

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAREY MOSS and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-445; Submitted on the Record;
Issued July 10, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective February 4, 1996 on the basis that the position of telephone solicitor represented his wage-earning capacity.

Appellant, a 32-year-old electronics engineer, filed a notice of traumatic injury on March 17, 1981 alleging that he injured his low back in the performance of duty. The Office accepted appellant's claim for acute strain/sprain of the cervical, dorsal and lumbar spines as well as herniated disc at L4-5. The Office entered appellant on the periodic rolls.

In a letter dated November 29, 1995, the Office proposed to reduce appellant's compensation benefits on the grounds that he had the capacity to earn wages as a telephone solicitor. By decision dated January 26, 1996, the Office reduced appellant's compensation benefits based on his capacity to earn wages as a telephone solicitor.

Appellant requested an oral hearing.¹ He later requested a review of the written record. By decision dated September 29, 1999, an Office hearing representative affirmed the January 26, 1996 decision.

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

Section 8115 of the Federal Employees' Compensation Act² provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and

¹ The Branch of Hearings and Review initially denied this request as untimely on April 1, 1996. Appellant appealed this decision to the Board and by decision dated February 12, 1999, the Board reversed the April 1, 1996 decision and remanded appellant's claim for an oral hearing. Docket No. 97-1253.

² 5 U.S.C. §§ 8101-8193, 8115.

reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.³

When the Office makes a medical determination of disability and of specific work restrictions, it may refer appellant's case to a vocational rehabilitation counselor authorized by the Office for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*⁴ will result in the percentage of the employee's loss of wage-earning capacity. The basis wage of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.⁵

Appellant's attending physician, Dr. Joseph M. Hassman, an osteopath, completed reports indicating that appellant was only disabled on April 17 and April 28, 1995. The Office referred appellant for a second opinion evaluation with Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon. In a report dated July 15, 1994, he stated that appellant was capable of working with no frequent bending nor repeated lifting of more than 35 pounds. He completed a work restriction evaluation and indicated that appellant could work eight hours a day within those physical restrictions.

The Office referred appellant to vocational rehabilitation services. The rehabilitation counselor confirmed that appellant had the vocational capacity to perform the position of a telephone solicitor, which required lifting up to 10 pounds and no bending. The rehabilitation counselor found that the position was available in sufficient numbers to make it reasonably available to appellant within his commuting area. The position required three days to three months training.

Appellant's attorney contends that the selected position is beyond appellant's physical restrictions. However, the Board notes that the physical requirements of the position are well within the physical restrictions provided by Dr. Klinghoffer and that there is no medical evidence in the record supporting additional physical limitations.

Appellant's attorney also contends that the Office failed to consider appellant's consequential employment-related emotional condition in determining whether the position was appropriate. In a report dated March 28, 1995, Dr. Joel H. Fish, a clinical psychologist, noted that appellant had above-average intelligence. He stated that appellant experienced a great deal

³ *Dorothy Jett*, 52 ECAB ____ (Docket No. 99-297, issued January 29, 2001).

⁴ 5 ECAB 376 (1953).

⁵ *Karen L. Lonon-Jones*, 50 ECAB ____ (Docket No. 97-155, issued March 18, 1999).

of frustration and anger about his present life circumstances and exhibited elements of a clinical depression. He opined that appellant's emotional state was such that it would be difficult for him to sustain involvement in a training program or employment situation.

The Office has not accepted that appellant sustained an employment-related emotional condition as a consequence of his 1981 injuries. Furthermore, there is no medical evidence indicating that this condition preexisted appellant's employment injuries. In a report dated February 5, 1996, Dr. Cyndia S. Choi, a Board-certified psychiatrist, indicated that appellant received psychological counseling and that he was admitted to the hospital due to anger at the Office. She diagnosed adjustment disorder, but provided no evidence that this condition was caused by appellant's employment injuries nor whether this condition preexisted appellant's employment injuries. It is well established that subsequently acquired impairments unrelated to the injury are excluded from consideration in the determination of work capacities.⁶ As the evidence does not establish that appellant's emotional condition preexisted his work injuries or was a consequence thereof, the Office did not err in addressing this issue.

Finally appellant's attorney contends appellant did not have sufficient vocational training to meet the requirements of the selected position. The position description indicated that appellant required three days to three months training to become a telephone solicitor. However, the record also indicated that this training would be provided by the employer.

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

⁶ *James Henderson, Jr.*, 51 ECAB ____ (Docket No. 98-616, issued January 10, 2000).

The September 29, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 10, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member