

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES M. WHITE and DEPARTMENT OF THE ARMY,
RED RIVER DEPOT, Texarkana, TX

*Docket No. 99-1907; Submitted on the Record;
Issued May 22, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of telephone solicitor.

The Office accepted appellant's claim for lumbar strain and permanent aggravation of degenerative disc disease. Appellant was paid temporary total disability benefits.

In a report dated January 22, 1992, appellant's treating physician, Dr. Barry M. Green, a Board-certified orthopedic surgeon, opined that appellant could not perform heavy work, should not lift more than 30 pounds and avoid repetitive climbing or bending. In a work restriction evaluation dated March 2, 1992, Dr. Green stated that appellant was capable of intermittent sitting, walking and standing for 4 hours a day with a lifting restriction of up to 10 pounds.

An Office referral physician, Dr. Benzel C. MacMaster, a Board-certified orthopedic surgeon, completed a work restriction form dated March 28, 1994 and opined that appellant could work 8 hours a day with intermittent sitting up to 8 hours, intermitting walking and standing up to 4 hours and lifting up to 20 pounds.

To resolve the conflict between Drs. Green and MacMaster, the Office referred appellant to an impartial medical specialist, Dr. Robert E. Holladay, a Board-certified orthopedic surgeon. In his report dated June 13, 1995, Dr. Holladay opined that appellant was unable to perform work that required standing, sitting or walking for more than 10 to 15 minutes without a position change. Appellant could lift or carry objects that weighed more than 10 to 15 pounds occasionally. In response to the Office's letter dated December 8, 1995, Dr. Holladay stated that appellant could work four hours a day.

In a report dated May 7, 1996, appellant's treating physician, Dr. Jeffrey T. DeHaan, a Board-certified orthopedic surgeon, noted that appellant has a "long history of back problems," and opined that appellant was unable to return to work.

A May 21, 1996 functional capacity evaluation, which Dr. DeHaan requested, stated that appellant lacked the capacity to sit for 30 minutes because he must stand after a maximum of 15 minutes and shift continuously prior to standing. The evaluation stated that appellant could occasionally lift up to 35 pounds and could return to work with frequent standing and walking and occasional sitting.

In a progress note dated May 30, 1996, Dr. DeHaan opined that appellant had “terrible,” multilevel degenerative disc problems and was unable to return to work.

In response to an Office letter requesting clarification, Dr. DeHaan stated that he agreed that appellant could perform the position of telephone solicitor eight hours a day.

On September 10, 1996 the rehabilitation counselor determined that the position of telephone solicitor, which was described as sedentary with “frequent accommodation” and no lifting requirements, was within appellant’s work restrictions and experience and was reasonably available. The availability of the solicitations jobs was based on a labor market survey by the Texas Workforce Commission on September 3, 1996, which identified 18 openings for telephone solicitors in the past year in the Texarkana area where appellant lived.

By decision dated December 2, 1996, the Office determined that the position of telephone solicitor fairly and reasonably represented appellant’s wage-earning capacity and reduced appellant’s compensation benefits accordingly.

By decision dated March 30, 1998, the Office hearing representative affirmed the Office’s February 13, 1997 decision.

By letter dated May 8, 1998, appellant requested reconsideration of the Office’s decision and submitted a report from Dr. DeHaan, who stated that he would “have to retract [his] statement” that appellant could perform a sitting job. He stated that he did not think appellant could work eight hours straight without being able “to get up and move around a little bit.” Dr. DeHaan added that he did not think appellant could do the job of telephone solicitor “because of his worsening stiffness in his back and the aggravation that that imparts on it.”

By decision dated July 2, 1998, the Office denied appellant’s request for modification.

By letter dated July 15, 1998, appellant requested reconsideration of the Office’s decision and submitted two reports from Dr. DeHaan. In his April 28, 1998 report, he stated that he saw appellant after a fairly lengthy absence and he was “having persistent and worsening lower back pain.” Dr. DeHaan related that appellant “was having a lot of difficulty putting in the time as a telephone solicitor because he could not sit for eight straight hours, which is what they are making him do.” He reiterated that appellant could not work eight hours without moving around and could not do telephone solicitation because of the “worsening stiffness in his back.

