United States Department of Labor
Employees' Compensation Appeals Board

RAY W. ROLLINS, Appellant	)	
and	)	
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	**Docket No. 03-2283** **Issued: March 11, 2004**

Appearances:
David C. Harrison, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 10, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated September 30, 2002 and June 23, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has *de novo* jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On August 6, 1980 appellant, then a 26-year-old painter, filed a traumatic injury claim alleging that on that date he twisted his left knee descending a "brow." The Office accepted the claim for mild instability of the left knee. The Office approved compensation benefits through

March 10, 1981, after which appellant returned to regular duty. A claim for a recurrence as of July 9, 1981 was denied.

On November 14, 1983 appellant filed a traumatic injury claim asserting that on that date he injured his back and head when he slipped. On January 24, 1984 the Office accepted appellant's claim for the condition of low back sprain and paid compensation benefits. The Office later also accepted the condition of pain syndrome. After November 14, 1983, appellant never returned to work with the employing establishment. Appellant worked briefly as a mechanic helper and as a driver, but was terminated from these positions. Beginning October 7, 1991, the Office restored payment of temporary total disability compensation.[1]

Appellant's most recent treating Board-certified orthopedic surgeon is Dr. Randall N. Smith. In a report dated November 20, 2000, Dr. Smith indicated that appellant was significantly disabled as a result of chronic cervical and low back syndrome and chronic myofascial pain. He opined that appellant was on an appropriate level of medications due to the severity of his pain. In a report dated January 8, 2001, Dr. Smith indicated that appellant continued to have pain in his neck and low back with associated headaches. Cold weather, activity and stress tended to make the pain worse. He noted, "I do n[o]t think that [appellant] can be working because he just does n[o]t have the reliability to be doing a job on a regular basis."

By letters dated December 15, 2000, the Office referred appellant for second opinion evaluations by Dr. Maurie D. Pressman, a Board-certified psychiatrist, Dr. William H. Simon, a Board-certified orthopedic surgeon, and Dr. Myron W. Frederic, a Board-certified neurologist and internist.

In a medical report dated January 11, 2001, Dr. Pressman indicated that appellant had pain disorder due to psychological factors. He noted that, from a psychological point of view, appellant was capable of gainful occupation, but did note that he should be given directive psychotherapy. In a work capacity evaluation completed the same day, Dr. Pressman indicated that from a psychiatric viewpoint appellant could work eight hours a day, but in a structured environment where little is expected and he gets specific instructions.

In a report dated January 26, 2001, Dr. Simon diagnosed degenerative disc disease lumbar spine. He indicated, "[I]t is my opinion within reasonable medical certainty that this patient is able to return to a light work situation that is sedentary in nature in which he does not have to do overhead work or bend to the floor or lift over 10 pounds."

In a medical report dated January 29, 2001, Dr. Frederic indicated that there was no neurologic condition related to the work injury. He further noted that while the normal magnetic resonance imaging and electromyography studies support the fact that there was no

[1] Although the Office issued a decision determining appellant's wage-earning capacity was represented by the position of parking lot attendant effective October 10, 1999, the Office eventually reinstated temporary total disability benefits as of October 10, 1999. This issue was appealed to this Board, but as benefits were reinstated, appellant requested that the Board dismiss this appeal, and the Board did so. *Ray W. Rollins*, Docket No. 00-1738 (issued August 15, 2000).

significant neurologic injury or condition as a result of the work accident, this did not rule out possible orthopedic or psychiatric sequela of the accident.

On February 21, 2001 Dr. Pressman reviewed the surveillance report of the surveillance of appellant on January 25, 2001 and concluded that there was nothing in this report that made him change his opinion from a psychiatric point of view.

In a medical report dated March 5, 2001, Dr. Smith indicated:

> "This is a long-term life situation that will never completely resolve. The best we can do is try to control the pain with equipment and medications while intermittently update studies to find something that we can address such as Cortisone injections or surgical options. I do n[o]t really anticipate much change in his situation. I think that, although he could do some sedentary light-duty job for periods of time, he is going to have a lot of time where the pain is going to get severe and he is going to have a difficult time getting to work and staying there seated or even doing frequent position changes on a regular basis. This is something that he is going to have to be considered. It is my opinion that he is disabled then as a result of his injuries, and this is permanent."

On March 20, 2001 appellant's vocational counselor, John Heathcote, determined that appellant was capable of performing the job of telemarketer/telephone sales representative and that such work was reasonably available in appellant's commuting area.

