

**United States Department of Labor  
Employees' Compensation Appeals Board**

WILLIAM F. MOSS, Appellant	)	
	)	
and	)	<b>Docket No. 04-24</b>
	)	<b>Issued: August 19, 2004</b>
DEPARTMENT OF THE INTERIOR,	)	
NATIONAL CAPITAL PARKS,	)	
Washington, DC, Employer	)	
	)	

*Appearances:*  
Jeffrey P. Zeelander, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On September 30, 2003 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 15, 2003 reducing his compensation benefits based on his capacity to earn wages in a constructed position. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office met its burden of proof to reduce appellant's compensation benefits based on the constructed position of telephone solicitor.

**FACTUAL HISTORY**

On June 11, 1991 appellant, then a 48-year-old maintenance worker, filed a notice of traumatic injury alleging on that date he injured his back lifting in the performance of duty. The Office accepted appellant's claim for lumbar strain on July 10, 1991. The Office entered appellant on the periodic rolls on March 10, 1992.

In a report dated January 25, 1998, Dr. William E. Gentry, a Board-certified orthopedic surgeon, and appellant's attending physician, completed a report finding that appellant could not return to his date-of-injury position. He stated that appellant could return to a trial of light duty. On January 26, 1998 Dr. Gentry provided appellant's light-duty restrictions of lifting less than 35 pounds, restricted bending, and avoid working in awkward positions. He stated that appellant should not climb ladders, and should avoid excessive stair climbing. Dr. Gentry stated that appellant could operate a motor vehicle for short periods of time and that he should attempt sedentary work with intermittent sitting, walking and standing avoiding any position for an extended period of time.

The Office referred appellant for vocational rehabilitation services beginning March 4, 1998. The vocational rehabilitation counselor was unable to reach appellant by letter dated March 13, 1998 and through repeated telephone calls. In a note dated May 18, 1998, the Office noted that appellant had moved and that his claim file would be transferred to a different district. On April 3, 1998 appellant provided the Office with his new address in Rehoboth Beach, Delaware. By letter dated April 7, 1998, the Office informed appellant of the consequences of failing to cooperate with vocational rehabilitation services and allowed him 30 days to contact the counselor or the Office.

On June 24, 1999 the Office provided appellant with a list of three physicians in Delaware from which to choose his new attending physician. Appellant selected Dr. James Marvel, a Board-certified orthopedic surgeon. In a report dated August 10, 1999, Dr. Marvel noted appellant's history of injury and medical treatment. He reported findings on physical examination including loss of range of motion, equal reflexes and no objective weakness in the lower extremities. Dr. Marvel diagnosed degenerative disc disease at L4-5 and L5-S1 and concluded that appellant's current symptoms were due to his employment injury. He stated, "I do not feel this patient is capable of any reasonable work activities and feel that this does, at this point, represent a permanent impairment." Dr. Marvel completed a work restriction evaluation on August 11, 1999 and stated, "I do not feel patient is capable of participating in light-duty work activities."

In a report dated October 5, 1999, Dr. Marvel noted appellant's report of low back and left leg pain which increased in the winter and with activity. His findings included a relatively rigid spine with tenderness in the lower lumbar midline, as well as equal reflexes at the knees. Dr. Marvel stated that appellant was not capable of any reasonable work activities and recommended a referral to a pain management service.

The Office referred appellant for a second opinion examination with Dr. Edward F. Quinn, a Board-certified orthopedic surgeon. In a report dated July 15, 1999, Dr. Quinn noted appellant's history of injury and performed a physical examination. He found tenderness in the low lumbar spine to deep palpation but no paravertebral muscle spasm or atrophy. Dr. Quinn stated that appellant had no evidence of lumbar strain nor nerve root compression at the L4-5 level. He did find evidence of degenerative disc disease and degenerative joint disease in his low back. Dr. Quinn stated that appellant's limitations were related to his degenerative disc disease. He completed a work capacity evaluation and concluded that appellant could do light work consisting of lifting up to 20 pounds, sitting for 8 hours, walking for 2 hours and standing for 2 hours. Dr. Quinn further found that appellant should not twist.

