United States Department of Labor
Employees' Compensation Appeals Board

TERRY L. HEWITT, Appellant	)	
and	)	**Docket No. 04-842**
	)	**Issued: September 13, 2004**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Terry L. Hewitt, pro se
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 February 11, 2004 appellant filed an appeal from a merit decision of the Office of Workers' Compensation Programs dated May 19, 2003 which finalized a proposed reduction of his compensation effective June 15, 2003 on the grounds that the position of a telephone solicitor represented his wage-earning capacity. 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 properly reduced appellant's compensation entitlement effective June 15, 2003 on the grounds that the position of telephone solicitor represented his wage-earning capacity.

FACTUAL HISTORY

This is appellant's second appeal before the Board. In the prior appeal, the Board reversed decisions of the Office dated July 31 and May 10, 1996 finding that it had improperly

reduced appellant's compensation on the grounds that the position of salesperson represented his wage-earning capacity. The Board found that the Office had failed to consider appellant's preexisting conditions from military service-related Type II diabetes mellitus, renal failure, diabetic retinopathy and foot ulcers. The facts and the circumstances of the case are presented in the prior decision and are hereby adopted by reference.[1]

Upon return of the case to the Office, it created a new statement of accepted facts and referred appellant, together with questions to be resolved to a second opinion medical examiner.[2]

On January 10, 2001 appellant was referred to Dr. Steven J. Valentino, an osteopathic physician, for an evaluation of his physical limitations.

By report dated January 29, 2001, Dr. Valentino reviewed appellant's factual and medical history, and noted that he complained of occasional medial right elbow discomfort and intermittent paresthesias radiating from the right medial elbow region into the ulnar two fingers. Dr. Valentino reported appellant's medications and past treatments and noted that diagnostic studies revealed right upper extremity mixed mild motor and sensory peripheral polyneuropathy consistent with insulin dependent diabetes mellitus, bilateral carpal tunnel syndrome, status post right ulnar nerve decompression, neurolysis and submuscular transposition with a right medial epicondylectomy, right ulnar neuropathy at the elbow, left thigh exploration and debridement of necrotic muscles, and degenerative changes or gout in the first metatarsal phalangeal joints. Dr. Valentino indicated that thoracic outlet syndrome and reflex sympathetic dystrophy were not present and that Allen's, Wright's, Roo's, Phalen's, reverse Phalen's, ulnar stretch and Tinel's signs were all normal. He diagnosed resolved lumbar strain, resolved right elbow contusion, but noted that appellant had residual right ulnar neuropathy, and noted that this was a residual of his employment injury. Dr. Valentino opined that appellant was not in need of ongoing supervised medical care referable to his work-related injury and was capable of gainful employment taking into account his work-related residuals only. He indicated that appellant had significant nonindustrial diagnoses of diabetes, renal failure, ulceration of the right foot, diabetic retinopathy, debridement of the left lower extremity secondary to complications of diabetes and a kidney and pancreatic transplant. Dr. Valentino also noted that appellant had left-sided residuals of the September 24, 1987 condition noted in a diminished sensory examination. He indicated that appellant could work 8 hours per day with a 20-pound pushing, pulling and lifting limitation.

On February 8, 2001 the vocational rehabilitation counselor noted that Dr. Valentino released appellant to return to full-time, light-duty work, but noted that, in determining his physical capacities, Dr. Valentino only took into account appellant's work-related residuals, when the Board had previously explained that preexisting conditions had to be considered.

[1] Docket No. 96-2563 (issued November 16, 1998).

[2] The Office accepted that appellant sustained lumbar strain, contusion of the right elbow, a right ulnar nerve lesion and a peripheral nerve transposition, when a 20-foot piece of pipe fell off his shoulder and struck his elbow. Concurrent conditions related to his military service were noted as including Type II diabetes mellitus, status post kidney and pancreas transplant due to diabetes-related chronic renal failure, myonecrosis of the left thigh muscle, polyneuropathy of the right upper extremity, peripheral neuropathy of the bilateral lower extremities, impotency, hypertension and diabetic retinopathy.

