

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL J. BALADEZ and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 99-1641; Submitted on the Record;
Issued June 6, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden to reduce appellant's compensation effective October 22, 1998, based on his capacity to perform the duties of a telephone solicitor.

On April 9, 1988 appellant, a 29-year-old plumber, injured his lower back while fitting some pipes. He filed a claim for benefits, which the Office accepted for lumbar sprain and herniated disc at L5-S1. Appellant missed work intermittently and was paid compensation for appropriate periods by the Office. He was released to return to limited duty for fours per day as a budget analyst's assistant on October 2, 1991 by Dr. William H. Edwards, a Board-certified orthopedic surgeon and appellant's treating physician. Appellant stopping working on December 3, 1993 due to continued pain in his lower back and has not returned to work since that time. The Office paid appellant compensation for temporary total disability and placed him on the periodic rolls.

In a report dated June 21, 1994, Dr. Edwards indicated that appellant was unable to resume his usual employment as a plumber. He stated that appellant was extremely restricted in his activities and was unable to do prolonged sitting or standing. Dr. Edwards advised that the position for which appellant would be best suited would be a job where he could intermittently sit, stand or get up and move around as needed.

In a work capacity evaluation dated April 4, 1995, Dr. Edwards released appellant to six hours per day on light duty, with no prolonged standing or sitting, no repeated bending, no climbing ladders or scaffolding and occasional kneeling and bending. He also restricted appellant from lifting more than 15 to 16 pounds and reiterated that appellant needed to periodically change positions and get up and move about.

On January 11, 1996 the Office referred appellant for a second opinion evaluation with Dr. Michael J. Yaszemski, a Board-certified orthopedic surgeon. In a report dated January 27, 1996, he opined that appellant would never obtain full recovery and become pain-free in his

back. In a work capacity evaluation accompanying the report, Dr. Yaszemski outlined limitations similar to those given by Dr. Edwards and agreed that appellant could return to work for six hours per day.

By letter dated April 23, 1996, the Office referred appellant to a vocational rehabilitation counselor for the development of a vocational rehabilitation program in order to locate a suitable alternate job, within the restrictions imposed by his employment injury, based on the reports from Drs. Edwards and Yaszemski.¹

On September 6, 1996 the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within the restrictions outlined by Drs. Edwards and Yaszemski. The vocational counselor recommended one position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which, he determined, reasonably reflected appellant's ability to earn wages, that of "telephone solicitor, DOT #299.357-014."² The vocational counselor requested a 90-day job placement to examine the job goal of the recommended position.

In a report dated December 20, 1996, Dr. Edwards stated:

"At this time I feel that [appellant] could work four hours, but there would be a considerable amount of restrictions. [He] would have to be able to get up and move around two to three times each hour and at the end of each hour be able to walk around a little bit. I do not think he can do prolonged sitting at one stance or any prolonged walking, ... [he] certainly cannot go up and down stairs or do any bending and his weight restriction is in the light category."

In a report dated December 31, 1996, the vocational counselor stated that appellant had notified him that he was going to school but could not work.

In a letter to the Office dated February 3, 1997, appellant stated that he was not physically capable of performing the selected position of telephone solicitor. He asserted that a person with his restrictions would be unable to sit at a desk all day answering phone calls or soliciting telephone calls. Appellant stated that Dr. Edwards, in his December 20, 1996 report, had outlined physical restrictions which precluded him from performing the offered position.

In a report dated February 28, 1997, the vocational counselor stated that he was closing the case because appellant had not taken any action to utilize the job placement services in the past three months. The vocational counselor formally closed the file on March 12, 1997, stating

¹ The Office noted in an August 25, 1995 memorandum that the employing establishment had advised the Office that it had no light duty available for appellant.

² The job description for telephone solicitor/telemarketer/telephone sales representative stated:

"Solicits order for merchandise or services over telephone: calls prospective customers to explain type of service or merchandise offered. Quotes prices and tries to persuade customer to buy, using prepared sales talk. Records names, addresses, purchases, and reactions of prospects solicited. Refers orders to other workers for filing. Keys data from order card into computer, using keyboard. May develop lists of prospects from city and telephone directories. May type report on sales activities...."

that appellant had refused to participate in rehabilitation services while attending college full time.

On July 30, 1997 the Office found that there was a conflict in the medical evidence regarding the amount of hours appellant could perform in a part-time, light-duty capacity and referred him to Dr. James W. Simmons, a Board-certified orthopedic surgeon, for an independent medical examination. He examined appellant on August 28, 1997 and stated in a work capacity evaluation dated May 18, 1998 that appellant could work a four-hour day, within the restrictions previously set forth by Drs. Edwards and Yaszemski.

