U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN F. GRAYBEAL and DEPARTMENT OF VETERANS AFFAIRS, PERRY POINT VETERANS HOSPITAL, Perry Point, MD

Docket No. 98-256; Submitted on the Record;
Issued September 2, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of telemarketer fairly and reasonably represented appellant's wage-earning capacity.

On September 2, 1982 appellant, then a 34-year-old boiler plant operator, sustained an employment-related contusion of the left wrist and open left navicular fracture. He stopped work on March 28, 1983 and was placed on the periodic rolls. Following multiple referrals by the Office, appellant underwent extensive rehabilitation effort. The record contains numerous reports by physicians who advised that appellant could return to work with restrictions beginning with an April 10, 1984 report from Dr. John N. Im, a Board-certified orthopedic surgeon. In an April 8, 1994 work restriction evaluation, Dr. E.F. Shaw Wilgis, a Board-certified surgeon who had treated appellant since January 1984, advised that he had reached maximum medical improvement and could work 8 hours per day with no climbing or twisting and lifting restricted to 10 pounds.[1] In a May 11, 1994 work restriction evaluation, Dr. W. Lima, a Board-certified orthopedic surgeon who provided a second opinion evaluation for the Office, agreed that appellant had reached maximum medical improvement and could work eight hours per day with restrictions. In an attached report, he stated that appellant should be able to return to work with limited duty regarding his left upper extremity in terms of pushing and pulling.

The record indicates that, beginning in November 1995, extensive rehabilitative efforts were undertaken in an effort to return appellant to work. In a January 12, 1997 report, Mindy Rosenzweig, a rehabilitation counselor, completed a labor market survey and determined that the position of telemarketer,[2] based on the Department of Labor's *Dictionary of Occupational Titles*,

[1] Dr. Neil Taylor, a general practitioner, submitted an October 23, 1984 report. Dr. Wilgis submitted reports dating from June 1984 to April 1994.

[2] The position was described as sedentary with constant reaching, handling, fingering, feeling, talking and hearing.

fit appellant's capabilities. Ms. Rosenzweig stated, however, that rehabilitative services were being terminated due to noncooperation by appellant.

By letter dated June 4, 1997, the Office advised appellant that it proposed to reduce his compensation based on his ability to perform the duties of a telemarketer. Appellant was advised that if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days. Hearing nothing further from appellant, by decision dated July 10, 1997, the Office finalized the reduction of his compensation, based on his capacity to earn wages as a telemarketer. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity and found that it was available in his commuting area. The instant appeal follows.

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

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her 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 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, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[7]

In this case, there is no indication that the selected position of telemarketer is outside the restrictions set forth by Drs. Wilgis and Lima. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of

[3] *Garry Don Young*, 45 ECAB 621 (1994).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

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

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

telemarketer fairly and reasonably represented his wage-earning capacity.[8] As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor in this case indicated that the recommended position was reasonably available and that the position paid $320.00 per week in the open market. Appellant's compensation was accordingly reduced to reflect a 61 percent wage-earning capacity under the principles set forth in *Shadrick*.[9]

The decision of the Office of Workers' Compensation Programs dated July 10, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 2, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] Appellant reported to the rehabilitation counselor that he had military service-related hearing loss. There is, however, no medical evidence of record to support this contention.

[9] *Supra* note 7.