U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDERICK I. ROBINSON and U.S. POSTAL SERVICE, ATLANTA BULK MAIL CENTER, Atlanta, GA

Docket No. 99-1592; Submitted on the Record;
Issued February 1, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a 45 percent loss of wage-earning capacity based on his ability to perform the duties of an administrative assistant.

On May 7, 1991 appellant, then a 34-year-old mailhandler, was pushing heavy containers of mail and developed low back pain. He stopped working the next day and received continuation of pay for the period May 8 through 29, 1991. Appellant returned to light duty. He subsequently sustained several recurrent periods of disability. The Office accepted appellant's claim for lumbar strain, aggravation of degenerative disc disease and, subsequently, depression as a consequence of the employment injury. He stopped working on September 24, 1993. The Office began payment of temporary total disability compensation.

In an April 7, 1998 decision, the Office found that appellant could perform the duties of an administrative assistant and therefore had a 45 percent loss of wage-earning capacity. The Office therefore reduced appellant's compensation effective April 26, 1998.

The Board finds that the Office improperly reduced appellant's compensation.

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 usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.[1] Accordingly, the evidence must establish 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.[2]

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

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

Medical reports and office notes submitted after appellant's employment injury indicated that he had back pain which limited his range of motion in the back. In a December 17, 1993 report, Dr. Allan M. Levine, a Board-certified orthopedic surgeon, indicated that appellant had subjective complaints of chronic low back pain since the employment injury but did not show much in the way of objective findings. Dr. Levine stated that, in conjunction with the minimal objective findings, appellant had restrictions of no lifting greater than 15 pounds, limited bending and stooping and no long periods of standing or sitting.

In an August 9, 1995 report, Dr. Michael A. Haberman, a Board-certified psychiatrist, stated that appellant was not under the care of an orthopedic surgeon, neurologist or any other specialist who would treat his chronic pain. Dr. Haberman noted that appellant had been discharged by his previous treating physician and therefore had no medical supervision of his pain syndrome or its underlying causes. He recommended that appellant be referred to an appropriate specialist. Appellant was referred to Dr. Arnold J. Weil, a Board-certified physiatrist. In a February 15, 1996 report, Dr. Weil diagnosed status post back injury in 1991 without leg pain, development into a chronic low back pain syndrome and clinical depression. He recommended a spine stabilization and strengthening program. In an April 16, 1998 report, Dr. Weil indicated appellant had significant muscle spasm throughout the lumbar paraspinal muscles and degenerative disc disease at L5-S1. He diagnosed chronic lumbar pain, chronic lumbar deconditioning syndrome and chronic muscle spasm. Dr. Weil released appellant to work with the restrictions of light duty, no bending and no lifting over 25 pounds. In a June 12, 1996 report, he stated that appellant had resolved lumbar pain and indicated that he was at maximum medical improvement.

The Office authorized training for appellant in a 10-week computer training course. The Office concluded that appellant could perform the duties of an administrative assistant,[3] a sedentary position requiring the ability to lift up to 10 pounds. The job required a vocational preparation of two to four years. An Office rehabilitation counselor reported that an official with the state department of labor verified that the position was being performed in sufficient numbers so as to be reasonably available within appellant's commuting area.

In a September 10, 1997 report, Dr. Weil indicated that appellant had not been seen in over a year. He noted that appellant had a limited range of lumbar motion, secondary to pain. Dr. Weil stated that the remainder of the physical examination remained unchanged.

The Office, in a March 17, 1997 letter, informed appellant of the proposed reduction in his compensation. Appellant, in response, stated that the training he had received did not prepare him for the position of administrative assistant and contended that he was physically incapable of performing those duties because he could not sit for prolonged periods.

The Office concluded that appellant had the vocational background to perform the duties of an administrative assistant, citing the 10-week computer training course he underwent. However, the description for the position of administrative assistant indicated that the job required two to four years of vocational preparation. The Office did not describe how it determined that appellant had the vocational background to perform the duties of an administrative assistant beyond the 10 weeks of computer training he received.

[3] Department of Labor, *Dictionary of Occupational Titles* DOT No. 169.167-010 (4th ed. 1980).

The Board also notes that the last report that specifically addressed appellant's physical work limitations was the April 16, 1996 report of Dr. Weil which indicated that appellant could perform light duty with a lifting restriction of 25 pounds. Dr. Weil did not address appellant's ability to sit or stand for prolonged periods. Dr. Levine, in his December 17, 1993 report, stated that appellant was unable to sit for prolonged periods. This is pertinent as the selected position of administrative assistant was a sedentary position which required the ability to sit for prolonged periods. The Office did not issue its decision that appellant could perform the duties of an administrative assistant until the April 7, 1998 decision which was two years after Dr. Weil's brief report on appellant's physical limitations and over four years after Dr. Levine's report which indicated that appellant could not sit for prolonged periods. The Board finds that Dr. Weil's report was not sufficiently recent to provide a valid basis for a loss of wage-earning capacity determination[4] and did not have the detail necessary to establish that appellant could meet the sedentary requirements of the position, in light of the prior unrebutted finding that appellant could not perform work requiring prolonged sitting. The Office therefore has not met its burden of proof in establishing that appellant could perform the duties of an administrative assistant and thereby reducing his compensation.

The decision of the Office of Workers' Compensation Programs dated April 7, 1998 is hereby reversed.

Dated, Washington, DC
February 1, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[4] *Keith Hanselman*, 42 ECAB 680 (1991).