

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

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**W.D., Appellant**

**and**

**U.S. POSTAL SERVICE, RIVERTON HEIGHTS  
POST OFFICE, Seattle, WA, Employer**

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**Docket No. 09-188  
Issued: August 21, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 27, 2008 appellant filed a timely appeal from the September 29, 2008 merit decision of the Office of Workers' Compensation Programs, which determined the loss of wage-earning capacity attributable to his March 11, 1969 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board has no jurisdiction to consider evidence that was not before the Office at the time of its September 29, 2008 final decision.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly reduced the compensation payable for appellant's March 11, 1969 employment injury.

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<sup>1</sup> 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

On March 11, 1969 appellant, then a 35-year-old regular carrier, sustained an injury in the performance of duty when, while unloading onto a raised portion of sidewalk, he stepped from his truck and turned his right ankle. The Office accepted his claim for right ankle sprain, right ankle instability and right ankle surgery. Appellant underwent a right ankle arthrotomy with reconstruction of the lateral ligaments. Following the injury, he was diagnosed with hypertension, cardiovascular problems with a triple bypass, angina, left knee arthritis and back problems, none of which were considered work related.

A conflict in medical opinion arose on whether the March 11, 1969 employment injury continued to totally disable appellant for all work. Appellant's family physician, Dr. John M. Ward, considered appellant chronically and completely incapacitated and disabled as a result of his right ankle. Dr. Edward J. Prostic, an orthopedic surgeon and Office referral physician, disagreed. He found that, based on the right ankle injury alone, appellant was not totally disabled for all work. Indeed, Dr. Prostic felt that some people with such an injury could return to full duties as a letter carrier, with or without an ankle foot orthosis, though patients with significant loss of motion of the ankle and hind foot would usually have difficulty walking on uneven surfaces, squatting and kneeling. He suggested that appellant be offered duties that did not require standing or walking more than 50 minutes per hour with avoidance of more than minimal climbing, squatting, kneeling or walking over uneven surfaces. Dr. Prostic reported that no abnormality was noted on multiple x-rays of the right ankle.

Dr. Ward reviewed Dr. Prostic's report and expressed his disagreement. He stated that appellant could not walk 50 minutes in an hour. Dr. Ward doubted that appellant could walk five minutes and x-rays he obtained in 2004 demonstrated not only operative changes, but chronic degenerative changes in the ankle as a result of the surgery. He concluded that appellant had a severe torn lateral ligament, which underwent reconstruction with a bad result. Dr. Ward stated that appellant could not walk, could not stand for prolonged periods and would remain chronically disabled.

To resolve this conflict, the Office referred appellant, together with medical records and a statement of accepted facts, to Dr. Corey G. Solman, Jr., a Board-certified orthopedic surgeon,<sup>2</sup> who examined appellant on February 6, 2008. Dr. Solman reviewed numerous medical records on the treatment of appellant's right ankle, and he obtained an x-ray. He related appellant's history in some detail. Dr. Solman noted appellant's complaints, described his findings on physical examination and reviewed a magnetic resonance imaging scan from July 25, 2006. He diagnosed chronic right ankle pain and instability with mild osteoarthritis.

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<sup>2</sup> The Office initially referred appellant to Dr. Jeff Harsch, but later determined he was not Board-certified and therefore not qualified to serve as an impartial medical specialist. The Office then referred appellant to Dr. Ernest Szabados, but his initial opinion lacked supportive objective findings and medical rationale. As Dr. Szabados was unable to cure those deficiencies in his supplemental report, the Office referred appellant to another impartial medical specialist, Dr. Solman. See *Nathan L. Harrell*, 41 ECAB 402 (1990). When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.

Dr. Solman discussed the surgical technique of the reconstruction appellant underwent in 1974 and the “overtightened” right ankle that resulted. He noted that, while this could alter the normal biomechanics of the ankle, the effect would be more noticeable in a heavy labor or athletic population. Dr. Solman concluded that appellant was likely having pain in the ankle and would likely have trouble climbing stairs, ladders and traversing uneven ground, but that would not preclude him 100 percent from all work. He felt appellant could return to some form of work, with proper rehabilitation and proper bracing, though it would have to be modified to accommodate him. Dr. Solman described appellant’s limitations and stated that appellant could perform any form of seated duty full time. In a supplemental report dated April 7, 2008, he clarified that, in light of the right ankle injury only, without consideration of subsequently acquired medical conditions, appellant was capable of performing sedentary duty, as defined by the Department of Labor’s *Dictionary of Occupational Titles*, for eight hours a day.

