

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH R. DELAGARZA and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, TX

*Docket No. 00-829; Submitted on the Record;
Issued March 14, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity as a telephone solicitor; and (2) whether the Office properly denied appellant's request for a hearing.

The Office accepted appellant's claim for a herniated nucleus pulposus at L5-S1 and surgery for a laminectomy and discectomy, and received disability compensation. On December 1, 1997 the Office referred appellant for vocational rehabilitation. In a work capacity evaluation dated July 7, 1997, appellant's treating physician, Dr. Michael P. Barker, a Board-certified physiatrist, opined that appellant could work four hours a day but could not lift more than 15 pounds, could not bend at the waist or twist repetitively, could sit for 30 minutes at a time but then must stand for pain relief, and could stand for 5 to 10 minutes before needing to sit or move around the room. On March 2, 1998 the vocational rehabilitation specialist determined that appellant could perform the job of telephone solicitor which was sedentary, required no lifting or kneeling and was reasonably available part time within appellant's commuting area. The rehabilitation specialist also found that appellant who worked as a sheet metal mechanic at the time of the December 9, 1986 employment injury was professionally qualified to perform the job.

In a Notice of Proposed Reduction of Compensation dated September 1, 1998, the Office proposed to reduce appellant's compensation based on his ability to work part time as a telephone solicitor, a job which was within his physical restrictions and his professional experience. Appellant submitted medical reports from Dr. Erlinda E. Belvis, a Board-certified psychiatrist and neurologist, dated August 24, September 21 and September 26, 1998 in which she described his symptoms of depression and back pain and her treatment of him. By decision dated November 3, 1998, the Office adjusted appellant's compensation to reflect his wage-earning capacity as a telephone solicitor.

By letter dated January 13, 1999, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 18, 1999, the Office denied appellant's request for a hearing because his request, which was postmarked January 13, 1999, more than 30 days after the November 3, 1998 decision was issued, was untimely.

By letter dated March 22, 1999, appellant requested reconsideration of the Office's decision and submitted a medical report from Dr. Belvis dated February 16, 1999 who admitted him for inpatient treatment to treat his suicidal thoughts and depression. In her report, Dr. Belvis considered appellant's history of injury, performed a mental status examination and diagnosed, *inter alia*, severe, major depression with melancholia and psychotic features from a single episode superimposed on dysthymia, generalized anxiety disorder, and chronic pain syndrome of the lower back with status of post laminectomy and fusion. She also diagnosed severe psychosocial stressors of chronic pain and "not being able to do much of anything, and relationship problems resulting from the chronic pain and injury at work." Dr. Belvis stated that appellant's mental condition was recently exacerbated when his workers' compensation checks were stopped and his back pain had worsened and was intolerable especially with recent weather changes. She also stated that appellant's depression worsened when the back pain from his work injury was not relieved. Dr. Belvis stated that she would place appellant under close observation, stabilize him with medications and provide group, occupational and recreational therapy.

By decision dated April 2, 1999, the Office denied appellant's request for modification.

By letter dated August 16, 1999, appellant requested reconsideration of the Office's decision and submitted additional medical evidence consisting of medical reports dated May 27 and July 30, 1999 from Dr. Salvador P. Baylan, a Board-certified physiatrist, medical reports from Dr. Belvis dated February 16, June 21, July 19 and 24, and August 7, 1999, a magnetic resonance imaging (MRI) scan of the lumbar spine dated June 24, 1999 and an electromyogram (EMG) and nerve conduction study dated July 2, 1999. In his May 27, 1999 report, Dr. Baylan considered appellant's history of injury, considered the diagnostic tests of record and performed a physical examination. He diagnosed chronic low back pain syndrome, "S/P" L5-S1 surgery with posterolateral fusion, and reactive depression. Dr. Baylan prescribed further blood studies, diagnostic tests and exercise program and psychological treatment. In his July 30, 1999 report entitled "Guidelines for Periodic Medical Report," Dr. Baylan reiterated that appellant had back pain and opined that appellant was totally disabled. In response to the question whether appellant could work with limitations or required a functional capacity evaluation to establish his limitations, Dr. Baylan stated that appellant was to remain off work until completion of his current treatment plan.

In her February 16, 1999 report, Dr. Belvis diagnosed, in part, major depression with melancholia and psychotic features, general anxiety disorder and chronic pain syndrome. She stated that appellant's condition was exacerbated by termination of his workers' compensation payments and worsening of his back pain. Dr. Belvis stated that appellant had severe psychostressors from his back pain, inability to do much and relationship problems arising from his chronic pain. Dr. Belvis prescribed group, occupational and recreational therapy but did not address appellant's ability to work or to perform the work of a part-time telephone solicitor.

