

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT T. WILLIS and DEPARTMENT OF THE TREASURY,
CUSTOMS SERVICES, St. Thomas, VI

*Docket No. 00-1168; Submitted on the Record;
Issued December 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied modification of its determination of appellant's wage-earning capacity.

On December 6, 1991 appellant, then a 54-year-old motor vehicle operator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his back and legs while lifting heavy boxes for the employing establishment. The Office accepted appellant's claim for lumbar strain and bulging disc L4-5 and began payment of temporary total disability compensation.

By decision dated April 17, 1996, the Office reduced appellant's compensation for the reason that it found that, appellant had not cooperated with the Office's attempts at rehabilitation. The Office further found that, if appellant had cooperated, it would have resulted in a return to work with no loss of wage-earning capacity. Accordingly, the Office reduced appellant's compensation benefits to reflect that there was no loss of wage-earning capacity. Appellant appealed this decision, and this Board affirmed the Office's decision, finding that the Office properly reduced appellant's compensation.¹

By letter dated September 1, 1999, appellant requested reconsideration of the April 17, 1996 decision. Appellant contended that the events in 1990 to 1996 had caused him recurrent nightmares, flashbacks and sleep disturbances, and difficulties in concentration and memory recall.² In support of his request, appellant submitted newspaper articles on Latin America and Columbia.

¹ The history of this claim is set forth in that decision and this Board's earlier decision is hereby incorporated into this decision. *Robert T. Willis*, Docket No. 97-242 (issued September 2, 1998).

² The Office has not accepted appellant's claim for emotional injuries.

In a letter to appellant dated December 10, 1999, the Office stated that it had no medical reports in appellant's compensation case that would establish that a psychological condition prevented him from cooperating with the rehabilitation efforts during the period January 29 through April 17, 1996. Accordingly, the Office requested that appellant provide, *inter alia*, copies of medical records, including physician's reports from each physician that treated him for a mental condition during the period January 29 through April 17, 1996; a reasoned medical opinion explaining whether appellant was capable of performing some type of work during the period January 29 through April 17, 1996, and a reasoned medical opinion as to whether appellant was capable of cooperating in vocational rehabilitation efforts during the period January 29 through April 17, 1996.

In response to the letter from the Office, appellant submitted a medical report from Dr. William Noreiga Murcia, who noted that he examined appellant on October 22, 1996 and diagnosed appellant with arterial hypertension, abdomen distress and visual changes and stating that his treatment of appellant was a medical necessity. Appellant also submitted a letter from him dated October 8, 1996 wherein he noted that appellant visited his office for treatment daily from October 2 through 7, 1996 and that he must continue under his control for, *inter alia*, arterial hypertension. Dr. Murcia also submitted a letter wherein he indicated that appellant was seen by him for chronic arterial hypertension on March 15 and 22, April 10 and 26, May 13 and 25 and June 3, 1996. He further noted that appellant visited him in his home on April 15 and May 20, 1996. Dr. Murcia opined: "The patient must continue under control for arterial hypertension and he must consider the possibility of an (sic) hemorrhoidectomy."

Appellant also submitted an unsigned medical report dated July 31, 1998 by Dr. Arnold Negrin, a psychiatrist, wherein he indicated that appellant suffered from post-traumatic stress disorder (PTSD) (chronic) and panic disorder with agoraphobia.

In an August 27, 1997 report, Dr. Ali Moayeri gave an update on appellant's condition wherein she noted that she had been treating appellant for right-sided herniated nucleus pulposus at C5-6 level, left-sided herniated nucleus pulposus at L4-5 level, scoliosis of the thoracic spine, cervical spondylosis, essential hypertension and chronic myofascitis of LS spine. Dr. Moayeri opined that appellant's conditions had taken a turn for the worse in that he now had developed cervical spondylosis and osteoarthritis of the cervical spine. She stated: "As I have already written to you on February 19, 1996, he is not able to return to his previous job and should be considered permanently disabled."

Appellant also submitted notes from Dr. Cynthia Gerrard, a clinical psychologist, and Dr. Susan L. Haverstock, a Board-certified psychiatrist, dated March 13, 1998 to January 6, 1999. These notes indicate that, during this time period, appellant was treated for PTSD. Unsigned notes during this time indicate that appellant was unemployable.

In addition, appellant submitted copies of articles on PTSD and articles about crime in Columbia.

By decision dated January 5, 2000, the Office denied appellant's request as it found that the evidence in support of appellant's application was not sufficient to warrant modification of the prior decision.

The Board finds that the Office properly denied modification of its determination of appellant's wage-earning capacity.

Once a loss of wage-earning capacity is determined, a modification of such a 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 that the awards should be modified.⁴

Appellant did not submit sufficient evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In its April 17, 1996 decision, the Office reduced appellant's compensation to zero on the grounds that appellant had not cooperated in rehabilitation efforts, finding that such efforts would have resulted in a return to work with no loss of wage-earning capacity. This decision was affirmed by the Board. This determination was consistent with section 8113(b) of the Federal Employees' Compensation Act which provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed, the Office "may reduce prospectively the monetary compensation of the individual in accordance with what would have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the [Office]."⁵ The procedures for implementing this section of the Act are found at 20 C.F.R. § 10.519.

The articles appellant submitted are irrelevant to the issue at hand, *i.e.*, whether appellant was capable of cooperating with vocational rehabilitation efforts between January 29 and April 17, 1996. Furthermore, none of the medical records establish that appellant was under the care of a physician for a disabling psychological condition during the period in question, such that it would render him unable to cooperate with vocational rehabilitation. For these reasons, appellant has not shown that it was improper for the Office to deny modification of its determination of wage-earning capacity.

³ *Tamra McCauley*, 51 ECAB ____ (Docket No. 98-1820, issued March 17, 2000); *Joseph M. Popp*, 48 ECAB 624 (1997); *George E. Coleman*, 38 ECAB 782, 788 (1987).

⁴ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁵ 5 U.S.C. § 8113(b).

The decision of the Office of Workers' Compensation Programs dated January 5, 2000 is hereby affirmed.

Dated, Washington, DC
December 20, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member