

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

S.L., Appellant)
and) Docket No. 07-2351
U.S. POSTAL SERVICE, POST OFFICE,) Issued: September 15, 2008
Oakland, CA, Employer)

)

Appearances: Case Submitted on the Record
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 27, 2007 appellant filed a timely appeal of a September 26, 2007 decision of the Office of Workers' Compensation Programs regarding his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's wage-loss compensation effective September 30, 2007 based on his ability to perform the constructed position of telephone solicitor.

FACTUAL HISTORY

The Office accepted that on April 3, 1972 appellant, then a 25-year-old mail handler, sustained a right knee contusion with internal derangement when he struck his knee at work.¹

¹ The Office also accepted a right knee contusion sustained on January 17, 1968. Appellant received a schedule award for a 20 percent impairment of the right lower extremity, from July 16, 1975 to August 22, 1976.

Appellant underwent right knee surgery on July 20, 1972 to repair torn cartilage and ligaments. The Office also accepted a right knee contusion sustained on August 7, 1973 and a right knee strain sustained on April 14, 1975. Appellant received compensation for total disability beginning in 1983.²

Dr. Thomas D. Schmitz, an attending Board-certified orthopedic surgeon, performed right knee arthroscopies in 1980, 1992 and on March 13, 1998 to address chondromalacia, degenerative changes and internal derangement.³

Appellant received vocational rehabilitation services from October 2002 through March 2004. Initial testing showed that he was functionally illiterate although he earned a real estate license in 1977. Appellant attributed his learning deficits to a 14-year period of homelessness with polysubstance addictions beginning in 1984. In 2003, he completed a nine-month adult basic education class but did not improve his academic performance.⁴

Dr. Schmitz submitted periodic reports noting appellant's chronic right knee pain, patellofemoral chondromalacia and a femoral spur.⁵ On December 1, 2004 he opined that appellant could perform full-time sedentary duty with restrictions. Appellant was then followed by Dr. Scott M. Taylor, a Board-certified orthopedic surgeon, who submitted reports through June 2005 finding appellant totally disabled for work due to osteoarthritis of the right knee with muscle spasms.⁶

The Office obtained a second opinion from Dr. John Randall Chu, a Board-certified orthopedic surgeon. In a June 9, 2005 report, Dr. Chu found appellant capable of full-time sedentary duty as a telemarketer, with standing limited to two hours.

Appellant received job placement services from June 2005 to March 2006. The vocational consultant identified the positions of information clerk, taxicab dispatcher and

² By decision dated August 30, 1983 and affirmed on September 11, 1984, the Office reduced appellant's wage-loss compensation based on his actual earnings as a real estate salesperson. By decision dated January 24, 1984, it found that appellant forfeited his compensation from November 10, 1977 to November 1, 1982 as he failed to fully report income from real estate sales. Following the period of forfeiture, appellant continued to receive total disability compensation.

³ A September 30, 1991 magnetic resonance imaging (MRI) scan showed a posterior horn and lateral meniscus tear, chronic degeneration and prior surgery. A March 16, 2004 x-ray showed minimal degenerative changes behind the right patella. An April 20, 2004 MRI scan showed a small osteochondral defect of the dorsal medial patella and in the femoral notch and a Grade I strain of the medial collateral ligament.

⁴ On April 11, 2005 the Office obtained a second opinion from Dr. Jillian Daly, a licensed clinical psychologist, who found appellant's test results invalid as he deliberately gave incorrect or misleading answers. Dr. Daly diagnosed dysthymic and personality disorders.

⁵ In an October 29, 2002 letter, appellant admitted that he supplemented the Darvocet prescribed by Dr. Schmitz with Vicodin, Lortab, Lodine and Motrin obtained from other physicians.

⁶ In an April 21, 2005 report, Dr. O. Barry McKinley, a neurologist to whom appellant was referred by Dr. Taylor, diagnosed right knee pain with a slight narrowing of the patellofemoral interval.

telephone solicitor as within appellant's medical and vocational capacities. The positions were classified as sedentary, with lifting requirements of 10 pounds or less, and required 3 to 30 days of vocational preparation. A labor market survey showed the positions were reasonably available in appellant's commuting area. Appellant conducted a job search but did not obtain employment.

