

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

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**RAY W. ROLLINS, Appellant**

**and**

**DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD,  
Philadelphia, PA, Employer**

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**Docket No. 05-1882  
Issued: April 20, 2006**

*Appearances:*  
David C. Harrison, Esq., for appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 12, 2005 appellant filed a timely appeal of a June 9, 2005 merit decision by the Office of Workers' Compensation Programs, which denied modification of appellant's wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether the Office properly denied modification of its determination that the constructed position of telephone solicitor represented appellant's wage-earning capacity.

## **FACTUAL HISTORY**

This case has been before the Board twice before. The facts of this case are presented in the previous Board decisions and are hereby incorporated by reference.<sup>1</sup> The facts relevant to the current issue are set forth.

The Office accepted appellant's April 6, 1980 traumatic injury claim for mild instability of the left knee and approved compensation benefits through March 10, 1981, after which appellant returned to regular duty.<sup>2</sup> On January 24, 1984 the Office accepted a November 14, 1983 traumatic injury claim for low back sprain and pain syndrome. Appellant stopped work and received appropriate compensation for total disability. By decision dated September 30, 2002, the Office reduced appellant's compensation based upon his ability to earn wages as a telephone solicitor. This decision was affirmed by an Office hearing representative on June 23, 2003 and by the Board on March 11, 2004 in Docket No. 03-2283. The Board noted that a conflict existed between Dr. Randall N. Smith, appellant's treating Board-certified orthopedic surgeon, who opined that appellant was totally disabled due to the work-related injury and Dr. William H. Simon, a Board-certified orthopedic surgeon, who determined that appellant was able to return to light work. The Office properly referred appellant to Dr. Marvin N. Kallish, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Kallish opined that there were no residuals from the work-related accident and that appellant was capable of doing light-duty and semi-sedentary work as a telephone solicitor. The Board also noted that Dr. Maurie Pressman, a Board-certified psychiatrist, noted that appellant was capable of gainful occupation and that Dr. Myron W. Frederic, a Board-certified neurologist and internist, noted that appellant had no neurologic condition related to his accepted injury. The Board's decision dated February 17, 2005 in Docket No. 04-2159, affirmed the Office's denial of appellant's request for reconsideration.

By letter dated April 5, 2005, appellant requested reconsideration and submitted a March 16, 2005 report from Dr. Richard G. Fried, a dermatologist and clinical psychologist. Dr. Fried indicated that appellant noted the onset of psoriasis around the time of his 1983 accident and had significant psychological stress making his ability to function vocationally impossible in association with his ongoing pain. He stated:

“[In] my professional opinion, [appellant] is suffering from post[-]traumatic stress disorder, which appears to be ongoing as a result of his accident and ongoing pain. It is my belief that his psoriasis is also being exacerbated by his [post-traumatic stress disorder] and ongoing pain. Conversely, his psoriasis itself is a source of significant physical and emotional stress.”

Appellant also submitted a March 2, 2005 report by Dr. Smith, who opined that the appellant was totally disabled due to chronic pain syndrome from his ongoing neck and back conditions. He diagnosed myofascial pain, discogenic problems and post-traumatic stress

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<sup>1</sup> Docket No. 04-2159 (issued February 17, 2005); Docket No. 03-2283 (issued March 11, 2004).

<sup>2</sup> At the time of the employment injury, appellant was a 26-year-old painter, who twisted his left knee descending a “brow.”

disorder. Dr. Smith stated: “Theoretically, on a part-time basis, he could be working but to be asked to return to work regularly with all of his orthopedic, psychological, dermatological and medical problems, it just seems beyond reason.”

By decision dated June 9, 2005, the Office denied modification of its loss of wage-earning capacity determination.

### **LEGAL PRECEDENT**

It is well established that, once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>3</sup> The burden of proof is on the party attempting to show a modification.<sup>4</sup> There is no time limit for a claimant to submit a request for modification of a wage-earning capacity determination.<sup>5</sup>

### **ANALYSIS**

In the instant case, the Board affirmed the Office’s determination that appellant’s wage-earning capacity was represented by the position of telephone solicitor. The burden is on appellant to show that this determination should be modified as he is the party requesting modification. Appellant has not submitted evidence sufficient to establish that a modification was warranted. There is no evidence that there has been a material change in the nature and extent of appellant’s injury-related condition nor is the evidence submitted sufficient to show that the original determination was erroneous. Dr. Smith merely reiterated his prior opinion with regard to appellant being totally disabled due to chronic pain syndrome and ongoing neck and back conditions. However, this issue was resolved when the case was referred to the impartial medical examiner, Dr. Kallish, who determined that appellant was capable of performing sedentary work. The Board notes that appellant’s case has only been accepted for instability in the left knee, low back pain and pain disorder. Accordingly, Dr. Fried’s opinion with regard to appellant suffering from significant psychological stress and psoriasis is not relevant to the issue appellant’s level of disability and wage-earning capacity with regard to the accepted injuries.

### **CONCLUSION**

The Office properly denied modification of its determination that the constructed position of telephone solicitor represented appellant’s wage-earning capacity.

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<sup>3</sup> *Gary L. Moreland*, 54 ECAB 638 (2004); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 9, 2005 is affirmed.

Issued: April 20, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board