In her June 21, 1999 report, Dr. Belvis stated that appellant continued to have symptoms of post traumatic stress disorder and major depression with melancholia. She stated that people

with post traumatic stress disorder “keep having exacerbation symptoms every time there is any kind of stress in their lives even minor ones.” Dr. Belvis stated that the work injury limited appellant’s activities because he continued to have severe back problems. She stated that appellant was unable to perform his job. Dr. Belvis prescribed individual and group therapy sessions. In her reports dated July 24 and August 7, 1999, Dr. Belvis described the group therapy sessions. In the July 19, 1999 report, she stated that appellant felt little improvement and was having great difficulty coping with his back pain and emotional condition. The June 24, 1999 MRI scan showed marked desiccation and disc space narrowing at the L5-S1 level and narrowing of the right L5-S1 neuroforamen secondary to osteophytes. The July 2, 1999 EMG and nerve conduction study showed left chronic S1 radiculopathy.

By decision dated September 27, 1999, the Office denied appellant’s request for modification.

The Board finds that the Office properly denied appellant’s request for a hearing.

Section 8124(b)(1) of the Federal Employees’ Compensation Act provides that “a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”¹ Section 10.131 of the Office’s federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.² Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.³ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,⁴ when the request is made after the 30-day period for requesting a hearing⁵ and when the request is for a second hearing on the same issue.⁶

In this case, the postmark date of appellant’s letter requesting an oral hearing is not in the record, but since the letter is dated January 13, 1999, more than 30 days after the Office issued the November 3, 1998 decision, the Office was correct in stating that appellant was not entitled

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. § 10.131.

³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁶ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

to a hearing. The Office exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The Board finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity as a telephone solicitor.

Once the Office has made a determination that a claimant is disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.⁷

Under Section 8159(a) of the Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁸ When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 labor market, that fits that employee's capabilities with regard to his 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.⁹ Finally, application of the principles set forth in *Albert C. Shadrack* will result in the percentage of the employee's loss of wage-earning capacity.¹⁰ The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, in a work capacity evaluation dated July 7, 1997, appellant's treating physician, Dr. Barker, opined that appellant could work four hours a day subject to restrictions of no lifting more than 15 pounds, no repetitive bending at the waist or twisting, sitting only 30 minutes at a time and the option to sit or move around the room after standing 5 to 10 minutes. On March 2, 1998 the rehabilitation vocational specialist identified the job of a part-time telephone solicitor as a job that was within appellant's physical restrictions, compatible with his professional experience, and was reasonably available. The subsequent medical evidence appellant submitted did not establish that appellant was unable to perform the work of a part-time telephone solicitor. In her February 16, 1999 report, Dr. Belvis diagnosed severe psychosocial stressors of chronic pain, appellant being unable to do much and impaired relationships. She also stated that appellant's back pain worsened, and his depression worsened due to his chronic pain. She did not, however, address appellant's ability to work. In her June 21, 1999 report, Dr. Belvis diagnosed post traumatic stress disorder and major depression

⁷ *Francesco Bermudez*, 51 ECAB _____ (Docket No. 98-1395, issued May 11, 2000).

⁸ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993); see also 5 U.S.C. § 8115(a).

⁹ *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

¹⁰ *Dorothy Lams*, *supra* note 9; *Albert C. Shadrack*, 5 ECAB 376 (1953). See also 20 C.F.R. § 10.303.

with melancholia and stated that appellant's work injury limited his activities and appellant was unable to perform his job but did not address appellant's ability to perform light work. In her reports dated July 19 and 24 and August 7, 1999, she described two group therapy sessions and described appellant's current health status but also did not address his ability to work. The diagnostic tests consisting of the MRI scan, EMG and nerve conduction study do not address whether appellant is able to perform the job of a part-time telephone solicitor.

In his May 27, 1999 report, Dr. Baylan diagnosed appellant's condition, stating, *inter alia*, that appellant had chronic low back syndrome and reactive depression and prescribed treatment but did not address appellant's ability to work. In his July 30, 1999 report, Dr. Baylan stated that appellant was totally disabled and unable to perform his "usual and customary duties" but did not address whether appellant could perform the light duty work of a telephone solicitor. In response to the question whether appellant should perform restricted work, he indicated that appellant should not perform restricted work because appellant should remain off work pending completion of his treatment. He, however, provided no explanation as to why appellant was unable to perform the light duty work of a part-time telephone solicitor. The Board has held that medical conclusions unsupported by rationale are of diminished probative value.¹¹

Inasmuch as appellant did not present any medical evidence supported by medical rationale addressing whether he could perform the work of a part-time telephone solicitor, appellant has failed to establish his claim.

The September 27, April 2 and February 18, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹¹ *Jacquelyn L. Oliver*, 48 ECAB 232, 236 (1996).