U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILLY H. EVERETT and DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Washington, DC

*Docket No. 03-285; Submitted on the Record;*
*Issued June 18, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

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

This case is on appeal to the Board for the second time.[1] In the first appeal, the Board found that the case was not in posture for decision. The Board found that it was unclear whether the January 23, 1997 labor market survey completed by the rehabilitation counselor, Frederick H. Fox, on which the Office relied in determining that appellant could perform the position of telephone solicitor, accommodated the restrictions of appellant's treating physician, Dr. Ross P. Chiles, a Board-certified internist with a specialty in endocrinology. In his June 21, 1996 report, Dr. Chiles stated that appellant required a job that would not allow for random absence for the irregular occurrence of his cluster headaches and that appellant would have to work in an occupation of "quite low stress." The Board also found that the reasons the Office gave for crediting Mr. Fox's report over the reports of two other vocational counselors, Terry L. Vander-Molen, a rehabilitation counselor and Stuart Vexler, a licensed psychologist, respectively, *i.e.*, that Dr. Fox was an impartial rehabilitation counselor, was not valid as there is no provision in the law for the opinion of a second rehabilitation counselor to whom appellant is referred to be accorded special weight. The Board therefore remanded the case, with instructions for the Office to address Dr. Chiles' June 21, 1996 medical report, give reasons for accepting or rejecting it and to explain how the jobs described by Mr. Fox complied with Dr. Chiles' medical restrictions. The Board also instructed the Office to give reasons why it credited Mr. Fox's January 23, 1997 labor market survey over Mr. Vexler's 1996 labor market survey in which Mr. Vexler stated that telephone solicitor work was stressful. The Board vacated the Office's March 3, July 16 and December 24, 1998 decisions and remanded the case for further development, to be followed by a *de novo* decision.

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[1] Docket No. 99-962 (issued February 8, 2001). The facts and history surrounding the prior appeal are set forth in the original decision and are hereby incorporated by reference.

The relevant vocational evidence in the record was the labor market survey dated October 31, 1994 from Mr. Vander-Molen, the report dated June 14, 1995, from the rehabilitation specialist, James Howard, a labor market survey conducted in 1996 and a report dated October 8, 1997 by Mr. Vexler, and by a licensed professional counselor and licensed marriage and family therapist, Doug Dierking and a labor market survey from a licensed professional counselor, Frederick H. Fox, dated January 23, 1997. In the October 31, 1994 labor market survey, two out of ten companies Mr. Vander-Molen contacted had jobs available for telemarketers. National Market Share, Incorporated stated that, it had a relaxed atmosphere, a large open area shared by other employees and no "real pressure." Telequest stated that the job required tolerance to rudeness and/or rejections. Both companies had full-time and part-time jobs available but Telequest stated that adherence to the preapproved schedule was required.

In his June 14, 1995 report, Mr. Howard contacted National Market Share, Incorporated and Telequest who acknowledged that the employees must work according to established schedules but could arrange their own work shift which could be full or part time or a split work schedule, meaning the employee could work two out of three days or five out of seven days either in the mornings, afternoons or evenings. He stated that the employers did not identify that the work environment involved high stress, fast pace sales and quotas and encouraged employees to set their own goals or offered additional bonuses. Mr. Howard stated that some of the work did not involve telephone sales but involved handling political polling campaigns, radio campaigns and survey and research work.

In their labor market survey conducted in 1996, Mr. Vexler and Mr. Dierking contacted seven telemarketing and five market research firms. Three of the telemarketing firms, MCI and Harte Hanks, had full-time positions and the three small firms, had part-time positions. Mr. Vexler stated that a common theme among the five firms was that the telephone agent position "involved a significant amount of rejection, often verbally abusive rejection, which many people find difficult not to take personally and thus experience as stressful." He stated that turnover performance was high with average tenure less than six months. Of the five market research firms Mr. Vexler's contacted positions were available at Tammadge Market Research, Incorporated (Tammadge) and First Market Research which were part time and required being able to work specific hours and being able to handle rejection and rudeness from those who were called.