Having established that appellant’s March 11, 1969 employment injury no longer totally disabled him for all employment, and having established the specific work restrictions related to that injury, the Office referred his case to an Office rehabilitation specialist for the selection of a position that fit his capabilities in light of his physical limitations, education, age and prior experience. Based on the medically determinable residuals of the March 11, 1969 employment injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the Office rehabilitation counselor found that appellant was able to perform the job of telephone solicitor. He noted that appellant met the specific vocational preparation requirements, and confirmed through the Missouri Department of Economic Development that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. According to the Bureau of Labor Statistics, as of May 2007 in Columbia, Missouri, the entry level weekly wage of such a position was \$340.00.

On July 15, 2008 the Office notified appellant that it proposed to reduce his compensation for wage loss due to the March 11, 1969 employment injury. Appellant disagreed with this proposal, in large part because other medical conditions prevented him for working eight hours a day: “I cannot sit from two bad hips and cannot use arms for any period of time due to arthritis and bursitis caused from falls. I might be able to do 4 hours per day but not at something I hate. I would prefer all telemarketers were dead. I hate solicitors, period.”

In a decision dated September 29, 2008, the Office reduced the compensation payable for appellant’s March 11, 1969 employment injury. It acknowledged that subsequently acquired medical conditions prevented appellant from returning to any gainful employment, but explained that such disabling medical conditions could not be considered in determining the loss of wage-earning capacity caused by the March 11, 1969 employment injury. The Office found that appellant failed to establish that his cardiac conditions were preexisting or that he had other disabling injuries as a result of the March 11, 1969 employment injury. It explained that the lack of current job openings was no evidence that the identified job was not reasonably available. The Office further explained that appellant’s receipt of a schedule award for permanent physical impairment was not synonymous with permanent disability for work.

## LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>4</sup>

In determining compensation for partial disability, the 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 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>5</sup>

When the Office makes a medical determination of partial disability and of the 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's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of 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* will result in the percentage of the employee's loss of wage-earning capacity.<sup>6</sup>

In determining a loss of wage-earning capacity, where the residuals of an injury prevent an employee from performing his regular duties, the impairments that preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. It is only subsequently acquired impairments unrelated to the injury that are excluded from consideration in the determination of the employee's work capabilities.<sup>7</sup>

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 20 C.F.R. § 10.5(f).

<sup>5</sup> 5 U.S.C. § 8115(a).

<sup>6</sup> *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>7</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>8</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>9</sup> When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

### ANALYSIS

Appellant has submitted a substantial amount of evidence and argument on this appeal. The Board has reviewed his correspondence, and it appears that he does not fully understand the conceptual basis upon which the Office was paying compensation for his March 11, 1969 employment injury.

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty. "Disability" means the incapacity, because of an employment injury -- in this case, specifically, the March 11, 1969 employment injury -- to earn the wages the employee was receiving at the time of injury. Because the Office accepted that appellant sustained a right ankle injury in the performance of duty on March 11, 1969, he is entitled to compensation for any disability, or loss of wage-earning capacity, caused by the accepted right ankle condition. Once that right ankle condition no longer totally disables him from all employment, he is no longer entitled to compensation for total disability based on the March 11, 1969 employment injury. It may be that some later injury or medical condition renders him totally disabled for any kind of employment, but in such a case, it is not the March 11, 1969 employment-related right ankle injury that is causing the total disability.

To be clear, the Office understands that appellant's current overall medical condition renders him totally incapable of any employment whatsoever, including any employment as a telephone solicitor. In order to pay him the compensation he is entitled to receive for his March 11, 1969 employment-related right ankle injury, it must determine how much of his disability or incapacity to earn wages is a result of that specific injury. To do that, the Office must determine what employment, if any, he is at least theoretically capable of performing given only the residuals of his employment-related right ankle injury. So it is no answer for appellant to point to a totally disabling coronary condition. Based on what happened on March 11, 1969, when he turned his right ankle at work, he is not entitled to compensation for disability stemming from his heart problems. Appellant is entitled to compensation only for the amount of disability or loss of wage-earning capacity that remains from his old employment-related right ankle injury. That is why the Office and the impartial medical specialist did not and may not consider whether appellant is also disabled by later injuries to his left ankle or knee or a subsequent worsening of his coronary condition.