The Office requested a supplemental report from Dr. Quinn on July 30, 1999 asking whether appellant had residuals from his herniated discs at L4-5 and L5-S1 or from the accepted aggravation of his degenerative disc disease. On September 24, 1999 Dr. Quinn stated that on physical examination he found no objective evidence of herniated discs or continued aggravation of degenerative disc disease.

Due to disagreements between appellant's attending physician and the Office's referral physician regarding the nature and extent of appellant's employment-related conditions and resultant disability, the Office referred appellant for an impartial medical examination with Dr. Andrew J. Gelman, an osteopath and a Board-certified orthopedic surgeon. In a report dated February 25, 2000, Dr. Gelman noted appellant's history of injury and findings on physical examination. He noted that appellant had good flexibility and no sciatic irritability with symmetrical reflexes. He reviewed appellant's magnetic resonance imaging (MRI) scan and found a "very slight herniation" at L4-5. Dr. Gelman found that appellant was experiencing subjective symptoms consistent with degenerative lumbar disc disease, that he sustained a lumbar sprain in June 1991 and that this exacerbated an underlying and preexisting condition. He concluded that appellant was capable of full-time employment in a sedentary or light-duty work position. Dr. Gelman stated that appellant could lift between 15 and 20 pounds and that he should avoid repetitive bending, kneeling, crouching, stooping or crawling. Dr. Gelman completed a work capacity evaluation finding that appellant could work eight hours a day with restrictions. These restrictions included four to six hours of sitting, one to two hours of walking, one to two hours of standing and no twisting, squatting, kneeling or climbing. He also found that appellant could push, pull and lift up to 20 pounds.

The Office requested a supplemental report from Dr. Gelman on May 25, 2000 regarding whether appellant's diagnosed condition of degenerative lumbar disc disease was causally related to his employment. In a report dated May 30, 2000, Dr. Gelman opined that appellant's soft tissue injury in July 1991 more likely than not exacerbated the underlying degenerative disease process.

On June 22, 2000 the Office again referred appellant for vocational rehabilitation services. The vocational rehabilitation specialist informed appellant that it had not received a response to a letter written three weeks ago on July 13, 2000. By letter dated July 27, 2000, the Office described appellant's lack of cooperation with the vocational rehabilitation counselor and informed him of the consequence of failing to cooperate with vocational rehabilitation services. Appellant agreed to cooperate on August 24, 2000.

Dr. Lawrence Morales, a Board-certified orthopedic surgeon, completed a report on December 28, 2000 and noted that appellant described continuing symptoms of intermittent pain radiating from his back, buttocks and into his legs. He performed trigger point injections and noted that appellant continued to demonstrate positive straight leg raising on the right. Dr. Morales stated that x-rays revealed severe degenerative changes in his low back which are perhaps a little worse than in the past.

Appellant refused to cooperate with vocational rehabilitation efforts on January 17, 2001. In a letter dated January 19, 2001, the Office informed appellant of the consequences of refusing to cooperate with vocational rehabilitation.

Appellant's attending physician, Dr. Marvel, completed a report on February 14, 2001 and noted appellant's description of his pain. He stated that appellant had been symptomatic since the 1991 employment injury. Dr. Marvel opined that there was no surgical procedure nor other diagnostic procedure appropriate as appellant's MRI scans in 1991 and 1998 revealed similar changes at L4-5 and L5-S1. He recommended a pain management program and stated that he did not feel that vocational rehabilitation was appropriate. On physical examination Dr. Marvel reported 40 to 50 percent decrease in normal range of motion, with no significant midline tenderness. Reflexes were equal and straight leg raising resulted in posterior thigh pain. In a separate report of the same date, Dr. Marvel noted appellant's history of injury and opined that appellant was totally disabled for any and all work activities. He recommended a pain management program and opined that vocational rehabilitation services were unlikely to cause any significant improvement or change in his symptoms.