In his January 23, 1997 report, Mr. Fox contacted 15 employers of telemarketers and telephone solicitors and found that Tammadge had a "very low" stress environment because there was no quota or commission basis pay rate but when he asked the person he contacted, Mr. Craig, to compare his operation to other telephone rooms, he stated that it would be a "low stress" environment. He stated that at Tammadge the majority of the interviewers worked 16 to 20 hours per week but some worked up to 35 hours. Mr. Fox stated that First Market Research required interviewers and there was no selling and no quotas and the stress level appear[ed] to be low." He stated that the majority of employees worked 15 to 20 hours a week although some worked 40 hours per week.

In their September 30, 1997 report, Mr. Vexler and Mr. Dierking reviewed the firms interviewed by Mr. Fox, and found that only Tammadge stated that the work was low stress and the four other firms had low to moderate stress.

In a report dated March 27, 1998, Dr. Victor H. Appel, a licensed psychologist and career counselor, reviewed the labor surveys performed by Mr. Fox and Mr. Dierking and Mr. Vexler, among other documents and concluded that none of the telephone solicitor jobs would involve very low stress. He stated that appellant performed normally on the anxiety levels but in terms of social interaction, appellant liked to stay "very much to himself," and would be unsuited for telephone work.

In a report dated June 30, 2001, which the Office obtained on remand, Dr. Chiles stated that, with reference to his June 21, 1996 report, there was "very little additional information" that he could add. He stated that his last examination of appellant was on August 18, 1999 and there was no appreciable change in his physical status at that time. Dr. Chiles stated that, "[w]hile there is little doubt that he could physically do the job of a telephone solicitor, [his] previous evaluation regarding [appellant's] very limited ability to tolerate stress would certainly seem to play a role with this or any similar occupation." He stated that it was "inconceivable that such an occupation could be without any significant stress." Dr. Chiles stated that he did not believe that appellant's medical condition would "tolerate any significant amount of stress without a significant exacerbation of symptoms."

By decision dated September 18, 2002, the Office affirmed its June 30, 1995 decision that appellant's compensation should be adjusted to reflect his wage-earning capacity as a telephone solicitor. The Office considered Dr. Chiles' June 21, 1996 and June 30, 2001 reports, noting that Dr. Chile opined that any potential occupation for appellant must be low stress and not associated with the operation of any moving machinery or other dangerous equipment and appellant's ability to tolerate stress "would certainly seem to play role" with the telephone solicitor position. Without specifying which rehabilitation counselor, the Office stated that the rehabilitation specialist determined that the prospective employers allowed telephone solicitors to determine their own schedules, they could work full time, part time or a split schedule, at the hours and days of the employee's choosing. Further, the Office noted that the rehabilitation specialist stated that telephone solicitors were involved in nonstressful political polling campaigns, radio campaigns and survey and research work, in addition to soliciting orders for merchandise or services. The Office stated that, according to the prospective employers, the work environment of telephone solicitors did not involve high stress or fast-paced sales quotas, and in fact, telephone solicitors could set their own goals and receive bonuses, rather than work under a quota system. The Office therefore concluded that the weight of the evidence established that the position of telephone solicitor was suitable, both medically and vocationally, for appellant and represented appellant's wage-earning capacity.

The Board finds that the Office erred in determining that appellant could perform the job of telephone solicitor and that the position represented appellant's wage-earning capacity.

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.[2]

[2] *Francisco Bermudez*, 51 ECAB 506, 513 (2000).

