U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK L. WHALEY and DEPARTMENT OF THE ARMY,
Fort Richardson, AK

Docket No. 03-161; Submitted on the Record;
Issued July 3, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of telephone solicitor; and (2) whether the Office properly denied appellant's June 30, 2002 request for reconsideration.

On July 16, 1981 appellant, then a 32-year-old plumber pipefitter, sustained an injury in the performance of duty when a pipe broke, allowing steam to escape. As he rushed for the exit, he fell against the rungs of a ladder. The Office accepted appellant's claim for fracture of the nasal spine, cartilaginous dorsum, intranasal lacerations and chondromalacia patella, left. The Office approved surgical interventions. Appellant received compensation for temporary total disability and for a 13 percent permanent impairment of the left leg.[1]

In 1989, the medical evidence supported that appellant could no longer work as a pipefitter, but that he was fully capable of sedentary work. On October 11, 1993 Dr. Franklin R. Stuart, an orthopedic surgeon, reported that appellant was well suited for sedentary work that primarily could be done in a sitting position, though he was capable of walking one or two hours a day intermittently. Dr. Stuart commented: "His knee pain and impairment are definitely real but this man is certainly capable of working. It is a tragedy that [appellant] has not been returned to the workforce after this extended period of time. He is fully capable of light[-]duty sedentary work."

Vocational rehabilitation efforts, however, were unsuccessful. In June 1999, the rehabilitation counselor reviewed appellant's work history, training, academic skills and intelligence scores. He analyzed appellant's transferable skills and conducted labor market surveys. Based upon medically determined residuals of appellant's injuries and taking into

[1] The record shows that appellant also sustained employment injuries on April 3, 1984 (mild sprain left knee) and October 3, 1985 (contusion left knee, chondromalacia left patella).

consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor found that appellant was able to perform the job of telephone solicitor (Department of Labor, *Dictionary of Occupational Titles* No. 299.357.014). The job was sedentary. Appellant met specific vocational preparation with training in the clerical field, word processing, database management, writing composition, English and public speaking. The rehabilitation counselor confirmed with the state employment representative that full-time jobs were being performed in sufficient numbers as to make it reasonably available to appellant within his commuting distance. Wage data showed that the job paid a weekly wage of $360.00 to $380.00 a week.

On February 7, 2002 the Office vocational rehabilitation specialist reported that the occupation of telephone solicitor was clearly suitable for appellant and available within his commuting distance. Appellant's left leg and knee condition limited him to sedentary work and the occupation was sedentary. His accepted work limitations did not otherwise conflict with the physical requirements of the position. In recommending this occupation, the rehabilitation counselor considered the nature of the injury, the degree of appellant's physical impairment, his usual employment, age and qualifications for other employment.

Seeking a current evaluation of appellant's condition and ability to perform work, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Dewey C. MacKay, III, an orthopedic surgeon. On March 20, 2002 he related appellant's history, current complaints and findings on physical examination. Dr. MacKay diagnosed left knee pain secondary to the work injury on July 16, 1981 and subsequent degenerative arthritis of the left knee. He reported that appellant could return immediately to full-time sedentary work. Permanent physical limitations included avoidance of heavy lifting, squatting, kneeling, prolonged standing and walking and heavy manual labor.

On April 18, 2002 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled for work and had the capacity to earn wages as a telephone solicitor at the rate of $360.00 a week.

On April 29, 2002 appellant disagreed with the proposed reduction and indicated that he could not type 25 words a minute, as a company in the labor market survey required.[2]

On May 11, 2002 appellant followed up by noting that Dr. MacKay's confirmed continuing residuals of the accepted employment injury. He also noted that Dr. MacKay had "about [20] pages, maybe [18] pages or so" of the medical record and that if he had all the medical evidence he would not have recommended exercises that would aggravate and worsen his knee condition. Appellant questioned how his usual employment and qualifications for other employment would allow him to meet the prerequisites of the constructed position.

On May 21, 2002 the Office vocational rehabilitation counselor addressed appellant's concerns that he did not possess the requisite skills to perform telephone solicitor work. He reviewed the position description from the Department of Labor, *Dictionary of Occupational*

[2] The company to which appellant referred was part of a labor market survey for the occupation of data entry clerk.