By notice dated April 7, 2006, the Office proposed to reduce appellant's compensation based on his ability to earn wages in the selected position of taxicab dispatcher. Appellant responded by April 18 and 24, 2006 letters, asserting that there were no jobs available for taxicab dispatchers within his commuting area. He submitted reports from Dr. Taylor dated through July 2007, recommending a neurologic consult for right knee clonus. Dr. Taylor opined that appellant could work four hours a day sedentary duty.

The Office found a conflict of medical opinion between Dr. Chu, for the government, and Dr. Taylor, for appellant. To resolve the conflict, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Jack Stehr, a Board-certified orthopedic surgeon. In a July 6, 2007 report, Dr. Stehr opined that appellant's right knee was stable, with a full range of motion, normal joint spaces and no neurologic abnormalities. He diagnosed mild degenerative arthritis of the right knee. Dr. Stehr found appellant able to work full time as a taxicab dispatcher or telephone solicitor. He noted that appellant should avoid walking, kneeling, squatting, stair climbing and prolonged standing.

A July 27, 2007 labor market survey showed that telephone solicitor positions were reasonably available in appellant's commuting area with starting wages of \$13.00 to \$17.00 an hour, averaging \$600.00 a week.

On August 16, 2007 appellant was advised that the Office proposed to reduce his compensation based on his capacity to earn wages in the selected position of telephone solicitor. The Office found that the position was within the job restrictions provided by Dr. Stehr. Appellant responded by August 27, 2007 letter, contending that he could not earn \$600.00 a week as telemarketing job advertisements showed starting wages of only \$480.00 to \$560.00 a week.

By September 26, 2007 decision, the Office finalized the wage-earning capacity determination. It found that appellant had a 71 percent wage-earning capacity and his compensation would be reduced effective September 30, 2007.

LEGAL PRECEDENT

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 of benefits.⁷ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the

⁷ *David W. Green*, 43 ECAB 883 (1992).

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 an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the 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*,⁹ will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

ANALYSIS

The Office accepted that appellant sustained a right knee contusion with internal derangement, necessitating subsequent surgical repairs. Dr. Schmitz, an attending Board-certified orthopedic surgeon, opined that appellant could perform sedentary work for eight hours a day as of December 1, 2004. Following vocational rehabilitation and job placement assistance, the Office determined that the selected position of telephone solicitor represented appellant's wage-earning capacity as of September 30, 2007, based upon the July 6, 2007 report of Dr. Stehr, a Board-certified orthopedic surgeon and impartial medical examiner.

The telephone solicitor position was classified as sedentary, with occasional lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Stehr. A vocational consultant found appellant's education and experience commensurate with the position's requirements, as he once held a real estate license and recently completed an adult education course. The vocational consultant then determined the prevailing wage rate of telephone solicitor positions and their reasonable availability in the open labor market. Based on these calculations, the Office issued a September 26, 2007 decision reducing appellant's compensation based on his ability to earn \$600.00 a week as a telephone solicitor.

The Board finds that the Office considered the proper factors, such as availability of telephone solicitor positions and appellant's physical limitations, in determining that the telephone solicitor position represented his wage-earning capacity. Dr. Stehr opined that appellant was medically capable of working full time as a telephone solicitor. The vocational consultant found that telephone solicitor positions were reasonably available in appellant's commuting area. Also, the Office followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant

⁸ M.A., 59 ECAB __ (Docket No. 07-349, issued July 10, 1998); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁹ 5 ECAB 376 (1953).

¹⁰ *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

did not contend that the Office erred in its mathematical calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

Appellant contested that telephone solicitors earned less than \$600.00 a week. However, the labor market survey supports the availability of these wages. The Board finds that the Office properly found that appellant was medically and vocationally capable of working full time as a telephone solicitor. The Office's September 26, 2007 decision reducing appellant's compensation based on his ability to earn wages in the selected position of telephone solicitor is proper under the law and facts of this case.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective September 30, 2007 based on his ability to earn wages in the selected position of telephone solicitor.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2007 is affirmed.

Issued: September 15, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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