On April 3, 2001 Dr. Simon answered specific questions from the Office. He indicated that appellant's degenerative disc disease of the lumbar spine was not medically connected to the work accident of 1983 or to factors of appellant's performance, and that there was no evidence that the work-related conditions sustained on November 14, 1983 are active and causing objective findings.

By letter dated July 11, 2001, appellant was referred to Dr. Marvin N. Kallish, a Board-certified orthopedic surgeon, for an independent medical examination. In a medical report dated July 27, 2001, Dr. Kallish opined:

> "At the present time, the diagnoses are degenerative changes in the cervical and lumbosacral spine which are attritional and aging in nature. They are unrelated to any injuries which the patient may have sustained and particularly to the injury of 1983. The only active diagnosis which I can find at this time is the lack of volitional cooperation by the patient, attempting to have him do a range of motion and other movement. There is the obvious diagnosis of total body psoriasis, which I am an orthopedic surgeon and am unable to comment on the causative factors or underlying problem from this. It is my opinion that there [are] no residuals from the injuries which he may have sustained in his alleged fall in the void tank while working at [the employing establishment]. I can find no findings in this examination which would support his continued complaints or support any continued complaints as related to the injuries.

> "There is evidence from the Key Assessments and other information in the chart that [appellant] is capable of doing light-duty work. It is now 18 years since [appellant] has done any work of any substance, and I certainly feel that this would be the appropriate place for him to begin. I do believe, purely from an orthopedic point of view, that the patient is capable of doing light-duty and semi-sedentary work, with lifting up to 15 to 20 [pounds] and no overhead work."

Dr. Kallish also indicated that appellant takes an excessive amount of drugs. He concluded:

> "Any injuries that would have happened of the nature which the patient sustained at age 30 should long ago have resolved and cleared themselves, and I am at a loss to explain the patient's continued complaints from an orthopedic point of view. I am also unable to explain the patient's continued inability to work. I can find from an orthopedic point of view no evidence of disability."

On September 17, 2001 the Office issued a notice of proposed reduction of compensation, noting that the medical and factual evidence of record established that appellant was no longer totally disabled but rather partially disabled, and had the capacity to earn wages as a telephone solicitor. In response thereto, appellant submitted a September 26, 2001 report by Dr. Smith, wherein he disagreed with Dr. Kallish and noted that he did not think that appellant was on too many medications. He indicated that, as far as employment, appellant was learning disabled and has side effects from the medications, which will affect his concentration, thinking and driving. Dr. Smith further noted that, if appellant was not on the medications, he would be in tremendous pain. He noted that appellant did not need surgical intervention, but did still have myofascial syndrome and chronic pain syndrome which was incurable. He opined that appellant needed to restrict his activities, and that he was unemployable at the present time.

By decision dated November 1, 2001, the Office reduced appellant's compensation benefits as proposed. The Office further finalized the termination of the accepted conditions of low back strain, postconcussion syndrome and cervical strain as it found that the weight of the medical opinion did not support any continued residuals from these 1983 injuries. However, the Office noted that appellant was entitled to continuing treatment for the accepted condition of chronic pain syndrome. Appellant's compensation was computed as being $109.29 per week based on a loss of wage-earning capacity of $163.94 per week.

By letter dated November 20, 2001, appellant requested an oral hearing. At the hearing held on May 16, 2002, appellant testified that his primary problem was pain in his back and neck and headaches, that he took a variety of medications for these problems, and that, as a result of this mediation, his "concentration is terrible." He stated that he did not think that he could perform the position of telephone solicitor because of the medication and the fact that he is tired all the time. He also noted that he left school after 10th grade, and that he has trouble reading and writing.

Appellant submitted further reports from Dr. Smith, including a December 5, 2001 report wherein Dr. Smith again opined that appellant was not employable at this time as a result of chronic pain syndrome.

On April 30, 2002, on the advice of his attorney, appellant underwent a vocational evaluation with Gary A. Young, a rehabilitation consultant, who reviewed appellant's record, including medical evidence, vocational history, education and testing, and reviewed the criteria of the position of telephone solicitor and opined:

