

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT LEYENAAR and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-162; Submitted on the Record;
Issued May 17, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

This issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his capacity to earn wages as a telemarketer.

On July 27, 1990 appellant, then a 39-year-old pipefitter, filed a notice of traumatic injury, alleging that he injured his knee on July 26, 1990 when he tripped and fell over a curb in the performance of duty. The Office accepted the claim for a left knee contusion. The claim was expanded to include internal derangement of the left knee for which the Office authorized arthroscopic surgery on October 3, 1990.

Appellant was initially treated for his work injury by Dr. Frank A. Mattei, an orthopedic surgeon. Following surgery, he approved appellant for sedentary, part-time duty for four hours per day. The employing establishment, however, reported that there were no appropriate light-duty jobs available at that time.

When appellant continued to complain of persistent knee pain, Dr. Mattei referred appellant to Dr. Nicholas A. DiNubile, a Board-certified orthopedic surgeon, for a second opinion. In a February 21, 1991 report, he stated:

“Appellant injured his knee on July 28, 1990, while at work. He tripped over a curb and fell directly onto his knee contusing his patella. [Appellant] had moderate swelling and pain.... Because of failure to respond to conservative treatment, he underwent arthroscopic surgery on October 3, 1990 at which time a synovitis was diagnosed as well as plica. [Appellant's] plica was excised and there was also evidence of early degenerative changes especially involving the undersurface of the patella. He has improved since his surgery but has had persistent pain about the knee and has not yet been able to return to work. In addition to his anterior knee pain, he describes some persistent swelling but no locking or giving way.”

Dr. DiNubile reported physical findings and recommended that appellant undergo a repeat arthroscopy. He noted that appellant could perform light duty although no such work was available to him.

A magnetic resonance image (MRI) scan of appellant's left knee performed on September 19, 1991 revealed degenerative changes with a vertical tear peripherally in the posterior horn of the medial meniscus and minimal chondromalacia within the patellofemoral joint.

In a work evaluation form dated October 15, 1992 report, Dr. DiNubile opined that appellant had reached maximum medical improvement. He reported that appellant could work for 8 hours per day with continuous sitting, walking and standing up to 1 hour per day and a lifting restriction of 10 to 20 pounds.

The Office referred appellant for a second opinion evaluation on April 8, 1994 with Dr. Roy Lerman, a Board-certified orthopedic surgeon. In a report dated April 22, 1994, he noted appellant's history of injury, physical findings and symptoms. His diagnosis included "rule out quadriceps tendinitis and degenerative medial meniscus derangement.

In a work evaluation form, Dr. Lerman opined that appellant could work eight hours a day with continuous sitting and intermittent walking, lifting, bending, twisting and standing up to four hours per day. He further stated that appellant was capable of lifting up to 50 pounds.

The Office referred appellant for vocational rehabilitation to facilitate a return to work. The vocational rehabilitation counselor undertook placement efforts between August 1994 and January 1995.

In a report dated January 11, 1995, a vocational rehabilitation counselor related that appellant had been uncooperative in the rehabilitation process.¹ He stated that appropriate jobs had been located within appellant's commuting area and within his work abilities. The vocational rehabilitation counselor provided a job description for the position of telemarketer as listed under the Department of Labor's *Dictionary of Occupational Titles* (DOT). The position was described as sedentary with a maximum lifting requirement of 10 pounds. It did not require appellant to climb, balance, stoop, kneel, crouch or crawl. He reported that the position of telemarketer was an entry-level position and would require appellant to undergo on-the-job training from 30 days to 3 months. The vocational rehabilitation counselor noted that the position of telemarketer was reasonably available within appellant's geographic commuting area with a salary of \$240.00 to \$290.00 per week.

In a notice of proposed reduction of compensation dated May 7, 1996, the Office advised appellant that it proposed to reduce his compensation benefits for the reason that he was no

¹ The vocational rehabilitation counselor noted, "Thus far, four jobs have been referred to [appellant]. He has failed to apply for all four positions, including one [t]elemarketing position which he could have performed out of his home."

longer totally disabled and that he had the capacity to earn the wages of a telemarketer at the rate of \$240.00 per week.²

By decision dated July 25, 1996, the Office reduced appellant's compensation effective August 18, 1996.

