U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY M. VAN SANT and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Los Angeles, Calif.

Docket No. 96-1245; Submitted on the Record;
Issued June 24, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant was employed in a learner's capacity at the time of his September 30, 1982 employment injury.

This case has previously been before the Board on appeal. By decision and order dated July 22, 1991, the Board found that appellant did not resume regular full-time employment following his September 30, 1982 employment injury, a stroke, and that he therefore was not entitled to a recurrent pay rate for his disability beginning December 3, 1983.[1]

By letter to the Office of Workers' Compensation Programs dated October 29, 1992, appellant contended that he was in a learner's capacity at the time of his September 30, 1982 employment injury and was therefore entitled to compensation based on his projected earning capacity. By decision dated January 9, 1995, the Office found that the position of operations branch specialist appellant held on September 30, 1982 was not a learner's capacity position. This decision was affirmed by an Office hearing representative in a decision dated February 20, 1996.

Section 8113(a) of the Federal Employees' Compensation Act[2] provides:

> "If an individual -- (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for

[1] Docket No. 91-514.

[2] 5 U.S.C. § 8113(a).

disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."

The Board has delineated the circumstances under which an employee will be considered to be employed in a learner's capacity at the time of his or her injury. These include whether the employee was in a formal training program, whether the job classification described an "in-training" or learning position, whether the position held was one in which the employee could have remained for the rest of his life, and whether any advancement would have been contingent upon ability, past experience or other qualifications.[3] Applying these criteria to the present case, the Board finds that appellant was not employed in a learner's capacity at the time of his September 30, 1982 employment injury.

Appellant has established that he was in a formal training program at the time of his September 30, 1982 employment injury, and has submitted a copy of the employing establishment's air traffic career progression plan. The purpose of this plan, as stated therein, is to establish "uniform rating and ranking criteria which are to be used to identify the best qualified candidates for promotion into certain air traffic staff and supervisory GS/GM-2152-0 positions" and it, and the air traffic national selection system (ATNSS), describe the experience and other qualifications needed to advance to GM-15 air traffic manager and program manager positions. A former coworker described the program: "A specific career path was defined with desired experiences and positions being outlined for employees to follow if they desired to progress to a GM-15 manager's position." This former coworker also stated that he had served as an air traffic assessor evaluating air traffic national selection system candidates, and, in his opinion, "[Appellant] had the necessary knowledge, skills and abilities to be successful in the ATNSS and would have been selected for a GM-15 Air Traffic Manager's position had he not had a stroke."

This evidence, however, is not sufficient to establish that appellant was employed in a learner's capacity at the time of his September 30, 1982 injury. The fact that the effects of an employment injury preclude the employee from obtaining a higher-paying job does not establish a loss of wage-earning capacity, nor does it establish that the employee was employed in a learner's capacity at the time of the injury.[4] The position description for the position of operations branch specialist that appellant held on September 30, 1982 does not describe an "in-training" or learning position, but rather one in which the incumbent "works independently within his assigned area of jurisdiction" and one which "requires a comprehensive knowledge of air traffic operating techniques, conditions, and standards." Moreover, the operations branch specialist position was one that appellant could have held for an indefinite period or for the rest of his career, had he not passed the oral review at the employing establishment's assessment center, which he indicated he would have undergone in February 1983. These circumstances lead the Board to conclude that, although appellant was involved in a career development plan,

[3] *Deborah D. Jones*, 37 ECAB 609 (1986); *Raymond W. Goodale*, 25 ECAB 350 (1974); *James L. Parkes*, 13 ECAB 515 (1962); *Carter C. Swinson*, 10 ECAB 281 (1958).

[4] *John Olejarski*, 39 ECAB 1138 (1988); *William S. Harbin*, 17 ECAB 183 (1965).

he was not employed in a learner's capacity at the time of his September 30, 1982 employment injury.

The decision of the Office of Workers' Compensation Programs dated February 20, 1996 is affirmed.

Dated, Washington, D.C.
June 24, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member