On July 20, 2001 a rehabilitation counselor indicated that on August 6, 2001 appellant would undergo removal of a piece of retina to stop the bleeding behind the eye and to fuse the blood vessels by laser. She indicated that this was due to appellant's diabetes and the blood pressure.

On October 11, 2001 the rehabilitation counselor noted that appellant had undergone two eye surgeries and had a third scheduled that month which was preventing him from moving forward with a rehabilitation development plan and job placement efforts.

On November 23, 2001 the Office was advised that appellant was undergoing laser treatments on his eyes which did not seem to be improving his sight.

On February 12, 2002 appellant's rehabilitation specialist noted that he continued to have eye problems and was scheduled for additional eye surgery. She noted that these problems were preexisting and were related to his diabetes and kidney problems.

On April 22, 2002 the Office medical adviser noted that appellant was undergoing an undisclosed type of eye surgery on May 14, 2002.

In an April 20, 2002 treatment note, Dr. Robert M. Kelly, a Board-certified ophthalmologist, reported that appellant was a patient of their eye clinic and had been diagnosed as having a visually significant cortical cataract in his left eye and was scheduled for cataract extraction on May 14, 2003.

By report dated April 30, 2002, Dr. Kelly provided the Office with a complete outline of appellant's treatment and surgeries. Dr. Kelly noted that the diagnosis for both eyes was hyperopic astigmatism, for the right eye it was proliferative diabetic retinopathy status post panretinal photocoagulation (PRP) by another physicians, cortical cataract and decreased visual acuity presumed secondary to past diabetic retinopathy, and for the left eye proliferative diabetic retinopathy status post PRP and cortical cataract. Dr. Kelly noted that appellant underwent panretinal photocoagulations of the left eye on August 6, September 10, October 15 and November 19, 2001 and January 28, 2002. He indicated that a cataract extraction with intraocular lens insertion of the left eye was scheduled for May 14, 2002, and that his recovery was expected to take up to five weeks. Dr. Kelly opined that appellant's eye conditions began in 1991 and opined that he had a fair chance of increased vision on the left eye with cataract extraction, and a slight chance of increased vision on the right with cataract extraction. Regarding the rehabilitation office's question about vocational rehabilitation Dr. Kelly replied that appellant might could work but only if he does not have to see anything smaller than six point typeface and is not under time pressure.

On September 9, 2002 appellant was diagnosed with elevated resistive indices identified throughout the transplanted kidney and slight echogenicity, which was felt to be due to either chronic rejection or cyclosporin toxicity.[3]

[3] On August 13, 1995 appellant underwent a kidney and pancreas transplant.

On September 12, 2002 the Office requested that appellant submit further medical evidence from his treatment physicians discussing his diagnosis, prognosis and causal relationship with his employment.

By report dated June 3, 2002, the rehabilitation counselor noted that appellant continued to have problems with his eyes and had further surgery scheduled. The rehabilitation counselor admitted that, although his compensable injury would not keep him from working in the general labor market, the residuals of his other conditions including diabetes, eye problems, transplant problems and the rest would probably make it extremely difficult for him to become employed.

On September 12, 2002 the Office again requested that appellant submit further medical evidence from his treating physicians discussing his diagnosis, prognosis and causal relationship with his employment.

On December 5, 2002 the rehabilitation counselor opined that appellant could perform the duties of a telephone solicitor which was sedentary and inside and required 30 days to 3 months of preparation. The rehabilitation counselor found that telephone solicitor was performed in appellant's general area and that such jobs were available after consulting employers. The job classification, Office Form CA-66, for the position of telephone solicitor indicated that appellant needed to reach, handle, finger and feel, and that he could talk, hear and see with acuity, depth perception, field of vision and accommodation frequently. An explanation sheet accompanying the form also indicated that appellant would have to keep records, perform filing and key data, type reports on sales activities set up displays of sample merchandise complete orders, deliver merchandise and collect money and keep records of the amounts. Writing orders and entering orders into a computer were also mentioned.