Under section 8115(a) of Federal Employees' Compensation 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.[3] 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.[4] 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.[5] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, the Office considered the relevant medical reports of Dr. Chiles noting that, in his June 21, 1996 and June 30, 2001 reports, Dr. Chiles opined that appellant required a low stress environment. In fact, in his June 21, 1996 report, Dr. Chiles stated that appellant required a work environment with "quite low stress" as well as time for random absence for the irregular occurrence of his cluster headaches. In his June 30, 2001 report, Dr. Chiles stated that, with reference to his June 21, 1996 report, he had little information to add. He stated that his last examination of appellant was on August 18, 1999 and there was no appreciable change in his physical status at the time. He stated that, although appellant could physically perform the work of a telephone solicitor, appellant's "very limited ability to tolerate stress would certainly seem to play a role with this or any similar occupation." Dr. Chiles stated that it was "inconceivable that such an occupation could be without any significant stress." He stated that he did not believe that appellant's medical condition would "tolerate any significant amount of stress without a significant exacerbation of symptoms."

The Office generally stated that, without referring to a specific vocational report, that the evidence established that the environment of a telephone solicitor was low stress and, therefore,

[3] *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).

[4] *Richard Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[5] *Dorothy Lams*, *supra* note 4; *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

within appellant's restrictions. The job description of telephone solicitor does not in itself indicate the degree of stress on the job. In the October 31, 1994 labor market survey, Mr. Vander-Molen found that the telemarketer position with National Market Share, Incorporated had a relaxed atmosphere and a large open area shared by other employees and no "real pressure." He stated that Telequest required tolerance to rudeness and/or rejections. Mr. Vander-Molen stated that both companies had full-time and part-time jobs available but Telequest stated that adherence to the preapproved schedule was required. In his June 14, 1995 letter, Mr. Howard stated that the employers at National Market Share, Incorporated and Telequest did not identify that the work environment involved high stress, fast-pace sales and quotas and that they encouraged employees to set their own goals. Further, Mr. Howard stated that some of the work did not involve telephone sales but involved handling political polling campaigns, radio campaigns and survey and research work. This evidence, however, is equivocal. Although Mr. Vander-Molen stated that National Share, Incorporated had a relaxed atmosphere and no "real pressure," when Mr. Howard called National Share, Incorporated and Telequest, Mr. Howard stated that the employers did not identify that the work environment involved "high stress" but that is not the same as stating that it involved "quite low stress" which Dr. Chiles stated was necessary. Further, Mr. Vander-Molen stated that Telequest required tolerance to rudeness and/or rejections which sounds stressful.

Regarding Tammadge, Mr. Fox stated that Tammadge had a "very low" stress environment because there was no quota or commission basis pay rate but when he directly asked the person he contacted, Mr. Craig, to compare his operation to other telephone rooms, he stated it would be a "low stress" environment. Therefore, the description of the stress level at Tammadge is also equivocal, as it is not clear it meets Dr. Chiles' requirement that the environment be "quite low stress." Similarly, regarding First Market Research, Mr. Fox stated that First Market Research had no selling and no quotas and the stress "appear[ed] to be low" but also did not state that First Market Research had "quite low stress" consistent with Dr. Chiles' requirement. In their 1996 labor market survey, Mr. Vexler and Mr. Dierking stated that Tammadge and First Market Research required being to work specific hours and being able to handle rejections and rudeness from those who are called. In his March 27, 1998 report, the licensed psychologist and career counselor, Dr. Appel opined that none of the telephone solicitor jobs, referring to those identified by Dr. Fox, *i.e.*, Tammadge and First Market Research, would involve very low stress. In his June 30, 2001 report, Dr. Chiles opined that it was "inconceivable" that the occupation of telephone solicitor could be without any significant stress and emphasized that appellant could not tolerate any significant stress. The evidence of record overall does not establish that the position of telephone solicitor, as presented by National Market Share, Telequest, Tammadge and First Market Research, had a sufficiently "quite low" stress environment to comply with Dr. Chiles' requirement. Therefore, the Office has not shown that its adjustment in appellant's compensation to reflect his wage-earning capacity in the position of telephone solicitor is justified.

The September 18, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
June 18, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member