U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THADDEUS HARDY and U.S. POSTAL SERVICE,
VEHICLE MAIL FACILITY, Philadelphia, PA

Docket No. 00-967; Submitted on the Record;
Issued November 7, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a paralegal and, therefore, had a 42 percent loss of wage-earning capacity.

On March 23, 1993 appellant, then a 36-year-old mail truck operator, filed a claim for a nervous condition which he related to stress at work. In a September 3, 1993 decision, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to demonstrate a causal relationship between the accepted employment factors and appellant's claimed condition. In an October 24, 1994 decision, an Office hearing representative, after an August 24, 1994 hearing, found that appellant had submitted sufficient medical evidence to require further development. The Office subsequently accepted that appellant had paranoia and a delusional disorder that was causally related to compensable factors of his employment. The Office paid temporary total disability compensation for intermittent periods between February 18 and October 1, 1993 and for the period beginning November 26, 1994.

The Office authorized vocational rehabilitation for appellant by approving training as a paralegal. Appellant enrolled in paralegal training in April 1996 and completed his training in October 1997. In a November 18, 1998 decision, the Office found that appellant could perform the duties of a paralegal and, therefore, had a 42 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective December 8, 1998. Appellant requested a hearing before an Office hearing representative which was conducted on June 29, 1999. In an October 12, 1999 decision, the Office hearing representative found that the evidence of record showed appellant could physically and vocationally perform the duties of a paralegal. He, therefore, affirmed the Office's November 18, 1998 decision.

The Board finds that the Office properly determined that appellant could perform the duties of a paralegal and, therefore, acted appropriately in reducing his compensation to reflect his loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, based on the nature of the employee's injuries and the degree of physical impairment, employment, age, 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]

The position of paralegal is a light-duty position requiring the ability to lift up to 20 pounds. The vocational preparation of the position is described as taking two to four years.[3] An official with the state employment service verified that the position was performed in sufficient numbers so as to be reasonably available within appellant's commuting area.

In regard to appellant's medical ability to perform the duties of the position, Dr. Gary Flaxenburg, a psychiatrist, in a May 24, 1995 report, indicated that appellant was resolving family issues but, when he had completed this task, would undergo a vocational assessment. In a March 20, 1996 report, Dr. Flaxenburg stated that appellant was willing and able emotionally to pursue further studies in paralegal work. He commented that, with continued treatment, appellant would be able to handle employment in the field. In a March 28, 1996 report, Dr. Flaxenburg stated that appellant had shown the ability to concentrate, noting that he had sat for the two-hour test for admission to the paralegal program and had a higher than average passing score. He noted that appellant was advised not to handle heavy equipment because of slowed reflexes, not an inability to concentrate. Dr. Flaxenburg commented that appellant's medication was not out of line with that of a man his weight and size. He related that appellant detected no decrease in his ability to concentrate. Dr. Flaxenburg stated that if appellant's concentration were affected, his medication could be monitored.

In a July 1, 1997 report, Dr. Flaxenburg stated that appellant had begun to master his anger and, to some extent, separate real from imagined or misinterpreted dangers. He noted that appellant continued to need help in the area. Dr. Flaxenburg reported appellant's medication had been reduced. He reported that, notwithstanding his difficulties, appellant had been able to maintain acceptable grades in his paralegal training. Dr. Flaxenburg stated that appellant was making progress but still needed treatment.

In an October 24, 1998 report, after the Office proposed to reduce appellant's compensation, Dr. Flaxenburg stated that appellant had been on medication. He noted appellant's overall dosage had been reduced. Dr. Flaxenburg expressed concern, however, that appellant, in an competitive work environment, might have difficulties concentrating which would lead eventually to the termination of his employment, setting up the same cycle he currently was in.

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

[2] *Phillip S. Deering*, 47 ECAB 692 (1998).

[3] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 119.267-026 (4th ed., September 1980).

Dr. Flaxenburg initially expressed no doubts about appellant's ability to concentrate sufficiently to perform the duties of the position of a paralegal. He noted that, despite the medication appellant was taking, he was showing progress in his vocational rehabilitation. Dr. Flaxenburg only expressed doubt when the Office proposed to reduce appellant's compensation. In expressing such doubt, he stated that appellant might have difficulty concentrating in a competitive work environment, which might lead to the termination of employment. Dr. Flaxenburg's statement was speculative and discussed the possibility of future injury. The Board has held that fear of future injury is not a compensable factor of employment.[4] Dr. Flaxenburg's most recent report, therefore, does not contradict his prior reports which indicated that appellant was medically capable of performing the duties of a paralegal.

Appellant contended that he did not have the vocational background to successfully be employed as a paralegal. He contended that many of his applications for employment were rejected by potential employers because he did not have a college degree. Appellant submitted several letters, in which his application for a position as a paralegal was rejected because he did not have the required education or experience. The rehabilitation specialist, however, identified numerous positions for a paralegal within appellant's commuting area. The paralegal training center attended by appellant indicated that its paralegal associate program was approved and accredited by the state government on April 10, 1996 and had a large percentage of students placed in employment. Even though the vocational preparation period for the position of a paralegal is described as two to four years, the existence of an accredited paralegal training program, approved by state authorities and with a record of employment by graduates of the program, shows that appellant received the requisite vocational preparation for the position of paralegal. The fact that appellant did not find employment as a paralegal despite sending out numerous resumes is not a basis for concluding that the position is not reasonably available.[5] Appellant has not shown that virtually every potential employer in his commuting area required paralegals to have a college degree.[6] Appellant, therefore, has not established that he did not have that proper vocational preparation for the position of a paralegal and that the position was not reasonably available within his commuting area.

[4] *James B. Christenson*, 47 ECAB 775 (1996).

[5] *Rosa M. Garcia*, 49 ECAB 272 (1998).

[6] *See Barbara J. Hines*, 37 ECAB 445 (1986) (appellant showed that the position of receptionist in her commuting area required the ability to type which she was restricted from performing by her physician.)

The decision of the Office of Workers' Compensation Programs, dated October 12, 1999, is hereby affirmed.

Dated, Washington, DC
November 7, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member