On December 19, 2002 the rehabilitation counselor was directed to submit a closure report on appellant addressing job availability. The rehabilitation counselor followed direction and found that the job of telephone solicitor was suitable to appellant's partially disabled condition, and he closed the case. The occupational physical requirements for the position of telephone solicitor included reaching occasionally, handling occasionally, fingering frequently, and seeing with near acuity occasionally and with visual accommodation frequently.

On January 28, 2003 the rehabilitation specialist noted that, based on the report of Dr. Valentino, appellant was physically capable of performing the position of telephone solicitor. The counselor found that appellant's vocational training was sufficient to qualify him for the position. Appellant's designated claims examiner was so advised.

On February 10, 2003 the Office issued appellant a notice of proposed reduction of compensation on the grounds that he was no longer totally disabled and had the ability to earn the wages in the position of telephone solicitor. The Office noted that Dr. Valentino had found that appellant could work 8 hours per day with a 20-pound lifting restriction, and that vocationally appellant had the skills and training to perform the job of telephone solicitor, a sedentary position without climbing, balancing, stooping, kneeling, crouching or crawling.

Appellant was given 30 days within which to respond to the proposed reduction if he disagreed with the proposed action.

In an undated letter, appellant disagreed with the proposed action and argued that he was totally disabled.

On March 28, 2003 the Office decided that further medical studies should be authorized. On April 1, 2003 appellant was referred to Dr. Gerald Packman, a Board-certified orthopedic surgeon, with a standard set of questions about injury-related factors.

By report dated April 21, 2003, Dr. Packman reviewed the evidence submitted and discussed the questions regarding appellant's orthopedic accepted injuries. Dr. Packman did note that appellant's discomfort, weakness and numbness in the upper extremities was present and that he had restricted elbow flexion and the inability to lift things with the right upper extremity. He did note that diabetic neuropathy added to appellant's difficulties standing and that he could not do prolonged standing, sitting or bending. Dr. Packman noted that appellant had chronic lower extremity edema which was uncomfortable and was presumably related to his chronic liver failure and that he had impairment vision due to cataracts. No fundescopic examination was completed and no diabetic retinopathy was diagnosed. Dr. Packman noted that appellant had significant osteoporosis which made him a poor candidate for physical labor and he noted that since appellant was still undergoing medical treatment related to his vision and his kidneys and presumably his other problems related to diabetes and hypertension, he did not need further treatment of his right upper extremity related to his work-induced problems. He noted that appellant had reached maximum benefit for medical treatment on that account. Appellant's working limitations were noted as including the inability to do significant heavy lifting with the right upper extremity, the inability to work overhead with the right upper extremity and the inability to do fine manipulation and discrimination with the right hand. Dr. Packman also found limitations on appellant's ability to bend, kneel, squat, crawl, or do any impact activities related to his chronic lumbar strain. He continued that appellant should not be required to ambulate over uneven surfaces because of his lower extremity peripheral neuropathy, use ladders, work at heights or perform impact activities. Dr. Packman noted that appellant's visual problems had not been clearly delineated in the records and that since he was having ongoing visual treatment, any visual impairment questions should be directed to an ophthalmologist. He discussed appellant's orthopedic ability to perform the job of telephone solicitor and found that he could do most, but not all, of the work and needed the ability to change position from sitting to standing at will. Dr. Packman qualified his answers, noting that they only pertained to appellant's orthopedic disabilities. He opined that appellant had medical residuals of his accepted conditions which included the numbness and tingling in the right middle finger and little finger as well as his complaints of low back discomfort.

The Office also referred appellant to Dr. Margaret Burke, Board-certified in internal medicine, for an evaluation.