In a report dated June 8, 1998, the vocational counselor stated that appellant was able to perform the job of telephone solicitor and that the job was reasonably available within appellant's commuting area on a part-time basis.

By notice of proposed reduction dated September 21, 1998, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as an telephone solicitor at the weekly rate of \$132.40 in accordance with the factors outlined in 5 U.S.C. § 8115.³ On September 21, 1998 the Office calculated that appellant's compensation rate should be adjusted to \$332.50 using the *Shadrick*⁴ formula. The Office indicated that appellant's salary on April 9, 1998, the date of injury, was \$433.60 per week, that his current, adjusted pay rate for his job on the date of injury was \$576.80 and that appellant was currently capable of earning \$132.40 per week, the rate of a telephone solicitor. The Office therefore determined that appellant had a 23 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of \$250.41. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was \$332.50.

The Office stated that the case had been referred to an independent medical examiner, Dr. Simmons, whose opinion indicated that appellant was capable of working four hours per day represented the weight of the medical evidence. The Office stated that the case had been referred to a vocational rehabilitation counselor, who located a position as a telephone solicitor which he found appellant capable of performing given Dr. Simmons' restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated October 14, 1998, appellant responded to the proposed termination by arguing that the position is unsuitable because it requires physical activities which exceed his physical restrictions, as outlined by all the physicians of record. He stated:

“The job of [t]elephone [s]olicitor according to local [t]ele[m]arketing companies, requires the employee to sit at a desk 100 [percent] of their work time. The employee is equipped with a headset attached to a telephone ... [and must] sit and

³ 5 U.S.C. § 8115.

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

place calls soliciting different products, [a minimum quota] of which the employee is required to [sell in order] to keep employment. In order to be productive enough to keep employment the employee must sit at [his] station the entire work time. This is a 100 [percent] sedentary position without regular opportunities to walk around as needed for as [long] as needed. Nor are there a variety [of] chairs that [an] employee could interchange [with] as necessary. My work restrictions state that I can [neither] sit ... nor stand for long periods [of time] ... that I must be able to get up and walk around as long as needed, [and] ... be able to lay down when necessary for as long as needed.”

Appellant further contended that he was incapable of performing the job because even if he was standing up, he would be required to bend over and twist to make phone calls and input information and to engage in constant and repetitive motions.

Appellant submitted an October 2, 1998 report from Dr. Arvo Neidre, a Board-certified orthopedic surgeon. He noted that appellant had been offered the position of telephone solicitor, and stated:

“[Appellant] is unable to sit for more than half an hour to an hour at a time because of his continued pain, so I do not feel that this is a reasonable consideration. [He] has recently undergone a Chymopapain injection at the L1-2 level to try to reduce the size of his disc herniation which was unsuccessful. [Appellant] still continues to have the spinal stenosis as well as the disc herniations as a result of his on-the-job injury.

“It is this physician’s opinion that the only surgical approach would be to consider a five-level fusion, which would still give [appellant] very little guarantee of any diminished pain would be a horrendous undertaking nonetheless. As well, he also had in September, 1997 [an] evaluation by Dr. Walt Simmons, [who] at that point recommended decompression because of what was felt to be cauda equina syndrome. [Appellant] also had a previous evaluation in January, 1996 by Dr. Michael Yaszemski who concurred that his whole scenario was complex. He recommended a prolonged, aggressive course of weight loss and stretching exercises and did not feel that surgery would help him that much.

“I think with all these factors as well as Dr. Edwards’ opinions beforehand, that [appellant] continues to be unable to maintain any gainful employment, it is my opinion also that he continues to be unable to maintain any gainful employment due to the continued problems he has as a result of his on-the-job injury as well as the [preexisting] congenital spinal stenosis.”

By decision dated October 22, 1998, the Office advised appellant that it was reducing his compensation because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his April 5, 1988 employment injury and that the evidence of record showed that the position of telephone solicitor represented his wage-earning capacity.

By letter dated November 5, 1998, appellant requested reconsideration. In support of his request, he submitted reports dated February 28 and August 14, 1997 from Dr. Edwards in which he essentially reiterated his previous findings and conclusions. Appellant also submitted reports dated September 19, 1997 and May 26, July 2, July 30 and August 10, 1998 reports from Dr. Neidre in which he stated findings on examination and reviewed appellant's prospects for improvement with proposed surgery.

