

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT C. WILSON and DEPARTMENT OF THE NAVY,
NAVAL AIR WARFARE CENTER, Point Mugu, CA

*Docket No. 00-1171; Submitted on the Record;
Issued June 1, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's position as an electronics engineer, as modified by the employing establishment, fairly and reasonably represents his wage-earning capacity.

On September 30, 1991 appellant, then a 32-year-old electronics engineer, filed a claim for cumulative soft tissue stress and wrist pain. He used 16 hours of sick leave between September 20 and 27, 1991, 80 hours of sick leave from November 4 to 18, 1991 and 80 hours of sick leave from December 2 to 13, 1991. The Office accepted that appellant sustained bilateral carpal tunnel syndrome while in the performance of duty.

On December 19, 1991 appellant accepted a light-duty job offer with the employing establishment, in which he would perform his regular position of electronics engineer but not use a computer or typewriter. He worked in this light-duty position until April 10, 1995, when his employment was terminated for unacceptable performance.

By decision dated February 9, 1996, the Office found that appellant's position as an electronics engineer, with modifications, fairly and reasonably represented his wage-earning capacity effective December 14, 1991, that he had no loss of wages in this position, and that appellant's firing for cause did not entitle him to compensation. On February 14, 1996 the Office issued appellant a schedule award for a 20 percent permanent loss of use of each arm. On September 17, 1996 the Office of Personnel Management approved appellant's application for disability retirement.

By letter dated February 8, 1997, appellant requested reconsideration of the Office's February 9, 1996 decision and submitted a report dated March 10, 1996 from Dr. Michael D. Roback, a Board-certified orthopedic surgeon. By decision dated March 13, 1997, the Office found that the evidence appellant submitted was immaterial and insufficient to warrant review of its prior decision.

Appellant appealed this decision to the Board, which by decision and order dated July 1, 1999, found that Dr. Roback's March 10, 1996 report was "relevant to the Office's determination that appellant's wage-earning capacity is represented by his former position with ergonomic accommodations...." The Board found that the Office improperly refused to reopen appellant's case for further review of the merits.¹

By decision dated November 23, 1999, the Office found that the medical report from Dr. Roback was of little probative value to support that appellant was totally disabled, and that modification of its prior decision was not warranted.

The Board finds that the Office properly determined that the position of electronics engineer, as modified by the employing establishment, fairly and reasonably represents appellant's wage-earning capacity.

Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.² At the time of the Office's February 9, 1996 decision, there was no evidence that the position of electronics engineer, as modified by the employing establishment, did not fairly and reasonably represent appellant's wage-earning capacity.

Appellant's attending physicians prescribed work tolerance limitations related to appellant's accepted carpal tunnel syndrome. The most recent limitations from Dr. Dennis Phelps, a Board-certified orthopedic surgeon, were contained in this physician's January 28, 1993 report. Dr. Phelps stated that appellant was unable to write for more than two to three minutes continuously or perform the repetitive motions required in computer or keyboard activity or the turning of pages or file material." In a report dated March 14, 1994, Dr. Gerry J. Blacker, a Board-certified orthopedic surgeon, prescribed work restrictions of "no repetitive flexion or extension of the fingers and wrists a cumulative total of greater than two to three hours a day," and "avoid repetitive pushing and pulling, and repetitive twisting and repetitive heavy grasping with both upper extremities."

The work tolerance limitations prescribed by appellant's attending physicians were not exceeded by the requirements of the light-duty position that appellant began on December 19, 1991. The employing establishment provided appellant with work involving no typing and minimal writing, an ergonomic chair and an adjustable copy holder. No later than August 21, 1992 the employing establishment allowed appellant to dictate to a secretary and on October 15, 1993 appellant received a recorder to dictate to a typist who would transcribe his work. An ergonomist performed a work site evaluation on April 12, 1993 and concluded that, other than a lumbar roll for his chair and a shoulder rest or speakerphone or headset, "the equipment that he possesses, if used correctly, can allow him to work very safely with little strain on his musculoskeletal system."

¹ Docket No. 97-2166 (issued July 1, 1999).

² *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

Appellant performed the modified duties of the position of electronics engineer for more than three years after his claim for carpal tunnel syndrome was accepted. His employment with the employing establishment was terminated on April 10, 1995 for unacceptable performance. Because there is no evidence that this termination was due to physical inability to perform the work, the April 10, 1995 work stoppage does not establish entitlement to compensation.³ Since appellant stopped work for reasons unrelated to his employment-related physical condition, he has no disability within the meaning of the Federal Employees' Compensation Act.⁴

In support of his February 8, 1997 request for reconsideration, appellant submitted a report dated March 10, 1996 from Dr. Roback, who concluded that appellant was "100 percent disabled for all employment." He also stated: "I do not believe that the patient can be given a reasonable accommodation such that his work area can be adjusted to allow him to work in any capacity." Dr. Roback apparently was not aware that appellant had performed full-time work for more than three years at the employing establishment with accommodations. His report reflects that he believed that appellant continued to perform his preinjury position requiring computing 80 percent of the workday.

Dr. Roback stated his opinion that appellant "must be considered totally unable to find gainful employment in the open labor market," his opinion would not establish that the modified position of electronics engineer does not represent appellant's wage-earning capacity. This position was modified specifically for appellant's limitations and there is no indication that Dr. Roback was aware of the modifications that allowed appellant to continue to work.

The decision of the Office of Workers' Compensation Programs dated November 23, 1999 is affirmed.

Dated, Washington, DC
June 1, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

³ See *John W. Normand*, 39 ECAB 1378 (1988).

⁴ *Lester Covington*, 47 ECAB 539 (1996).