

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES C. COTNEY and DEPARTMENT OF THE ARMY,
FORT CHAFFEE, AR

*Docket No. 99-1563; Submitted on the Record;
Issued February 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 12, 1997 based on his capacity to earn wages as a telephone solicitor.

On January 16, 1981 appellant, then a 45-year-old plumber, filed a claim for an injury to his left leg sustained on that date when he became pinned between a truck and a loading dock. The Office accepted ligament damage to his left knee, which was repaired on January 17, 1981 and a fracture of the left tibia and fibula. Appellant received continuation of pay from January 17 to March 2, 1981, followed by compensation for temporary total disability. On November 24, 1992 the Office issued a schedule award for a 24 percent permanent impairment of appellant's left leg, after which the Office resumed payment of compensation for temporary total disability.

By decision dated November 2, 1993, the Office reduced appellant's compensation based on his capacity to earn wages as a data entry clerk. He requested a hearing and an Office hearing representative, by decision dated October 14, 1994, found that the evidence cast serious doubt on whether appellant had the vocational skills to perform the duties of data entry clerk. By decision dated March 15, 1995, the Office reduced appellant's compensation based on his capacity to earn wages as an order clerk. He requested a hearing and an Office hearing representative, by decision dated December 5, 1995, found that the Office erroneously determined appellant's wage-earning capacity. Appellant's compensation for temporary total disability was reinstated retroactive to November 14, 1993.

On June 25, 1997 the Office issued a notice of proposed reduction of compensation on the basis that appellant had the capacity to earn wages as a telephone solicitor. On October 16, 1997 the Office reduced his compensation effective October 12, 1997 based on his capacity to earn wages as a telephone solicitor for four hours per day. Appellant requested a hearing, which was held on June 17, 1998.

By decision dated October 1, 1998, an Office hearing representative found that appellant was capable of performing the duties of a telephone solicitor, that this position was reasonably available and that the Office properly reduced appellant's compensation. He requested reconsideration and submitted further evidence. By decision dated January 20, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

The Board finds that the Office properly reduced appellant's compensation effective October 12, 1997 based on his capacity to earn wages as a telephone solicitor.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of wage-earning capacity" states in pertinent part:

"In determining compensation for partial disability

* * *

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 --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

The medical evidence establishes that appellant is physically capable of performing the duties position of a telephone solicitor. This position, as described in the Department of Labor's *Dictionary of Occupational Titles*,² is sedentary and requires the ability to hear, reach, handle, finger and talk. Dr. Fred Ruefer, a Board-certified orthopedic surgeon to whom the Office referred appellant for an opinion on his ability to work, concluded in an October 15, 1996 report that appellant could perform a sedentary job and had no impairment of his upper extremities. In a report dated December 2, 1996, he indicated that appellant had no hand restrictions and that he

¹ 5 U.S.C. § 8115.

² No. 299-357.014.

could work four to six hours per day. The Office's determination of appellant's wage-earning capacity was based on his ability to work 20 hours per week. There is no medical evidence that indicates that appellant could not perform the duties of a telephone solicitor.

There is also no evidence that appellant does not have the vocational background to perform the selected position. The specific vocational preparation listed in the *Dictionary of Occupational Titles* is 30 days to 3 months. An Office rehabilitation counselor concluded that appellant's past education, training and work experience, which included self-employment as a plumber with service calls as his specialty, met the requirements for specific vocational preparation.

The evidence also establishes that the position of telephone solicitor was reasonably available on a part-time basis in appellant's commuting area. In a report dated May 13, 1997, an Office rehabilitation counselor stated: "Based upon information obtained from the Arkansas Employment Security Department, these positions are frequently available. 1 to 2 part-time positions are available per month at an hourly rate of \$6.00. Very little typing is required in these positions as supervisors enter most data into the computer after orders are taken. No experience is required for most positions."

In a letter dated July 13, 1997, appellant's representative stated that he had contacted the same individual in the Arkansas Employment Security Department in Fort Smith, Arkansas from whom the Office rehabilitation counselor indicated she obtained information on availability of the position. The representative said that this individual indicated that telephone solicitor positions were not available very often and that keyboard skills and computer knowledge were preferred by any employer seeking to fill such a position. An Office rehabilitation specialist then called this same employment specialist, who advised him "that he usually gets a few of these jobs listed through his office every month" and that "the majority of employers do not require or express preference for any typing or computer skills."

The Board finds that this evidence establishes that the position of telephone solicitor is reasonably available in appellant's commuting area. Although appellant presented evidence that this position is not reasonably available in the town where he lives, Sallisaw, Oklahoma, the evidence does show that such positions are reasonably available in Fort Smith, Arkansas, which appellant had to drive by to report to his job at the employing establishment. The advertisements appellant submitted from a Fort Smith newspaper do not show that the position of telephone solicitor is not reasonably available there. The determination of availability is made by a vocational specialist based on evidence from the state employment service or similar source.³

³ See Alfred R. Hafer, 46 ECAB 553 (1995).

The decisions of the Office of Workers' Compensation Programs dated January 20, 1999 and December 12, 1998 are affirmed.

Dated, Washington, DC
February 26, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member