On March 21, 2001 the Office noted that appellant had a meeting scheduled with the vocational rehabilitation counselor on April 6, 2001. The Office informed appellant that if he failed to attend this meeting or otherwise failed to cooperate his compensation benefits would be terminated.

Dr. Marvel completed a note on May 16, 2001 and noted that appellant reported continuing back and left leg pain as well as depression. He found that examination of the lumbar spine revealed a 70 to 80 percent restriction of motion with tenderness at the midline at the lumbosacral junction. Dr. Marvel noted that appellant had equal depression of deep tendon reflexes and tight hamstrings bilaterally on straight leg raising tests. He recommended a psychiatric evaluation and pain management services.

The vocational rehabilitation counselor completed a letter on July 20, 2001 and noted that appellant stated he would not be cooperating with reemployment efforts in accordance with his attorney's advice. In a memorandum dated July 24, 2001, the Office noted that appellant had changed his mind and intended to cooperate with vocational rehabilitation. Appellant signed the job development plan on July 24, 2001. This vocational plan was placed in an interrupted status beginning October 5, 2001.

In a report dated June 28, 2001, received July 30, 2001, Dr. David August, an osteopath, examined appellant and diagnosed major depression, single episode, due solely to pain resulting from appellant's July 1, 1991 work injury. He found that appellant was totally disabled due to his psychiatric condition.

Dr. Marvel completed a report on July 24, 2001, also received July 30, 2001, suggesting a referral to a pain management center. He noted that appellant reported an increasing depression. Dr. Marvel attributed this depression to the Office and the rehabilitation process. He opined that vocational rehabilitation was useless as appellant had disability since June 1991.

On August 6, 2001 the Office referred appellant for a second opinion examination with Dr. Fred A. Dittmer, a Board-certified psychiatrist, regarding his psychiatric condition.

In a report dated August 15, 2001, Dr. Marvel stated that appellant's lower back had improved although he was still experiencing flare ups of back and left leg pain. His findings on

physical examination included a relatively rigid spine with tenderness in the midline at the L4-5 level, equal reflexes at the knees and tight hamstrings bilaterally on straight leg raising.

Dr. Dittmer, a Board-certified psychiatrist and Office second opinion physician, examined appellant on August 29, 2001 and, in a report of the same date, diagnosed major depression due to part to appellant's work injury. He stated, "With concurrent psychiatric care and antidepressant medication, he might be capable of sedentary part-time employment." Dr. Dittmer completed a work restriction evaluation on September 6, 2001 and indicated that appellant could work only four hours a day. In a supplemental report dated September 24, 2001, Dr. Dittmer repeated his conclusions. The Office received a report from Dr. Dittmer on November 20, 2001 diagnosing major depressive disorder, single episode, and dysthymic disorder both of which he believed were related to appellant's accepted employment injury. The Office accepted the additional condition of major depression without psychosis and dysthymic disorder.

The Office again instituted vocational rehabilitation on October 9, 2001. Appellant refused to cooperate in accordance with the advice of his attorney and services were placed in an interrupted status until February 28, 2002.

In a report dated November 19, 2001, Dr. Marvel noted that appellant reported that his symptoms were about the same and that he was receiving active treatment for depression. He found a relatively rigid spine on physical examination with no significant midline or paraspinal tenderness. Dr. Marvel described equal reflexes and tight hamstrings bilaterally.

