficient to reopen appellant's claim for further review of the merits of his claim.

Appellant submitted an appeal to the Board.² In a decision dated September 3, 1996, the Board affirmed the January 4 and April 7, 1994 denials of reconsideration, finding that the evidence from Dr. Everly was not relevant to the issue on reconsideration. With regard to the August 6, 1993 reconsideration denial, the Board affirmed that part of the decision which found that the report from Dr. Hamlin was not relevant as he offered an opinion outside his field of medical expertise. The Board set aside the August 6, 1993 decision, however, finding that the letter of Mr. Smolkin was relevant to appellant's contention that he did not have the necessary vocational preparation for the position of sales manager. The case was remanded to the Office for further merit review of appellant's claim.

On remand, in an April 14, 1997 decision, the Office reopened appellant's claim for determination of whether the letter of Ms. Smolkin was sufficient to require modification of appellant's wage-earning capacity determination. The Office found that the June 28, 1993 letter of Mr. Smolkin was not sufficient to establish that appellant had insufficient vocational preparation necessary to perform the position of a sales manager. The claims examiner noted that Mr. Smolkin concluded that appellant was unprepared emotionally or vocationally for the position of sales manager and that the Office had not considered appellant's lack of success of appellant's work experience, contending that his education was "incomplete, inconsistent and disjointed." However, the claims examiner reviewed the vocational rehabilitation evidence of record contemporaneous to the 1992 wage-earning capacity and noted that, again at the 1993 hearing, evidence was submitted pertaining to appellant's vocational preparation and training. The claims examiner noted that the hearing representative incorporated the March 23, 1993 opinion of Sheila Hackett, then an Office rehabilitation specialist, and made his own separate conclusions supporting appellant's specific vocational preparation which exceeded the minimum four years of background experience for the selected position of sales manager. The Office found that while Mr. Smolkin generally addressed appellant's incapacity for performing the duties of the position, this evidence was outweighed by the contemporaneous statements of appellant's physicians and vocational specialists regarding his ability for self-employment and to manage a retail business. The Office noted that it was not claimed that appellant's self-

² Docket No. 94-1567.

employment effort failed because of his incapacity for performing the work involved or due to emotional stresses, rather the failure was attributed by appellant to a lack of adequate funding, difficulty in obtaining merchandise from suppliers and slow sales due to an economic recession. For these reasons, the Office denied modification of appellant's wage-earning capacity determination.

The Board finds that the appellant's wage-earning capacity is represented by the position of sales manager.

Section 8106 of the Federal Employees' Compensation Act provides that if an injured employee is partially disabled, compensation shall be paid based on his or her loss of wage-earning capacity.³ Section 8115(a) of the Act, in turn, provides that the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁴ If the actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and any other factors of circumstances which may affect his wage-earning capacity in his disabled condition.⁵ Wage-earning capacity means the ability of the injured employee to earn wages, taking into consideration the effects caused by the employee's impaired physical condition due to the employment injury, and should not be confused with wages received or actual earnings.⁶

The record establishes that appellant was employed as a letter carrier at the time of injury in 1981. His claim was accepted by the Office for anxiety, reactive depression, and gastritis and he received appropriate compensation for total disability. Appellant subsequently returned to work in 1988 as a modified clerk and, in 1989, his claim was accepted for a post-traumatic stress disorder and he was returned to the periodic rolls. Appellant was referred to vocational rehabilitation and subsequently petitioned the Office to support his interest in self-employment operating his own jewelry, clothing and crafts business. Medical evidence was submitted from Dr. Hamlin, his attending psychiatrist, which found that appellant was capable of returning to work in self-employment in a small business enterprise. Dr. Hamlin noted that appellant possessed the intellect, desire, coping skills, and background experience for self-employment. The Office thereafter approved funding for appellant's business enterprise, which opened on May 25, 1991.

By report dated July 15, 1992, after appellant had been self-employed for over one year, an Office rehabilitation counselor noted that sales from the business operation varied on a monthly basis such that she could not use appellant's actual earnings to determine his wage-

³ See 5 U.S.C. § 8106.

⁴ 5 U.S.C. § 8115(a).

⁵ See *Ray H. Harp*, 44 ECAB 409 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁶ See *Donald Johnson*, 44 ECAB 540 (1993).

earning capacity. She therefore applied section 8115 to determine his wage-earning capacity based on the position of a sales manager. The rehabilitation counselor conducted a labor market survey and determined that such positions were reasonably available in the Baltimore, Maryland commuting area at the wage rate of \$28,833.33 per year. It was also noted that the position was found medically suitable for appellant, as Dr. Hamlin had noted only that appellant should work with minimal supervision and the job description of the position of sales manager indicated the incumbent would, as a manager, be working in a largely autonomous capacity and potentially supervise others.

Appellant's primary contention, which formed the basis for the prior remand, is that he lacks the necessary background and vocational experience for the position of sales manager. In this regard, the Office hearing representative relied upon the expert opinion of the rehabilitation specialist and made specific findings pertaining to appellant's education and work experience. The hearing representative noted that appellant's statements at the hearing were unclear and contradictory with regard to prior statements and representations made to the Office. He accepted appellant's testimony of 1 year of work experience in operating a home import business; 700 hours of business school courses and 2 years work experience as a bookkeeper while in the army; 3 years of vocational preparation from developing the specific business plan and coordinating his self-employment, 15 hours of creditable course work at Bowie State College, SBA and SCORE; and additional vocational preparation of 1 year experience in obtaining a degree from Pima Community College.

The June 23, 1993 letter of Mr. Smolkin, addressed to Dr. Hamlin, notes only his opinion that the Office's wage-earning capacity determination was "flawed and unfair," contending that the Office had not considered appellant's lack of success in his self-employment venture. The Board finds that Mr. Smolkin's opinion is clearly outweighed by the detailed findings presented by the rehabilitation specialist and Office hearing representative which extensively reviewed appellant's educational background and work experiences. Mr. Smolkin, while stating appellant's education was "incomplete, inconsistent and disjointed," did not address any of the specific vocational preparation findings made by the Office rehabilitation specialist or Office hearing representative in this case. As such, his opinion on appellant's vocational experience and preparation for the position of sales manager is of diminished probative value and is not sufficient to establish that appellant lacked the specific vocational preparation for the position of a sales manager.

The April 14, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
December 29, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member