> "[Appellant] is not able to return to work as a telephone solicitor. He is not capable of doing this job from a variety of perspectives including:
>
> 1. Dr. Smith feels that [appellant] would have difficulty sitting for the duration needed to be a telephone solicitor.
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> 2. Dr. Pressman stated that [appellant] could return to work in a highly structured job. Telephone solicitor is not this type of position.
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> 3. [Appellant] does not possess the necessary aptitudes and skills to be successful as a telephone solicitor. He is barely literate. His reading level would not allow for smooth reading of a script and his spelling problems would not permit accurate recording of information. At his level of spelling, he would make a greater number of mistakes than would be permitted in this type of work.
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> 4. Because of educational deficiencies [appellant] does not have the necessary abilities to work in skilled and semi-skilled positions.
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> 5. [Appellant] is easily distractible. In a room full of telephone solicitors, [appellant] could not keep on track on his conversation.
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> 6. [Appellant] has no computer skills and with his General Educational Development levels, he would be too slow to keep up in learning these skills.
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> "There is another factor that impacts upon his ability to return to work. [Appellant] has psoriasis almost completely across his body. His treatments have included cancer chemotherapy and steroids. While it is not contagious, it is unsightly. He receives treatment for this, and the combination of the pain and this condition causes as well as the time he would miss from work indicate that he would not be reliable.
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> "Therefore, from every perspective the position as a telephone solicitor is not an appropriate vocational choice for [appellant]."

In a decision dated September 10, 2002, the hearing representative found that the Office met its burden of proof in reducing appellant's compensation on the basis that he was capable of earning wages as a telephone solicitor. However, the hearing representative further found that appellant had provided sufficient additional evidence by way of the report of Mr. Young to

warrant further development of the record with regard to entitlement to compensation subsequent to the date compensation was reduced. The hearing representative then affirmed the November 1, 2001 decision, but also indicated that the case was remanded for further development and the issuance of a *de novo* decision.

Pursuant to the hearing representative's decision, the Office referred appellant to Phil Stark, a rehabilitation specialist, for a review of appellant's case and, in particular, the report of Mr. Young. In a report dated September 26, 2002, Mr. Stark opined that the position of telephone solicitor was within appellant's physical and mental capacity. He noted:

> "The arguments presented by the independent rehabilitation consultant, Mr. Young, are not sufficient from my point of view to alter my opinion. All the weighted medical indicates [appellant] can work. His full scale IQ was measured in the low average range. He showed the ability to learn from an educational standpoint by successfully completing a short-term computer-operator type program. The jobs he held or had training for would for the most part make him a viable candidate for the telephone solicitor position in as much as he was successful in the interview process and thus being hired as well as performing the required duties of those positions. He had interpersonal contact with other employees including supervisors as well as the public. In [a] [n]europsychological evaluation performed in January 1985, he was observed interacting with a group of his peers as well as being able to incorporate constructive suggestions related to specific problems he encounters. The report continues stating [appellant] is usually an independent worker who begins his work, once the instructions have been given and continues to work attentively to complete his assignments. [Appellant] has a reading grade level of 5.1 and math grade level of 5.2.
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> "In the matter of sitting, referred to by Mr. Young, it is advisable to refer to the Key Functional Assessment dated July 21, 2001. It states in a five- to six-hour workday tolerance [appellant] could sit for up to three hours and walk up to three hours. The report also indicates that despite the effects of his medication he as able to concentrate during the four-hour assessment.
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> "In conclusion, it is my professional opinion that the title of telephone solicitor is a suitable position for [appellant] based on my review of the material stated in this memo[randum]."

By decision dated September 30, 2002, the Office found that appellant was entitled to compensation based upon his ability to earn wages as a telephone solicitor based on the review of the case file, medical evidence of record and the vocational information.

By letter dated October 1, 2002, appellant requested a hearing. At the hearing, held on April 10, 2003, appellant noted that he has trouble concentrating due to the medications. He further indicated that he was currently being treated by INF Behavioral Care. He stated that he did not think that he could perform the job of telephone solicitor because he could not sit very

long and he did not believe that he could sell something. He further indicated that he had never had a job where he had to interact with people. At the hearing, appellant admitted that he took a week-long computer course through the employing establishment and that he got a diploma for finishing the course, but indicated that everyone got the diplomas even if they did not know how to turn on the computer. Appellant also noted that he has not used a computer since.

At the hearing, appellant submitted three exhibits, including a medical opinion dated November 6, 2002, wherein Dr. Judith R. Peterson, a Board-certified physiatrist, noted that appellant still had chronic pain, and that she would recommend that he be evaluated by a pain program as well as being treated by a pain psychiatrist. Appellant was evaluated on March 12, 2003 by Dr. Smith, who reiterated that appellant had degenerative disc disease, degenerative joint disease, cervical and lumbar myofascial pain and gait dysfunction. Finally, appellant submitted a March 31, 2003 letter from Kenneth Chatzinoff, a licensed psychologist, who diagnosed appellant as having a generalized anxiety disorder. He noted any opinion as to whether appellant was able to work in a telephone-soliciting role were beyond the range of his expertise.