On February 20, 2002 the Office referred appellant for an impartial medical examination with Dr. Randy O. Rummler, a Board-certified psychiatrist, to resolve a conflict in medical opinion between Drs. August and Dittmer as to whether appellant was capable of working due to his psychiatric condition. Dr. Rummler completed a report on March 28, 2002 noting appellant's history of injury and diagnosing major depression, single episode, in partial remission. He stated, "No limitations from work-related disability. The patient's symptoms of depression, whether directly or indirectly related to the patient's injury of June 11, 1991 are in and of themselves not of a severity to prevent full-time employment." Dr. Rummler completed a work capacity evaluation on March 29, 2002 and concluded that appellant could work eight hours a day.

In a letter dated April 25, 2002, the vocational rehabilitation counselor contacted appellant regarding the placement plan. Appellant completed a vocational rehabilitation form on May 7, 2002 and stated that it was too depressing to be constantly turned down for employment. He stated that the counselor would have to find work for him. On May 16, 2002 the Office authorized a three-month placement new employer search.

Dr. Marvel completed a report on May 28, 2002 noting that appellant reported periodic episodes of back and left leg pain but that overall appellant was feeling better. He described appellant's physical findings as a relatively rigid spine with tenderness in the entire lumbar midline as well as equal reflexes at the knees and positive straight leg raising on the leg. Dr. Marvel did not address appellant's disability for work.

The vocation rehabilitation counselor indicated on July 10, 2002 that appellant had failed to apply for the job openings provided him. He completed a report on July 19, 2002 and stated that appellant was not cooperating with him. In a report dated August 16, 2002, the vocational rehabilitation counselor stated that appellant had not cooperated in seeking employment and recommended three positions as within appellant's capabilities and geographic area.

On August 26, 2002 the Office issued a proposed notice to reduce compensation benefits based on appellant's capacity to earn wages as a telephone solicitor.

Dr. Marvel submitted a report dated September 10, 2002 noting that appellant stated he was doing about the same with back and periodic left leg pain. He stated that appellant did not report any significant change. Dr. Marvel listed his physical findings as a relatively rigid spine with tenderness in the midline at the lumbosacral junction, as well as equal depression of the deep tendon reflexes and positive straight leg raising on the left. He did not address appellant's disability for work.

In a decision dated October 1, 2002, the Office finalized the wage-earning capacity determination relying on the opinion of Dr. Gelman.

Appellant, through his attorney, requested an oral hearing. Appellant's attorney altered this to a request for a review of the written record on June 5, 2003. In support of his request, appellant submitted reports from Dr. Marvel dated January 7 and May 12, 2003. In the January 7, 2003 note, Dr. Marvel noted that appellant felt he was doing reasonably well with a slight increase in his discomfort in cool, damp weather. His findings included a relatively rigid spine with tenderness in the lower lumbar midline, and equal depression of the deep tendon reflexes. Dr. Marvel noted that straight leg raising was negative bilaterally with definite tightness of the hamstrings. On May 12, 2003 Dr. Marvel described appellant's symptoms of periodic episodes of back pain and no significant leg pain. He found a relatively rigid spine with no significant tenderness as well as equal depression of deep tendon reflexes and tight hamstrings bilaterally.

By decision dated and finalized August 15, 2003, the hearing representative found that the Office properly reduced appellant's compensation benefits based on his capacity to earn wages as a telephone solicitor.<sup>1</sup>

### **LEGAL PRECEDENT**

Section 8115 of the Federal Employees' Compensation Act<sup>2</sup> provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning

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<sup>1</sup> Following the Office's August 15, 2003 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8115.

capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>3</sup>

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 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 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. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>4</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.<sup>5</sup>

### ANALYSIS

In this case, the Office based its October 1, 2002 determination that the selected position of telephone solicitor was within appellant's physical limitations on the February 25 and May 30, 2000 reports of Dr. Gelman, the impartial medical specialist selected to resolve a conflict in medical opinion between Dr. Marvel, appellant's attending physician, and Dr. Quinn, the second opinion specialist, as to the nature and degree of appellant's employment-related conditions and any resultant disability.<sup>6</sup> The Board has held, however, that a wage-earning capacity determination must be made on a reasonably current medical evaluation.<sup>7</sup>

In the case of *Keith Hanselman*,<sup>8</sup> the relevant medical report was almost two years old when the Office issued its decision modifying the claimant's compensation. The relevant work restriction evaluation form was over one year old, was not fully completed, listed no current findings and was unaccompanied by evidence that it was made with the benefit of a concurrent examination. The Board held that these reports could not form a valid basis for a loss of wage-earning capacity determination.