Titles and appellant's history, including his training, vocational testing and relevant college coursework. The rehabilitation specialist concluded as follows:

> "[Appellant's] profile is one that clearly matches the requirements for telephone solicitor occupations. Telemarketer suitability is based on comparison of [appellant's] profile to [t]elemarketer data in the *Dictionary of Occupational Titles*. I also reference [r]ehabilitation [c]ounselor, Buck Hall's, June 25, 1999 wage[-]earning capacity recommendations and labor market survey documentation. The [r]ehabilitation [c]ounselor documented that for a significant number of telemarketer jobs, employers state willingness to train. This is a standard in the telemarketing industry for promising applicants, to provide initial familiarization with telemarketing work and with the current computer and computer programs used. [Appellant's] profile clearly is one of a promising telemarketing candidate. [His] assertion that his typing and his computer training are dated is clearly not sufficient to conclude [that] he cannot qualify for [t]elemarketer work. Even for companies requiring a typing speed of 25 to 35 wpm, which many companies do not require, [appellant] has the past coursework and the tested innate capability to type this speed with only a little refreshing and practice on his own.
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> "In summary, I affirm again that the recommendations from my attached July 15, 1999 wage[-]earning capacity recommendations are still valid and useable."

In a decision dated May 30, 2002, the Office reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of telephone solicitor.

On June 30, 2002 appellant requested reconsideration. He alleged that the Office had made a bad-faith attempt to place upon him the burden of submitting medical records for review by second opinion physicians. He questioned statements made by the claims examiner concerning his attendance in electronics technician training and asserted that classes in word processing, spreadsheets and database management did not teach or require the typing skills identified as prerequisites for the constructed position.

In a decision dated August 26, 2002, the Office denied appellant's request for reconsideration on the grounds that his arguments were repetitious and immaterial and, therefore, insufficient to warrant a review of the prior decision.

The Board finds that the Office properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of telephone solicitor.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances 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.[3]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. When the Office makes a medical determination of partial disability and of the specific work restrictions, it should refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[4]

After receiving medical evidence supporting that appellant was capable of performing sedentary work, the Office referred the case record to an Office specialist in wage-earning capacity, who selected a position listed in the Department of Labor, *Dictionary of Occupational Titles* to fit appellant's capabilities. The specialist determined the position's availability in the open market and prevailing wage rate from information obtained from the state employment service.[5] The specialist also determined that appellant had satisfied the specific vocational requirements of the job. The Office obtained a current medical evaluation from Dr. MacKay, who confirmed that appellant could return immediately to full-time sedentary work.

The Office properly found that appellant was no longer totally disabled for work. It followed established procedures for determining his employment-related loss of wage-earning capacity and it gave due regard to the factors listed in section 8115(a) of the Act. Appellant disagrees that the position of telephone solicitor is suitable, but the rehabilitation specialist is an expert in the field of vocational rehabilitation and the Office claims examiner may properly rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.[6] In this case, the rehabilitation specialist well addressed appellant's concerns about his qualifications for the constructed position. The Board will affirm the Office's May 30, 2002 decision, reducing his compensation to reflect a capacity to earn wages in the constructed position of telephone solicitor.

The Board also finds that the Office properly denied appellant's June 30, 2002 request for reconsideration.

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[3] 5 U.S.C. § 8115(a).

[4] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] *See Leo A. Chartier*, 32 ECAB 652 (1981) (the fact that an employee has been unsuccessful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.8.b(2) (December 1993).

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[7]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[8]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meet at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

Appellant's June 30, 2002 request for reconsideration fails to show that the Office erroneously applied or interpreted a specific point of law and it contained no relevant and pertinent new evidence not previously considered by the Office. Instead, he raised arguments that the Office had made a bad-faith attempt to place upon him the burden of submitting medical records for review by second opinion physicians. Appellant also addressed his attendance in electronics technician training and argued that he did not have the typing skills required of the constructed position. These arguments are repetitious and immaterial and do not entitle appellant to a merit review of his claim by the Office.[10]

As appellant's June 30, 2002 request for reconsideration fails to meet at least one of the standards for obtaining a merit review of his claim, the Board will affirm the Office's August 26, 2002 decision to deny that request.

[7] 20 C.F.R. § 10.605 (1999).

[8] *Id*. at § 10.606.

[9] *Id*. at § 10.608.

[10] The Board notes that it has itself reviewed the merits of appellant's claim under the first issue on appeal.

The August 26 and May 30, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 3, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member