By decision dated November 24, 1998, the Office denied appellant's claim, finding that he failed to submit evidence sufficient to warrant modification.

By letter dated December 16, 1998, appellant requested reconsideration. In support of his request, he submitted a December 8, 1998 report from Dr. Neidre, who reiterated his opinion that appellant was unable to perform the job of telephone solicitor due to his physical restrictions. Dr. Neidre specifically stated that, because appellant was unable to sit for more than 30 minutes at a time, he did not feel that he would be able to assume a position as a telemarketing sales person which would require sitting down in front of a computer console for long periods of time. He further stated that both he and Dr. Edwards agreed that appellant was unable to maintain any form of gainful employment.

By decision dated February 18, 1999, the Office denied appellant's claim, finding that he failed to submit evidence sufficient to warrant modification.

The Board finds that the Office did not meet its burden to reduce appellant's compensation effective October 22, 1998, based on his capacity to perform the duties of a telephone solicitor.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ As used in the Federal Employees' Compensation Act the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.⁶⁷

A review of the medical evidence in the present case indicates that there is not sufficient medical evidence to support a finding that the selected position as telephone solicitor was within appellant's physical limitations. The Office referred appellant to a vocational rehabilitation counselor, who on September 6, 1996 located a job as a telephone solicitor that he found to be within appellant's physical restrictions. The Office referred appellant to Dr. Simmons, an independent medical examiner, who examined appellant on August 28, 1997 and concluded in a work capacity evaluation dated July 30, 1998 that appellant could work a four-hour job. His report, however, is neither well rationalized nor based on sound medical reasoning. In his initial

⁵ *Id.*

⁶ *Ralph W. Baker*, 39 ECAB 1413 (1988).

⁷ *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124.

September 2, 1997 report, Dr. Simmons did not render an opinion regarding whether appellant was capable of performing part-time work and did not specifically approve the telephone solicitor job offered by the Office. After the Office subsequently requested an opinion regarding appellant's work capabilities, Dr. Simmons submitted a July 30, 1998 work-capacity evaluation form in which he merely indicated that appellant could work a four-hour day within the restrictions outlined by Drs. Edwards and Yaszemski. Thus, the Office erred in relying on Dr. Simmons' opinion to terminate appellant's total disability compensation.

In addition, in response to the Office's September 21, 1998 proposed termination, appellant stated that he would not be able to perform the telephone solicitor position because it would require him to sit at a desk or stand for prolonged periods and engage in repetitive activities, from which Dr. Edwards had restricted him. Appellant also asserted that the job description of telephone solicitor did not indicate whether he would be afforded regular opportunities to walk around or lie down as needed, in accordance with his physical restrictions required, or to alternate chairs.

Finally, subsequent to the October 22, 1998 termination decision, appellant submitted Dr. Neidre's December 8, 1998 report, which contains probative, rationalized medical evidence that appellant's back conditions would be exacerbated by the duties entailed by the telephone solicitor position. He stated that appellant would not be able to perform the offered position because he was unable to sit for more than half an hour to an hour at a time because of his continued pain and continues to have spinal stenosis as well and disc herniations resulting from his 1988 employment injury. He advised that, because of all the work-related and nonwork-related conditions appellant continued to experience, as outlined previously by Dr. Edwards, appellant continues to be unable to maintain any gainful employment due to the continued problems he has as a result from both his 1988 work injury.

Once appellant raised the issue of whether the telephone solicitor job did not allow him to alternate sitting and standing and to get up and move around, thereby conflicting with his physical restrictions, the Office did not submit any medical opinion or factual evidence indicating that the position involved alternate tasks which would diversify appellant's duties and prevent appellant from engaging in activities contrary to these restrictions. Dr. Edwards stated in his December 20, 1996 report that appellant could work four hours, but would have to be able to get up and move around two to three times each hour and be able to walk around a little bit at the end of each hour. He specifically opined that appellant would not be able to do prolonged sitting at one stance. The position description, however, merely notes that the position was sedentary and that appellant would be required to answer telephones and compile records for four hours. For this reason, the Board finds that the job requirements of the telephone solicitor position exceed appellant's work restrictions. As it is the Office's burden of proof to establish that a selected position represents appellant's wage-earning capacity, the Office did not meet its burden of proof in this case to reduce appellant's compensation benefits based on his capacity to perform the duties of a telephone solicitor.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 22, 1998 is reversed.

Dated, Washington, DC
June 6, 20001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member