More directly addressing the Office's September 29, 2008 decision, the Board finds that the Office properly determined that a conflict arose between appellant's family physician,

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<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Ward, and the Office referral physician, Dr. Prostic, on whether appellant remained totally disabled as a result of his March 11, 1969 employment-related right ankle injury. The Office, therefore, properly referred appellant to an impartial medical specialist, Dr. Solman, to resolve the conflict.<sup>11</sup>

The Office provided Dr. Solman, a Board-certified orthopedic surgeon, with medical records and a statement of accepted facts so he could base his opinion on a proper medical and factual background. Dr. Solman reviewed the records, examined appellant and obtained an x-ray. He provided a reasoned medical opinion that the March 11, 1969 employment-related right ankle injury no longer totally disabled appellant for all work. Dr. Solman explained that appellant's reconstructive surgery in 1974 was typical of the surgical techniques in use at the time, and left appellant with an "overtightened" ankle. He explained that this could alter the normal biomechanics of the joint, but that it did not preclude appellant 100 percent from all work. Indeed, as Dr. Solman clarified, appellant was capable of performing sedentary duty eight hours a day, at least based on his March 11, 1969 employment-related right ankle injury.

The Board finds that the opinion of the impartial medical specialist, Dr. Solman, is based on a proper background and is sufficiently well rationalized that it must be accorded special weight in resolving the conflict between Dr. Ward and Dr. Prostic. Dr. Solman's opinion establishes that residuals of the March 11, 1969 employment-related right ankle injury no longer totally disable appellant for all work. As the Board explained earlier, that means appellant is not entitled to compensation for total disability based on his employment-related right ankle injury. The question that arises is how much disability does remain from that injury. To calculate that, the Office must determine what employment the residuals of that injury would theoretically allow.

Because the weight of the medical opinion evidence establishes that appellant's March 11, 1969 employment injury only partially disables him for work, and because the impartial medical specialist specified appellant's work restrictions, the Office properly referred appellant to its rehabilitation specialist for the selection of a position that fit his capabilities in light of his physical limitations, education, age and prior experience. The rehabilitation counselor determined, based on the medically determinable residuals of the March 11, 1969 employment injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, that appellant was able to perform the job of telephone solicitor, a sedentary position. The rehabilitation counselor confirmed the entry level pay rate in nearby Columbia, Missouri, and further confirmed through the Missouri Department of Economic Development that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. That was no guarantee there would be many openings for a telephone solicitor at any particular time, only that there were enough people performing that job that positions could be expected to open up from time to time, making it reasonably available in the open market. The point was to establish how much money appellant could theoretically make in the open market if the only disability he had came from his March 11, 1969 employment-related right ankle injury.

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<sup>11</sup> Dr. Harsch was not qualified to act as an impartial medical specialist, and Dr. Szabados offered insufficient medical rationale to resolve the issued presented to him. This does not mean, as appellant suggests, that their reports must be excluded from the record or that any reference to their reports will poison the opinion of another physician.

Having established that, the Office could then calculate how much disability or loss of wage-earning capacity remained from the employment-related right ankle injury, notwithstanding any disability that any later injuries or medical conditions might be causing. The Board finds that the Office properly applied the principles set forth in *Albert C. Shadrick* to determine the loss of wage-earning capacity remaining from the accepted injury. The Office compared the earnings appellant could theoretically earn as a telephone solicitor, based solely on his employment-related right ankle injury, to the current pay rate of his date-of-injury position and found that his wage-earning capacity was 37 percent, entitling him to compensation equal to 63 percent of what he would otherwise receive for total disability.

Appellant disagrees that he can perform the position of telephone solicitor. However, the rehabilitation specialist is an expert in the field of vocational rehabilitation, and the Office may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.<sup>12</sup> The rehabilitation counselor conducted a transferable skills analysis that took into account many factors, including appellant's schooling, military service, an analysis of his past employment, his vocational interests, worker trait profiles and personality reinforcers.

The Board finds that the Office has met its burden of proof to reduce the compensation payable for appellant's March 11, 1969 employment injury. The Office gave due regard to appropriate factors in determining, as appears reasonable under the circumstances, the wage-earning capacity allowed by his employment-related right ankle injury, even though later injuries or medical conditions now totally disable him for all work. The Board will therefore affirm the Office's September 29, 2008 decision.

### **CONCLUSION**

The Board finds that the Office properly reduced the compensation payable for appellant's March 11, 1969 employment injury.

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.b(2) (December 1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board