

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARIE R. NEVETT and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Palo Alto, CA

*Docket No. 03-383; Submitted on the Record;  
Issued May 5, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

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

The Office accepted that appellant, then a 36-year-old food service worker, sustained a lumbar strain/sprain while lifting crates of grapefruit juice in the performance of duty on July 22, 1982. Appellant was disabled for work from July 25, 1982 until September 6, 1983, after which she returned to light duty. Following a reinjury on November 3, 1982, appellant worked intermittently at light duty until April 22, 1983. Appellant stopped working on September 3, 1983. Appellant received appropriate compensation benefits for temporary total disability.

By letter dated May 30, 2002, the Office notified appellant that it proposed to reduce her compensation on the grounds that she had the ability to earn wages as a telephone solicitor at \$280.00 per week.

By decision dated July 11, 2002, the Office reduced appellant's compensation to reflect her wage-earning capacity as a telephone solicitor. In a decision dated October 2, 2002, the Office denied modification of the July 11, 2002 decision.

The Board finds that the Office properly determined appellant's wage-earning capacity.

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 in such benefits.<sup>1</sup>

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<sup>1</sup> *Carla Letcher*, 46 ECAB 452 (1995).

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 her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.<sup>2</sup>

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's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to 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.<sup>3</sup> 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>4</sup>

The Office selected the position of telephone solicitor, a sedentary position with occasional lifting of up to 10 pounds, as reflecting appellant's wage-earning capacity.<sup>5</sup> In a report dated February 24, 2000, Dr. John Bacon, a Board-certified orthopedic surgeon and an Office referral physician, provided a history and results following examination of appellant. Dr. Bacon diagnosed a chronic low back strain secondary to her 1982 work injury. He noted that she did not have surgery and was treated with physical therapy. Dr. Bacon opined that the degree of disability that appellant exhibited over the last several years was more than he would expect from the physical findings. Dr. Bacon opined that appellant was able to perform the duties of her previous position of a food service worker, but would have difficulty with lifting and carrying activities, bending, lifting and twisting. She would be unable to mop due to the presence of muscle spasm ongoing in her lumbar region. In an OWCP-5c work restriction form, Dr. Bacon advised that appellant could work for 8 hours a day, sit for 4 hours; walk, stand and operate a motor vehicle for 2 hours; push, pull and lift no more than 10 pounds for 2 hours; and reach for 1 hour. Breaks should be given every 2 hours for a 10-minute duration. He suggested that appellant undergo a significant weight-loss program and physical therapy to increase flexibility of the lumbar musculature. Muscle relaxants, anti-inflammatories and Prozac should be continued.

Upon receipt of Dr. Bacon's report, an Office rehabilitation specialist noted on July 11, 2000 that appellant had the physical capacity to perform the duties of a telephone solicitor. On

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<sup>2</sup> See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

<sup>3</sup> See *Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>4</sup> 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

<sup>5</sup> *Dictionary of Occupational Titles*, No. 299.357-014.

October 17, 2000 the Office closed job placement services and recommended a wage-earning capacity determination. The rehabilitation specialist found that the job of telephone solicitor paid a salary of \$7.00 per hour or \$280.00 for a 40-hour workweek. It was found that work was available, job training was provided, and the job was performed in sufficient numbers in appellant's commuting area as to be considered reasonably available.

Once an appropriate selected position has been identified, the Office procedures require that appellant be notified of the proposed reduction in compensation. The Office notified appellant by letter dated May 30, 2002 and provided her 30 days to submit relevant evidence. Appellant submitted a June 10, 2002 report, in which Dr. Theodis Buggs, Jr., a Board-certified orthopedic surgeon, advised that "At this time we believe [appellant] has a significant physical impairment, which prevents her from performing any significant bending, standing, walking or any significant prolonged sitting. We agree with her previous work limitations, which resulted in her being disabled because of the previous injury. We will continue present medications as prescribed by Dr. Sandra Ford." Dr. Buggs noted his general agreement with the work limitations on file, submitted by Dr. Bacon. Dr. Buggs did not explain or address that appellant could not perform the duties of the selected position of telephone solicitor.