Appellant subsequently requested an oral hearing, which was held on July 9, 1997 and submitted additional evidence.

In a June 2, 1997 report, Dr. Peter Gross, a family practitioner, noted that he had been treating appellant since 1985 for panic attacks, severe anxiety, claustrophobia -- "fear of enclosed spaces" and agoraphobia -- "fear of being in any situation that might provoke a panic attack, or from which escape might be difficult if one occurred." He listed appellant's symptoms as rapid pulse, heart palpitations, shortness of breath and dizziness, for which he prescribed Valium as needed. Dr. Gross concluded that appellant's condition was fair so long as he avoided any situation that might trigger an anxiety or panic attack.

In a report dated August 8, 1997, Dr. Gross opined that appellant would not be able to take a telemarketing position if it involved working in an office, even for a short period of time, as confinement in such a situation would trigger an attack. He noted that, if appellant worked at home, he did not foresee a problem if appellant's stress were kept at a minimum.

In a decision dated September 22, 1997, an Office hearing representative found that the Office did not properly take into consideration whether appellant could perform the duties of a telemarketer due to his emotional condition. The case was remanded for further consideration and a *de novo* decision.

The Office referred appellant for a second opinion examination with Dr. Perry A. Berman, a Board-certified psychiatrist and neurologist, who stated:

"There are two problems [appellant] describes. The first involves an injury of his knee that occurred in 1988 when he claims he was accidentally hit by a pipe. The same knee was th[e]n reinjured on July 26, 1990 when he tripped and fell over a curb walking on the naval base.... [Appellant] has not worked since that injury and claims he has been under the care of Dr. DiNubile, an orthopedic surgeon.

"The second issue claimed is that he recently developed panic attacks and attributes that, to some extent, a result of his knee injury and also to an incident where he recalls being onboard a ship undergoing repairs. [Appellant] was in the hold of the ship and he came out to discover that, while looking for a tool, there had apparently been a fire alarm. He indicates that no one informed him and that, while working in a lower compartment of a ship, he might have been seriously injured as a result of a fire because no one had warned him. However, his first

² An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job. The Office calculated that appellant had a 37 percent wage-earning capacity or a 63 percent loss of wage-earning capacity; see *Albert C. Shadrick*, 5 ECAB 376 (1953).

panic attack did not come then, but was later when he felt light headed and could not breathe while sitting in his mother's house. He said that occurred in the late 1980s, but cannot provide an actual date."

Dr. Berman reported diagnostic findings including panic disorder with agoraphobia. He opined that there was no connection between appellant's emotional condition and his employment since appellant appeared to experience panic episodes in almost any setting. Dr. Berman opined that working as a telemarketer might cause appellant some initial panic until he was properly medicated. He concluded that the position of telemarketer was suitable work for appellant and noted that appellant would have the same difficulty going back to work even if his prior job at the naval base were available. With respect to whether appellant was required to work at home, Dr. Berman stated: "The idea of yielding to the fear he has of leaving home as away of supposedly treating his problem is not an accepted therapeutic technique. Actually, keeping him at home increases and reinforces his belief that he cannot leave the house."

In a January 26, 1998 decision, the Office determined that appellant's emotional condition described as panic attacks arose subsequent to his work injury and, therefore, appellant was capable of performing the job of a telemarketer.³ The Office consequently reduced appellant's compensation to reflect his capacity to work in a telemarketer position.