By decision dated June 23, 2003, the hearing representative affirmed the Office's decision of September 30, 2002. The hearing representative found that the weight of the medical evidence regarding appellant's accepted physical conditions of lumbar sprain, cervical strain and postconcussion syndrome rested with the opinion of Dr. Kallish as he was the referee medical examiner and he opined that appellant had no objective orthopedic disability. The hearing representative found that the weight of the medical evidence of record regarding the accepted condition of pain syndrome rested with the report of Dr. Pressman who diagnosed pain disorder causally related to the November 14, 1983 injury but who opined that this condition did not disable appellant from working eight hours a day in a structured environment. The hearing representative found that the weight of the vocational evidence rested with the opinions of Mr. Heathcote and Mr. Stark rather than Mr. Young.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made

[2] *Lawrence D. Price*, 54 ECAB ___ Docket No. 02-1541 (issued May 19, 2003); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[3] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

a determination of wage-rate availability in the open labor market should be made through contact with the state employment service or other applicable service.[4] In determining the availability of suitable employment, 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.[5]

Section 8123(a) of the Federal Employees' Compensation Act provides that, when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[6] The opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7]

ANALYSIS

In the instant case, there was a conflict in the medical evidence between appellant's treating physician, Dr. Smith, who opined that appellant was unemployable due to the work-related injury, and Dr. Simon, who opined that appellant was capable of returning to work in a sedentary position, and that there was no evidence that the work-related conditions sustained on November 14, 1983 were currently causing objective findings. Accordingly, the Office properly referred appellant to Dr. Kallish for an impartial medical examination. Dr. Kallish opined that there were no residuals from the work-related accident, and that appellant, from an orthopedic point of view, was capable of doing light-duty and semi-sedentary work. The selected position of telephone solicitor is sedentary. As the weight of the medical evidence is represented by the opinion of the impartial medical examiner, the Board concludes that the medical evidence indicated that appellant was orthopedically able to return sedentary work. The Board also notes that Dr. Pressman indicated that, from a psychological point of view, appellant was capable of gainful occupation, and Dr. Frederic indicated that there was no neurologic condition related to the work injury.

Appellant's vocational counselor, Mr. Heathcote, determined that appellant was capable of performing the job of telemarketer/telephone sales representative and that such work was reasonably available in appellant's commuting area. The Office procedure manual provides that, "[b]ecause the [vocational specialist] is an expert in the field of vocational rehabilitation, the [claims examiner] may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."[8] Accordingly, the Office properly relied on the opinion of Mr. Heathcote when it initially decided that the position was suitable. However, appellant provided rebuttal evidence in the form of the vocational report by Mr. Young who concluded that

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] *David Smith*, 34 ECAB 409, 411 (1982).

[6] *Roger W. Griffith*, 51 ECAB 491, 504 (2000); *Joseph D. Lee*, 42 ECAB 172 (1990).

[7] *Solomon Polen*, 51 ECAB 341, 343 (2000).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

appellant was not able to return to work as a telephone solicitor for numerous reasons, including that he would have difficulty sitting for that length of time, that appellant did not possess the necessary aptitudes and skills to be a successful telephone solicitor and that appellant had no computer experience. The Office found that this opinion was sufficient to require further development of the evidence, and referred appellant's case to Mr. Stark, who reviewed Mr. Young's report, and concluded that appellant was capable of performing the telephone solicitor position. As discussed *supra*, the weight of the medical evidence establishes that appellant is capable of sedentary duty. The record does not provide rationalized medical opinion evidence indicating that appellant would be unable to perform the position due to excessive sitting. Mr. Stark persuasively explains that appellant has the aptitude for this position due to his vocational background, and also indicated that appellant had the necessary abilities, noting that appellant was not illiterate and had a 10th grade education. Mr. Stark also properly noted that appellant had a computer course, whereas Mr. Young stated that appellant had no computer skills. Accordingly, the weight of the vocational evidence rests with the opinion of Mr. Stark, who thoroughly evaluated appellant's case and determined that the proposed position of telephone solicitor was suitable.

CONCLUSION

The Board finds that the Office properly determined that the constructed position of telephone solicitor represented appellant's wage-earning capacity, and reduced appellant's benefits accordingly.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 23, 2003 and September 30, 2002 are hereby affirmed.

Issued: March 11, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member