By report dated April 30, 2003, Dr. Burke reviewed appellant's factual and medical history, and noted his complaints that when he uses his right hand to write the forearm hurts and the pain runs from his inner elbow to his left fifth finger. She noted that he claimed that he dropped a lot of things because when his hand opened up he could not feel it. Dr. Burke also

noted that appellant was unable to straighten his right arm and when he tries he feels pain in the medial elbow area. She noted that he could not carry anything in his right hand, and that he had chronic soreness between his scapulae. Dr. Burke noted appellant's extensive list of medications and reported the results of her examination, finding pitting edema in his ankles, dullness to light touch from his feet to his knees and from his hands to his shoulders, normal straight leg raising, but pain with palpation of the paraspinous muscles in the area between the scapulae. She diagnosed diabetic neuropathy secondary to his diabetes mellitus, but noted that preexisting disability included diabetes mellitus, renal failure, hypertension secondary to renal failure, muscle necrosis and status post debridement of the left inner thigh, cataracts bilaterally, osteoporosis and skin cancers. Dr. Burke declared that appellant had no physical limitations and would be able to perform the job of telephone solicitor.

By decision dated May 19, 2003, the Office finalized its proposed reduction of compensation effective June 15, 2003 finding that appellant was able to perform the job of telephone solicitor. The Office found that Dr. Burke found that he needed no restrictions and could perform the job of telephone solicitor.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] When 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 of benefits.[5]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.[6] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[7]

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Id.; Samuel J. Russo*, 28 ECAB 43 (1976).

[6] *See generally*, 5 U.S.C. § 8115(a). *See also Bettye F. Wade*, 37 ECAB 556 (1986). Section 8115(a) of the Act, which provides:

> "Wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

[7] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

According to the Office's Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(a)(2) (December 1993) factors which must be considered in assessing suitability of a selected constructed position include the degree of physical impairment, "including impairments resulting from *both* injury-related and *preexisting conditions*." (Emphasis added.)

ANALYSIS

In the instant case, the Office failed to adequately consider the current impairments appellant manifested, particularly his diabetic retinopathy and cataracts, which would significantly impair his vision and which would not be corrected to achieve good visual acuity, and his upper extremity paresthesias in his fingers which would affect his ability for fine manipulation, due to his preexisting uncontrolled diabetes mellitus, in determining that he could perform the position of a telephone solicitor.

The Office accepted that on September 24, 1987 appellant sustained lumbar strain, a contusion of the right elbow, and a right ulnar nerve lesion and that he had to undergo a surgical peripheral nerve transposition and a bilateral carpal tunnel release for right ulnar nerve compression. Concurrent conditions noted to exist at that time, but which were not accepted as work related included diabetes mellitus, renal failure, diabetic neuropathy, ulceration of the foot, diabetic retinopathy, and status post kidney and pancreas transplant. It is the impairments resulting from these preexisting diabetes mellitus-related conditions which the Office acknowledged as existing at the time of injury, but which it did not consider, and from further diabetes mellitus sequelae which the medical evidence supports continued to disable appellant from employment.

Dr. Valentino, an orthopedist, specifically stated that his report did not consider any of appellant's preexisting conditions in its disability determination and activity limitations. He reported that diagnostic studies revealed right upper extremity mixed mild motor and sensory peripheral polyneuropathy, bilateral carpal tunnel syndrome, status post right ulnar nerve decompression, neurolysis and submuscular transposition with a right medial epicondylectomy, and right ulnar neuropathy at the elbow. Dr. Valentino gave appellant work restrictions only referring to his accepted employment conditions which he found resolved, except for the residual right ulnar nerve neuropathy, and specifically stated that he did not address appellant's impairments due to his nonindustrial conditions related to diabetes mellitus. As Dr. Valentino stated that his examination and work restrictions were given only considering the employment-related conditions, his report is not probative on the preexisting nonindustrial conditions or on whether they disabled appellant from employment.

Dr. Kelly, the ophthalmologist, noted that appellant had a visually significant cortical cataract in his left eye, hyperopic astigmatism, right eye proliferative diabetic retinopathy following panretinal photocoagulation, a cortical cataract and decreased visual acuity secondary to diabetic retinopathy, left eye proliferative diabetic retinopathy following panretinal photocoagulation, and a cortical cataract. With cataract extractions, Dr. Kelly opined that appellant had only a fair chance of increased vision on the left and a slight chance of vision on the right. He opined that appellant might be able to work but only if he does not have to see

anything smaller than six point type face. Dr. Kelly was not asked whether appellant could perform the position of telephone solicitor, and the Board notes that visual acuity, depth perception, an adequate field of vision and the ability for frequent visual accommodation were all required in the position description. Therefore, Dr. Kelly's report does not support that appellant can work as a telephone solicitor.