Appellant requested a hearing, which was held on October 27, 1998.⁴

Subsequent to the hearing, appellant submitted a December 10, 1998 report from Dr. Eric W. Fine, a Board-certified psychiatrist, who noted that appellant had been working for the past three months as a green's maintenance man which allowed him to be outdoors and not indoors, in a confined space, where he experienced increased anxiety and depression. Dr. Fine reported that appellant has experienced anxiety attacks since 1985. He further stated:

"[Appellant] is fortunate to have found an activity that he can perform with minimal if any psychiatric symptoms and it is my opinion that if he was subjected to a job such as a telemarketer, this would be extremely counter therapeutic and he would be unable to tolerate this environment without symptoms of claustrophobia and panic. It is my recommendation that he continue to work in his present occupation and he should definitely not be exposed to any kind of employment that requires him to be confined in enclosed spaces."

In a February 1, 1999 decision, an Office hearing representative affirmed the Office's January 26, 1998 decision.

³ It was noted that appellant's emotional condition arose prior to his work injury. Contrary to the Office's finding, Dr. Gross indicated that he had been treating appellant since 1985 for anxiety attacks. Appellant also described that he experienced panic attacks working as a pipe fitter on naval ships in the late 1980s, which is prior to his July 26, 1990 work injury.

⁴ Appellant testified that he was working at Wedgewood Country Club as a grounds keeper and that his gross pay was about \$208.00 per week.

The Board finds that the Office erred in reducing appellant's wage-loss compensation based on his capacity to earn wages as a telemarketer.

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 of benefits.⁵

Under section 8115(a) of the Federal Employees' Compensation Act,⁶ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee's disabled condition.⁷ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁸ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.⁹

The Office procedures pertaining to vocation rehabilitation services emphasize returning partially disabled employees to suitable employment.¹⁰ If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.¹¹

When rehabilitation efforts prove unsuccessful, the Office's procedures instruct the rehabilitation counselor to submit a closure report to the Office, with relevant information regarding the suitability and availability of the selected positions.¹² In a report dated January 11, 1995, appellant's rehabilitation counselor determined that he was able to perform the position of a telemarketer, that the position was available in sufficient numbers so as to make it reasonably available with appellant's commuting area and that salary range for the position was \$240.00 to

⁵ *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L Clow, Jr.*, 44 ECAB 157 (1992).

⁶ 5 U.S.C. § 8115(a).

⁷ *See Richard Alexander*, 48 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

¹⁰ *Id.*

¹¹ *Id.* at Chapter 2.813.6(b); *see Sylvia Bridcut*, 48 ECAB 162 (1996); *Clayton Varner*, 37 ECAB 248 (1985).

¹² *Philip S. Deering*, 47 ECAB 692 (1996).

\$290.00 per week. A job description further indicated that the position was sedentary and consistent with appellant's medical restrictions.

In response to the notice of proposed reduction of compensation, appellant submitted medical evidence indicating that he suffers from an anxiety disorder that would prevent him from working indoors as a telemarketer. The evidence of record establishes that appellant's emotional condition preexisted his 1990 work injury as noted by Dr. Fine, who noted panic attacks since 1985. An Office hearing representative directed the Office to obtain a second opinion evaluation. The examination was conducted by Dr. Berman, who noted that appellant would have difficulty performing the duties of a telemarketer in a confined, indoor space without proper medication. Dr. Berman noted that appellant would require medical treatment for his preexisting emotional condition prior to working as a telemarketer.¹³ The Board finds that the Office erred in relying on Dr. Berman's opinion to reduce appellant's compensation. As noted by the original hearing representative, appellant's preexisting emotional condition must be taken into consideration in the selection of a job for determining his wage-earning capacity.¹⁴ The medical evidence of record is insufficient to establish that appellant has the capacity to perform the duties of the selected position of a telemarketer. For this reason, the Board finds that the Office did not meet its burden of proof.

The decision of the Office of Workers' Compensation Programs dated February 1, 1999 is hereby reversed.

Dated, Washington, DC
May 17, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹³ The Office has not fully addressed whether appellant could perform a telemarketing job at home. The rehabilitation counselor's January 11, 1995 report notes that appellant would have to undergo on the job training, presumably in an office, for at least thirty days. There is no distinction made between the availability of at home telemarketing positions versus office-based telemarketing positions.

¹⁴ See *Jess D. Todd*, 34 ECAB 798 (1983).