U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON G. HALL and DEPARTMENT OF COMMERCE,
U.S. CENSUS BUREAU, Parkersburg, W.Va.

Docket No. 97-357; Submitted on the Record;
Issued February 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a telephone surveyor and, therefore, had a 37 percent loss of wage-earning capacity.

On March 12, 1990 appellant, then a 53-year-old enumerator, slipped on gravel and fell over an embankment, landing in a driveway. In a March 15, 1990 report, Dr. Richard Sibley, a Board-certified orthopedic surgeon, reported that appellant had a compression fracture of the L1 vertebra. Appellant received continuation of pay from March 13 through April 26, 1990. The Office accepted appellant's claim for lumbosacral strain and sprain and fracture of the L1 vertebra and began payment of temporary total disability compensation beginning April 27, 1990.

In a March 21, 1996 decision, the Office found that appellant could perform the duties of a telephone surveyor and, therefore, had a 37 percent loss of wage-earning capacity. In an August 28, 1996 merit decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that the case is not in posture for decision.

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

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

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 selected the position of telephone surveyor[4] as a position within appellant's work limitations. The job was described as sedentary, requiring the ability to lift up to 10 pounds, reach, handle, finger, talk and hear. Dr. Henry M. Hills, Jr., a Board-certified orthopedic surgeon, indicated in a November 14, 1994 report that appellant needed to limit all activities of lifting, pushing, pulling and hauling to a 10-pound weight limit. He also indicated that appellant could perform repetitive motion of the wrist and elbow. His report, therefore, showed that appellant had the physical ability to perform the duties of the position of telephone surveyor.

An Office rehabilitation counselor indicated that the position of telephone surveyor was performed in sufficient numbers so as to be generally available within appellant's commuting area. However, Dr. Hills stated that appellant could work only six hours a day. The Board has held that if an employee can work only part time, the Office must find a position within appellant's work limitations that is reasonably available on a part-time basis.[5] A general finding that the position is reasonably available is not sufficient because a position available on a full-time basis may not be available on a part-time basis.[6] The case must, therefore, be remanded for further development by the Office to determine whether the position of telephone surveyor was, and remains, reasonably available on a part-time basis within appellant's commuting distance.

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

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

[4] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 299.257.014. (4th ed. 1981).

[5] *Chester John Marzec*, 32 ECAB 1386 (1981); *Wordie G. Turner*, 19 ECAB 530 (1968)

[6] *Lewis B. Jackson*, 32 ECAB 1225 (1981).

The decisions of the Office of Workers' Compensation Programs, dated August 28 and March 21, 1996, are hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
February 16, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member