

**United States Department of Labor
Employees' Compensation Appeals Board**

JOHNNY H. BUTLER, III, Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Washington, DC,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-676
Issued: August 4, 2005**

Appearances:
Johnny H. Butler, III, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 25, 2005 appellant timely filed an appeal from a December 7, 2004 decision by the Office of Workers' Compensation Programs, which found that appellant could perform the duties of a sales representative. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly determined that the constructed position of sales representative represented appellant's wage-earning capacity.

FACTUAL HISTORY

On December 7, 1999 appellant, then a 33-year-old mail clerk, filed a claim for a repetitive motion injury. In an accompanying narrative, appellant stated that he had worked at the employing establishment for nine years as a keyer on a small parcel bundle sorter.

In a March 10, 2000 letter, the Office stated that it accepted appellant's condition of tendinitis of the shoulder as causally related to his employment. It subsequently accepted that appellant had mononeuritis multiplex and myalgia myositis. The Office paid compensation for intermittent periods appellant did not work. Appellant stopped work again on February 2, 2002 and the Office began payment of temporary total disability as of that date.

The Office referred appellant to a rehabilitation counselor. In a July 2003 vocational evaluation, the counselor indicated that appellant had worked as a cashier from 1986 to 1987 and as a security guard from 1986 to 1990, when he began to work at the employing establishment. She noted that appellant received a bachelor's degree in music education from the University of the District of Columbia. She indicated that test results from various vocational tests and evaluation led her to conclude that appellant could work at music stores performing advising, teaching and selling, could work in sales in the musical section of retail stores or with additional training, could work as a music therapist. She related that appellant preferred to seek employment performing voiceovers for commercials and advertisement.

In a September 23, 2003 report, the rehabilitation counselor indicated that appellant could perform the duties of a sales representative in musical instruments and accessories. She reported that the job was a light-duty position, requiring the ability to lift 10 pounds frequently and 20 pounds occasionally. The job also required occasional reaching and handling and frequent talking and listening. The counselor commented that the position would require one to two years of vocational training. She reported that the job was performed in such numbers in appellant's commuting area that it was reasonably available.

In a November 30, 2003 report, the rehabilitation counselor indicated that appellant had problems with chronic pain. She noted that he attempted volunteer work but was unable to perform the task assigned to him. Appellant saw a mental health counselor and was diagnosed with a dysthymic disorder. The rehabilitation counselor stated that appellant had not been active in his job search in the past six weeks because of his medical problems. He indicated that he had an updated resume posted on an internet site but had not received any invitations for an interview. The counselor reported that she had found some sales associate and usher positions for appellant. She noted that there were numerous cashier and sales positions available in the holiday season. She commented that the majority of music stores wanted an applicant to come in person and complete an application. The counselor stated that appellant's lack of response was troubling because the time for the job search was over and appellant had let opportunities slip through his fingers because of his inability to respond.

In a November 19, 2003 report, a licensed social worker stated that appellant had dysthemia, irritable bowel syndrome, gastro-esophageal reflux disease and myofascial pain. In a December 16, 2003 report, Dr. Daniel A. Glor, appellant's treating Board-certified neurologist, stated that since 1999 appellant's work restrictions had been no sweeping with the left arm, limit left hand fine movements and grasping to two hours a day, limit left shoulder motion to no more than two hours a day and sit in a regular chair with a back. He commented that because of appellant's symptoms, he could not work more than 20 to 24 hours a week.

In a May 24, 2004 email, an Office rehabilitation specialist stated that the rehabilitation was unsuccessful in returning appellant to suitable work within a reasonable program time frame.

He therefore was closing appellant's case and provided the Office with the loss of wage-earning capacity information. In a separate report, the rehabilitation specialist indicated that appellant was capable of full-time medically suitable employment. He recommended that the claims examiner process appellant's entitlement to a loss of wage-earning capacity based on a constructed wage-earning capacity. He stated that the job of sales representative was the most appropriate position to consider for appellant's wage-earning capacity. The rehabilitation specialist stated that the job met appellant's restrictions in that the job was light duty with no lifting over 20 pounds and no prolonged rotation of the shoulder, grasping or over the shoulder sweeping motions. He indicated that appellant met the specific vocational requirements of the job in that he had over 24 months of specific and general work experience from specific vocational training and previous training in private industry and federal employment. He noted that the job was reasonably available within appellant's commuting area.

In an October 14, 2004 letter, the Office informed appellant that it was proposing to reduce his compensation for wage loss because the medical and factual evidence in his case showed that he was only partially disabled, not totally disabled. The Office indicated that if appellant disagreed with the proposal, he could submit any additional evidence or argument within 30 days. In a November 4, 2004 letter, appellant indicated that his employment injury had led to depression and chronic fatigue syndrome. He stated that these conditions had an impact on his life, not just his ability to sustain consistent employment. He noted that he attempted to have medical documentation of his depression attached to the claim but he received no response. He stated that he had filed a claim for depression and dysthemia, which were directly related to his myofascial pain syndrome.

In a December 7, 2004 decision, the Office found that appellant could perform the duties of a sales representative and therefore had a 54 percent loss of wage-earning capacity.

LEGAL PRECEDENT

Once the Office had made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits to reflect a claimant's wage-earning capacity.¹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. Under section 8115,² the determination of wage-earning capacity for a partial disability is based on actual earnings if such earnings fairly and reasonably represent the claimant's wage-earning capacity. If actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the employee's injuries; (2) the degree of physical impairment; (3) the employee's usual employment; (4) age; (5) qualifications for other employment; (6) the availability of suitable employment; and (7) other circumstances that may affect the employee's wage-earning capacity in the disabled position.³

¹ *Karen Lonon-Jones*, 50 ECAB 293, 297 (1999).

² 5 U.S.C. § 8115.

³ *Todd Harrison*, 49 ECAB 571, 578 (1998).

ANALYSIS

The Office concluded that appellant could perform the position of sales representative full time. The Office rehabilitation specialist stated that the job met appellant's restrictions in that the job was light duty with no lifting over 20 pounds and no prolonged rotation of the shoulder, grasping or over the shoulder sweeping motions. He stated that appellant had the vocational background to perform the duties of the position. He concluded that the medical evidence of record supported that appellant could perform the duties of a sales representative full time.

The most recent report of record from Dr. Glor contradicts the conclusion of the Office rehabilitation specialist. The position of sales representative required no prolonged rotation of the shoulder and no grasping or working above the shoulder. Dr. Glor had limited appellant to no sweeping movements of the left hand, a limit on left shoulder rotation to two hours a day and a limit on left hand fine movements and grasping for two hours a day. Appellant therefore could physically perform the identified duties of the position of a sales representative. However, Dr. Glor stated that appellant could only work 20 to 24 hours a week. The rehabilitation specialist only discussed whether the position of sales representative was reasonably available full time within appellant's commuting area. He did not determine whether the job was reasonably available on the part-time basis that Dr. Glor specified as a work limitation for appellant.⁴ There is no other medical evidence of record that found appellant could work full time as a sales representative. The Office therefore failed to establish that a part-time sales representative position was reasonably available within appellant's commuting area.

CONCLUSION

The Office did not meet its burden of proof that appellant had a loss of wage-earning capacity based on a determination of whether the position of a part-time sales representative was reasonably available within appellant's commuting area.

⁴ See *Harvey Jacobs, Jr.*, 39 ECAB 1439, 1445-46 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 7, 2004 is reversed.

Issued: August 4, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board