

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK A. BAILEY and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

*Docket No. 00-1016; Submitted on the Record;
Issued March 20, 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 adjusted appellant's compensation to reflect his wage-earning capacity in the position of telephone solicitor.

On June 15, 1974 appellant, then a 55-year-old letter carrier, sustained a back injury in the performance of duty. His claim was accepted for a lumbar strain and chronic protruded disc at L5 with a laminectomy. He stopped work from June 16 to October 29, 1974 and again on October 31, 1974. He did not return to work.

The record shows that appellant taught ceramics classes to children aged 6 to 12 for approximately 20 hours a week from 1994 to 1996.

By letter dated October 13, 1997, the Office referred appellant, together with a statement of accepted facts and a medical history, to Dr. Charles J. Paquelet, an orthopedic surgeon, for an examination and evaluation as to whether he had any residual disability or medical condition causally related to his 1974 employment injury.

In reports dated October 31 and December 1, 1997, Dr. Paquelet provided a history of appellant's condition and his findings on examination. He opined that appellant's inability to perform his job was due to his age and nonwork-related medical conditions rather than to his employment injury. He stated that appellant's work-related physical restrictions included kneeling, standing, bending, twisting, reaching and lifting limited to 1/3 to 2/3 of an 8-hour workday and maximum lifting of 50 pounds limited to less than 1/3 to 2/3 of an 8-hour workday. Dr. Paquelet indicated that appellant could perform repetitive motions of the wrist and elbow. He noted that appellant's nonwork-related medical factors to be considered were his age, carcinoma of the prostate with subsequent urinary incontinence, cervical spondylosis, cardiac disorder with hypertension and an intestinal disorder requiring symptomatic care.

By letter dated April 7, 1998, an Office rehabilitation specialist asked the vocational rehabilitation counselor assigned to appellant's case to identify jobs for which appellant was qualified based on his training, experience, education and the work restrictions outlined by Dr. Paquelet.

In a report dated June 24, 1998, one of the positions identified by the vocational rehabilitation counselor as suitable for appellant was that of telephone solicitor.¹ He provided a description of the position with duties required, physical demands and weekly wages. The position involved soliciting orders for merchandise or services over the telephone and the position was described as sedentary with no climbing, balancing, stooping, kneeling, crouching or crawling required; no lifting more than 10 pounds, occasional reaching and handling, frequent fingering and constant talking and hearing required. He noted that appellant had sold insurance for three years before working at the employing establishment. The counselor indicated that the position was reasonably available within appellant's commuting area as confirmed by contact with the state employment service.

By letter dated December 18, 1998, the Office proposed to reduce appellant's compensation benefits on the grounds that the factual and medical evidence established that he had the ability to earn the wages of a telephone solicitor. He was advised to submit additional factual or medical evidence within 30 days if he disagreed with the proposed action.

In a report dated December 28, 1998, Dr. Pankil Vora, appellant's attending physician, indicated that appellant should limit all activities except standing, walking, or sitting and could work only four hours a day at light-duty work. He indicated that appellant could not perform repetitive motions of the wrist or elbow due to degenerative joint disease. Dr. Vora indicated that appellant had limitations due to diabetes mellitus, chronic renal failure, hypertension, degenerative arthritis and a history of spinal surgery and prostatectomy.

By decision dated January 28, 1999, the Office reduced appellant's compensation benefits based on his capacity to earn the wages of a telephone solicitor. The Office stated that it had considered appellant's disability, training, experience, age, the availability of the position in his area, the residuals from his employment injury, all significant preexisting impairments and pertinent nonmedical factors. The Office indicated that Dr. Vora's report contained no objective physical findings or any medical rationale explaining why appellant was capable of working only four hours a day.²

The Board finds that the Office properly reduced appellant's compensation benefits.

¹ Department of Labor, *Dictionary of Occupations Titles*, DOT No. 299.357-014 (1991 ed.).

² The Board notes that additional evidence was submitted to the record subsequent to the issuance of the Office's January 28, 1999 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

Once the Office has 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 in such benefits.³

Under section 8115(a) of the Federal Employees' Compensation Act,⁴ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁵

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 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, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.⁶ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁷

In this case, the Office determined that appellant could physically perform the work of a telephone solicitor based on Dr. Paquelet's October 31, 1997 work restriction evaluation. Dr. Paquelet stated that appellant's work-related physical restrictions included kneeling, standing, bending, twisting, reaching and lifting limited to 1/3 to 2/3 of an 8-hour workday and maximum lifting of 50 pounds limited to less than 1/3 to 2/3 of an 8-hour workday. The position of telephone solicitor, as described in the *Dictionary of Occupational Titles*, involved soliciting orders for merchandise or services over the telephone and was described as sedentary with no climbing, balancing, stooping, kneeling, crouching or crawling required; no lifting more than 10 pounds, occasional reaching and handling, frequent fingering and constant talking and hearing required. Appellant, therefore, meets the physical qualifications for a telephone solicitor.

Although Dr. Vora, appellant's attending physician, opined that appellant could work only four hours a day and should avoid all activities except for standing, walking and sitting, he failed to provide any medical rationale explaining why appellant was capable of working only

³ *Carla Letcher*, 46 ECAB 452 (1995).

⁴ 5 U.S.C. § 8115(a).

⁵ *See Wilson L. Clow, Jr.*, 44 ECAB 157, 170-71 (1992); *see also* 5 U.S.C. § 8115(a).

⁶ *See Dennis D. Owen*, 44 ECAB 475, 479 (1993).

⁷ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

four hours a day. Therefore, Dr. Vora's opinion is not sufficient to show that appellant could not perform the physical requirements of the position of telephone solicitor.

The Office also properly determined, based on the vocational counselor's job surveys and vocational reports, that the position of telephone solicitor was reasonably available in appellant's area to one with appellant's educational background and experience. Under 5 U.S.C. § 8115, the Office properly determined that appellant's wage-earning capacity was represented by the position of telephone solicitor and met its burden of proof in reducing his compensation to reflect his wage-earning capacity.

The January 28, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 20, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member