With respect to appellant's physical ability to perform the duties of the position, the medical evidence establishes that the position is within appellant's work restrictions. As noted, the selected position of telephone solicitor is a sedentary position with occasional lifting of up to 10 pounds. This is consistent with the restrictions set forth by Dr. Bacon in his February 24, 2000 OWCP-5c work restrictions form and not disputed by Dr. Buggs, who expressed his general agreement with the work restrictions on file. The Board, therefore, finds that the Office properly followed established procedures in reducing appellant's compensation to reflect her wage-earning capacity. The evidence indicates that the position was medically and vocationally suitable and reasonably available in appellant's commuting area, with wages of \$280.00 per week. The Office properly reduced appellant's compensation in accord with the *Shadrick*<sup>6</sup> formula to reflect her wage-earning capacity.

The Board notes that appellant submitted evidence of a disabling psychiatric condition, which arose subsequent to the employment injury of July 22, 1982. A condition which develops following an employment injury and which is not a consequence of the employment injury is not considered in determining wage-earning capacity.<sup>7</sup> The earliest report of record documenting appellant's psychiatric condition is an April 27, 1984 report from Dr. John Darby, a psychiatrist, who advised that she had been treated for an anxiety and depression since March 7, 1984. In a report dated June 1, 2000, Dr. Daniel C. Dahl, a Board-certified psychiatrist, advised that he had been following appellant since 1991 for major depression with psychosis and a mixed personality disorder. Dr. Dahl opined that, if appellant were to return to work, she would rapidly deteriorate. In an August 9, 2000 report, Dr. J. Mark Westfall advised that appellant had been hospitalized on July 28 through August 8, 2000 for chronic depression. As the evidence reflects that appellant's psychiatric condition arose subsequent to her employment injury and is not a

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<sup>6</sup> *Albert C. Shadrick, supra* note 4.

<sup>7</sup> *Alfred R. Hafer*, 46 ECAB 553 (1995).

consequence of the employment injury, this medical condition is not considered in determining appellant's wage-earning capacity.

The Board further finds that the evidence submitted after the Office determined appellant's wage-earning capacity is insufficient to demonstrate that the selected position is no longer suitable for appellant.

In a June 10, 2002 report, the Office manager for Dr. George R. McWhorter, a Board-certified gastroenterologist, advised that appellant had additional diagnoses of hiatal hernia, reflux disease, diverticulosis and a periumbilical hernia. This report is of no probative value as it was not signed by the physician and does not address causal relationship.<sup>8</sup>

In a July 24, 2002 report, Dr. Buggs related that appellant returned for a follow-up visit, due to continuing discomfort in her back. Appellant advised that she had not improved significantly and was still having problems with performing activities. Dr. Buggs stated that appellant's examination was essentially unchanged since the last office visit. He recommended that appellant continue her disability. Dr. Buggs further advised that "for some reason there is a misinterpretation of my conclusion for [appellant]. At this point, we believe she should continue her previous work status as total disability as we understand it." As previously noted, the work restrictions as set forth by Dr. Bacon constitute the weight of the medical evidence in this case and the selected position is within the established medical restrictions. Dr. Buggs related that appellant's examination was essentially unchanged since the last office visit, which appears to be when his last report of June 10, 2002 was written. As previously noted, the restrictions set forth in Dr. Buggs' June 10, 2002 report were consistent with medical restrictions for the selected position. Although Dr. Buggs advised that appellant was totally disabled and there appeared to be a misinterpretation of his conclusion, Dr. Buggs failed to offer any objective evidence or medical explanation for his opinion that appellant was totally disabled. Moreover, although appellant appears to have continuing discomfort, the Board notes that it has frequently explained that statements about appellant's pain, not corroborated by objective findings of disability being demonstrated or a diagnosis of "pain," do not constitute a basis for payment of compensation.<sup>9</sup> Accordingly, Dr. Buggs' report is of diminished probative value and is insufficient to outweigh Dr. Bacon's opinion, which represents the weight of the medical evidence in this case.

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<sup>8</sup> See 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

<sup>9</sup> See *John L. Clark*, 32 ECAB 1618 (1981); *Huie Lee Goad*, 1 ECAB 180 (1948).

The October 2 and July 11, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
May 5, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member