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<sup>3</sup> *Pope D. Cox*, 39 ECAB 143, 148 (1988).

<sup>4</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403(d).

<sup>5</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

<sup>6</sup> The record contains reports addressing appellant's psychological impairments including a March 28, 2002 report from Dr. Randy Rummeler, a Board-certified psychiatrist selected as an impartial medical examiner to resolve the conflict regarding appellant's psychological condition. However, as these reports do not address appellant's physical ability to work, the reports are not sufficient to meet the Office's burden of proof on that issue.

<sup>7</sup> *Anthony Pestana*, 39 ECAB 980, 986-87 (1988).

<sup>8</sup> 42 ECAB 680, 687 (1991).

In the case of *Ellen G. Trimmer*,<sup>9</sup> the Board found that the Office did not meet its burden of justifying the reduction of the employee's monetary compensation because of fatal defect in its determination of wage-earning capacity. The Office had based its decision on a work-tolerance limitations report by the employee's attending physician, but by the time the Office determined that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened its relevance.

In *Samuel J. Russo*,<sup>10</sup> the Office determined the claimant's wage-earning capacity without a current medical evaluation of the claimant's work limitations. The most recent medical reports regarding such limitations in that case were prepared two years prior to the Office's determination. In *Anthony Pestana*,<sup>11</sup> the Board held that the Office failed to ensure that the record contained a detailed current description of the claimant's disabled condition and ability to perform work. In that case, the Office made its wage-earning capacity determination nearly five years after the claimant's most thorough physical examination and evaluation.

The Office in this case based its decision regarding appellant's wage-earning capacity on a medical determination by Dr. Gelman, the impartial medical specialist, that appellant could do the work of a telephone solicitor. This determination was made in reports of February 25 and May 30, 2000, dated more than two years prior to the Office's August 26, 2002 proposed reduction and its October 1, 2002 decision reducing appellant's compensation benefits. Pursuant to *Hanselman*,<sup>12</sup> *Trimmer*,<sup>13</sup> and *Russo*,<sup>14</sup> the Board finds that Dr. Gelman's reports are not reasonably current and cannot form a valid basis for a loss of wage-earning capacity decision. As this medical evidence was based on an examination made two years prior to the Office's decision, it does not clearly represent appellant's abilities at the time of the October 2, 2002 wage-earning capacity determination. Due to this defect, Dr. Gelman's reports lack probative value and cannot be sufficient to meet the Office's burden of proof to reduce appellant's compensation benefits. It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>15</sup> The Office failed to meet its burden of proof because there was insufficient probative evidence in the record to establish that the selected position of telephone solicitor was consistent with appellant's current work tolerance limitations at the time the decision was issued.

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<sup>9</sup> 32 ECAB 1878, 1882 (1981).

<sup>10</sup> 28 ECAB 43, 47 (1976).

<sup>11</sup> 39 ECAB 980, 985 (1988).

<sup>12</sup> *Supra* note 8.

<sup>13</sup> *Supra* note 9.

<sup>14</sup> *Supra* note 10.

<sup>15</sup> *Harold S. McGough*, 36 ECAB 332 (1984).



**CONCLUSION**

As the medical evidence describing appellant's physical condition upon which the Office relied was not reasonably current, the Board finds that the Office did not meet its burden of proof to reduce appellant's compensation benefits based on his ability to perform the duties of a telephone solicitor.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 15, 2003 and October 2, 2002 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 19, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member