Appellant was then evaluated by Dr. Packman, another orthopedic surgeon, who addressed appellant's employment-related conditions regarding his upper and lower extremities. He noted that appellant had discomfort, weakness and numbness in his upper extremities with restricted elbow flexion and the inability to lift things with the right upper extremity. Dr. Packman noted that appellant had dependent lower extremity edema and difficulties with standing, and that he could not do prolonged standing, sitting or bending due to his diabetic neuropathy. He also noted that appellant had vision impairment due to cataracts, but he performed no fundescopic examination and no further evaluation of appellant's visual limitations was made, but he referred further development on this issue to an ophthalmologist. Dr. Packman felt appellant was a poor candidate for physical labor due to osteoporosis, and he indicated that appellant's right upper extremity was restricted from significant heavy lifting, working overhead, and performing fine manipulation and discrimination. Regarding appellant's ability to perform the job of telephone solicitor, Dr. Packman addressed the orthopedic aspect of appellant's disability only, and found that he could do most, but not all, of the work required. He noted that appellant had medical residuals of his accepted conditions which included numbness and tingling in the right middle finger and little finger. As Dr. Packman did not address appellant's visual disabilities, his report does not support that appellant's vision meets the requirement in the *Dictionary of Occupational Titles*. In fact he referred the Office to an opinion from an ophthalmologist on the issue of appellant's visual acuity, and admitted that appellant was restricted from performing fine manipulation and discrimination with his right hand due to diabetic neuropathies, among other things. Therefore, Dr. Packman's report only supports that appellant can perform some but not all of the physical activities required for the position of telephone marketer.

Appellant was referred to Dr. Burke, an internist, for evaluation regarding internal medicine matters. She noted his orthopedic complaints, noted that when he wrote with his right hand his forearm hurt from his inner elbow to his fifth finger, and noted that he dropped things because when his hand opened up he could not feel it. Dr. Burke opined that appellant could not carry anything in his right hand and that he had chronic soreness between the scapulae. She found pitting edema in his lower extremities and she diagnosed diabetic neuropathy secondary to his diabetes mellitus, renal failure, hypertension secondary to renal failure, muscle necrosis status post debridement of the left inner thigh, cataracts bilaterally, osteoporosis and skin cancers. She opined that appellant had no physical limitations and would be able to perform the job of telephone solicitor. As Dr. Burke did not even address appellant's visual impairments her report is not probative on that issue, and as she lists his diagnoses related to the diabetic neuropathies and diabetes mellitus and states that he could not carry anything with his right hand, but then without explanation states that he had no physical limitations or restrictions, without any medical explanation, her opinion is unrationalized and therefore of insufficient probative value to establish that appellant could work as a telephone solicitor.

The physical requirements of the position of telephone solicitor included the ability to finely manipulate, handle, finger and feel forms and other things, and to perform recordation, filing, keying data, typing reports on sales activities, completing orders, collecting money, and delivering merchandise. The visual requirements for the position of telephone solicitor are that the individual have visual acuity, depth perception, an adequate field of vision and the ability for frequent visual accommodation, all of which were specifically required in the position description. These physical and visual requirements for the position of telephone solicitor present a problem for an employee who cannot see well out of either eye due to cataracts and who has additional visual problems due to diabetic retinopathy and deterioration of his retina, leading to further deterioration of his visual skills, and who has paresthesias affecting his ability to finger, feel, handle, touch and manipulate paperwork and other information, and absent the ability to lift or carry using his right hand, all of which is integral to the performance of the position, according to the *Dictionary of Occupational Titles.*

CONCLUSION

The Board finds that the Office improperly determined that appellant can perform the duties of telephone solicitor. Therefore, it failed to meet its burden of proof in reducing appellant's compensation benefits based on his ability to perform the duties of this position.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2003 is reversed.

Issued: September 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member