

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSTANCE SELBY and DEPARTMENT OF THE ARMY,
Fort Dix, NJ

*Docket No. 01-1485; Submitted on the Record;
Issued June 10, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity in the selected position of telephone solicitor.

The Office accepted that appellant sustained knee contusions and a torn meniscus as a result of an employment incident on March 19, 1992. By decision dated June 16, 1999, the Office determined that the selected position of telephone solicitor represented appellant's wage-earning capacity and reduced her compensation based on an earning capacity of \$265.20 per week. In a decision dated October 28, 1999, an Office hearing representative reversed the June 16, 1999 decision. The hearing representative held that the Office should secure a supplemental report from the impartial medical specialist, Dr. Herbert Stein, a Board-certified orthopedic surgeon.

In a decision dated May 18, 2000, the Office reduced appellant's compensation based on her capacity to earn wages as a telephone solicitor. By decision dated March 21, 2001, an Office hearing representative affirmed the wage-earning capacity determination.

The Board finds that the Office properly reduced appellant's compensation based on her capacity to earn wages as a telephone solicitor.

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.¹

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent 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, her wage-

¹ *Carla Letcher*, 46 ECAB 452 (1995).

earning capacity is determined with due regard to the nature of his injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.²

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 wage-earning capacity 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.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

With respect to whether appellant was physically able to perform the selected position, the Office found a conflict in the medical evidence. An attending physician, Dr. Eric Mitchell, opined that appellant was totally disabled, while a second opinion orthopedic surgeon, Dr. Frank Mattei, found that appellant was capable of sedentary work.

The Office referred the evidence and a statement of accepted facts to Dr. Stein to resolve the conflict. In a January 29, 1999 report, Dr. Stein provided a history and results on examination. He opined that appellant was capable of performing the full-time telephone solicitor position. An Office hearing representative noted that Dr. Stein did not review x-rays or provide a definitive diagnosis and found that his report was not of sufficient probative value to resolve the conflict.

In a report dated March 2, 2000, Dr. Stein indicated that he reexamined appellant on February 23, 2000; he reviewed x-ray results and diagnosed degenerative osteoarthritis of the left knee and early degenerative osteoarthritis of the right knee with degenerative arthritis of the patella. He reiterated his opinion that appellant could sit and work as a telephone solicitor in regards to the work injuries.

The Board finds that Dr. Stein's report is sufficient to resolve the conflict. He provided an opinion based on his examination and review of medical records and diagnostic testing, that appellant could perform the selected position. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁵

With respect to selecting the position of telephone solicitor, the Office followed established procedures. A rehabilitation specialist confirmed that the position was reasonably

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

⁵ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

available in appellant's commuting area with weekly wages of \$306.00. Appellant has argued that she did not have a driver's license and the Office failed to establish that public transportation was available. The Board notes that appellant's residence is in Philadelphia, Pennsylvania and the rehabilitation specialist found a high number of telephone solicitor positions being performed in the commuting area. Appellant did not submit any probative evidence to support an argument that public transportation was not available or that she was physically incapable of taking public transportation.

The Board finds that the position was medically suitable and the Office properly considered the factors enumerated in 5 U.S.C. § 8115. Appellant's compensation is therefore properly reduced based on the *Shadrick* formula. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate for the date-of-injury job.⁶ The percentage of wage-earning capacity is then applied to the pay rate for compensation purposes and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.⁷ The record indicates that the Office properly reduced appellant's compensation based on the selected position of telephone solicitor.

The decisions of the Office of Workers' Compensation Programs dated March 21, 2001 and May 18, 2000 are affirmed.

Dated, Washington, DC
June 10, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁶ 20 C.F.R. § 10.403(d).

⁷ 20 C.F.R. § 10.403(e).