In the July 28, 1998 report, Dr. DeHaan stated that it was “fairly well documented” that appellant had objective degenerative disc problems at multiple levels in his lumbar spine. He referred to the functional capacity evaluation, which stated that appellant could not sit for longer than 30 minutes, and opined that appellant could not do telephone soliciting job.

By decision dated November 16, 1998, the Office denied appellant’s request for modification.

By letter dated December 10, 1998, appellant requested reconsideration of the Office's decision and emphasized that Dr. DeHaan had retracted his opinion that appellant could do a sitting job full time.

By decision dated April 5, 1999, the Office denied appellant's request for reconsideration.

The Board finds that the Office erred in adjusting appellant's compensation to reflect his wage-earning capacity in the position of telephone solicitor.

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.¹

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.² 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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.⁴

In this case, appellant has shown that the Office's reduction of his wage-earning capacity in its December 2, 1996 decision was erroneous. In his January 22, 1992 report, appellant's treating physician, Dr. Green, opined that appellant could work four hours a day with intermittent sitting and walking. In his March 28, 1994 report, the referral physician, Dr. MacMaster, found that appellant could work eight hours a day with intermittent walking and standing up to four hours. To resolve the conflict, the Office referred appellant to an impartial medical specialist, Dr. Holladay, who concluded that appellant could work 4 hours a day but could not stand, sit or walk for more than 10 to 15 minutes without a position change.

In his report dated May 7, 1996, appellant's treating physician, Dr. DeHaan stated twice in May 1996, that appellant was unable to work and May 21, 1996 a work capacity evaluation performed at Dr. DeHaan's request indicated that appellant could not sit for 30 minutes, needed to shift positions continuously and had to stand after 15 minutes.

In response to the Office's request for clarification on July 26, 1996, Dr. DeHaan stated, without explanation, that appellant could do the job of telephone solicitor eight hours a day. In its December 2, 1996 decision, the Office reduced appellant's compensation, based on Dr. DeHaan's statement. In subsequent reports, however, Dr. DeHaan stated three times that he wished to retract his earlier statement that appellant could work as a telephone solicitor eight hours a day and opined that appellant could not work at all. Further, he stated that he based his

¹ *Sylvia Bridcut*, 48 ECAB 162 (1996); *James B. Christenson*, 47 ECAB 775 (1996).

² *See Lawrence M. Nelson*, 39 ECAB 788 (1988).

³ *See Dana Bruce*, 44 ECAB 132, 142-43 (1992).

⁴ *See Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

conclusion on objective test results showing multilevel degenerative arthritis and the functional capacity evaluation showing that appellant could not sit for more than 30 minutes.

In his June 13, 1995 report of Dr. Holladay, the impartial medical specialist, opined that appellant could work 4 hours but could sit at most 15 minutes at a time. The results of the functional capacity evaluation were consistent with his findings. Dr. Holladay's report is complete and well rationalized. With the exception of Dr. DeHaan's July 26, 1996 response to the Office's request for clarification, Dr. DeHaan consistently stated that appellant could not work. In reducing appellant's compensation benefits, the Office did not explain why Dr. DeHaan's opinion, which was not as complete as Dr. Holladay's opinion and was not well rationalized, should be given greater weight than Dr. Holladay's opinion.

The physical requirements of the telephone solicitor position were sedentary with no lifting and "frequent accommodation." However, this phrase is not defined. Further, it is not clear that the position of telephone solicitor was within the physical requirements imposed by Dr. Holladay because the sitting requirements were never described in detail. Thus, whether the position of telephone solicitor could accommodate appellant to the extent necessary to comply with a 15-minute sitting restriction is not known.

The fact that Dr. DeHaan subsequently retracted his finding that appellant could work in his April 28, May 4 and July 28, 1998 reports and stated that he did so based on objective test results and the functional capacity evaluation only further confirmed that the Office erred in relying on Dr. DeHaan's July 26, 1996 opinion. Because the Office's reduction of benefits was not based on the medical evidence in the record at the time of its December 2, 1996 decision, and the medical evidence appellant subsequently submitted showed that the Office erred, the Office's reduction of appellant's compensation was not justified.

The decisions of the Office of Workers' Compensation Programs dated April 5, 1999 and November 16 and July 2, 1998 are hereby reversed.

Dated, Washington, DC
May 22, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member