

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

FELIPE CORDOVA, Appellant

and

**DEPARTMENT OF AGRICULTURE,
CARSON NATIONAL FOREST,
Taos, NM, Employer**

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**Docket No. 04-297
Issued: April 19, 2004**

Appearances:
Felipe Cordova, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 14, 2003 appellant filed a timely appeal from the July 8, 2003 decision of the Office of Workers' Compensation Programs which reduced his compensation based on a capacity to earn wages in the constructed position of assembler. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this reduction of compensation. Because the Board's review of a case is limited by section 501.2(c) to the evidence in the case record that was before the Office at the time of its July 8, 2003 decision, the Board has no jurisdiction to consider subsequent evidence submitted on appeal.

ISSUE

The issue is whether the Office properly reduced appellant's compensation for wage loss based on a capacity to earn wages in the constructed position of assembler.

FACTUAL HISTORY

On June 15, 2000 appellant, then a 53-year-old casual (emergency hired) firefighter, sustained an injury in the performance of his duty while carrying a bladder bag full of water,

weight approximately 70 pounds, up the fire line to put out hot spots during the Pot Mountain fire. The Office accepted his claim for thoracic and lumbar strain. Appellant received compensation for temporary total disability on the periodic rolls. He reported on January 25, 2001 that he was a self-employed jewelry maker, but was not able to work on jewelry because of his back injury.

On July 16, 2001 appellant's attending physician, Dr. Arnold B. Wise, an orthopedic surgeon, reported that appellant was probably close to a level of maximum medical improvement, as he was about a year post injury. Dr. Wise completed a work capacity evaluation on that date indicating that appellant could work eight hours a day with limitations.

The Office provided this information to the employing establishment, which advised that it had no work for appellant. The Office then referred him for vocational rehabilitation.

After unsuccessful efforts to place appellant with a private employer, the Office rehabilitation counselor reported on November 1, 2001 that he was able to perform the job of assembler (jewelry-silverware), which the *Dictionary of Occupational Titles* described as follows:

“Assembles jewelry, such as rings, lockets, bracelets, brooches and watchcases, using pliers, screwdriver and jeweler's hammer. May use foot press. May be designated according to type of product assembled as Bracelet Maker, Novelty (jewelry-silver); Brooch Maker, Novelty (jewelry-silver).”

The rehabilitation counselor noted the physical demands of the position and relevant environmental conditions. She explained how appellant met the specific vocational preparation requirement of 30 days to 3 months: “Injured worker trained on the job by a Taos [New Mexico] jewelry designer to make jewelry. He has made jewelry since 1997 and has sold to a Taos gallery in the past.” The rehabilitation counselor confirmed by telephone contact with the New Mexico Department of Labor and the state employment service representative in Santa Fe, New Mexico, that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The job was available both full and part time and paid a weekly wage of \$342.80, according to the 2001 wage survey from the New Mexico Department of Labor. Based on the medically determinable residuals of appellant's injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor reported that appellant was able to perform the job of assembler (jewelry-silverware) for the earnings indicated and that such work was reasonably available within the commuting area.

Appellant saw Dr. Wise on April 29, 2002. Clinically, appellant reported no change and stated that he was extremely reluctant to consider back surgery. Dr. Wise noted that appellant remained at a stable level.

On May 28, 2003 the Office notified appellant that it proposed to reduce his compensation for wage loss on the grounds that the medical and factual evidence established that he was no longer totally disabled for work, but rather was capable of earning wages as an

assembler at \$342.80 a week. The Office allowed appellant 30 days to submit additional evidence or argument regarding his capacity to earn wages in the described position.

Appellant responded by noting that his back was worse than before, that his age made it almost impossible for him to find work and that he was just learning to make jewelry. He stated that he could not support himself and his child on jewelry making. In an April 23, 2001 report, Dr. Wise stated that appellant had difficulty sitting or standing in one position for a long time and that his back was interfering with his attempt at jewelry making. In a separate report also dated April 23, 2001, Dr. Wise noted that appellant had discomfort “when he tries to make jewelry.” On June 24, 2002 appellant stated that he was unable to perform some of the duties of an assembler because he was not able to sit and stand for long periods of time due to his back injury. He added: “As for jewelry making I do not possess the knowledge or capabilities of making a suitable living to support myself or my family.”

In a decision dated July 8, 2003, the Office reduced appellant’s compensation for wage loss effective August 10, 2003. The Office found that the position of assembler was medically and vocationally suitable and represented his capacity to earn wages.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees’ Compensation Act provides that 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.¹

ANALYSIS

The Board has held that the Office must base its wage-earning capacity determination on a reasonably current medical evaluation.² In *Anthony Pestana*,³ the Office made its wage-earning capacity determination almost five years after the claimant’s most recent thorough physical examination and evaluation. The Board found that the Office failed to meet its burden of proof to justify a reduction in the claimant’s compensation benefits by failing to demonstrate that the selected position fairly and reasonably represented his wage-earning capacity consistent with his current work tolerance limitations. In *Ellen G. Trimmer*,⁴ the Board found that the Office did not meet its burden of justifying the reduction of the employee’s temporary total

¹ 5 U.S.C. § 8115(a)

² *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

³ 39 ECAB 980, 987 (1988).

⁴ 32 ECAB 1878, 1882 (1981).

disability compensation. The Office had based its determination on an August 4, 1975 work tolerance limitations report by the employee's attending physician. By the time the Office determined in July 1977, that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened the relevance of the work tolerance limitations report.

In the present case, appellant's orthopedic surgeon, Dr. Wise, completed a work capacity evaluation on July 16, 2001, an evaluation that would serve as a basis for reducing appellant's compensation for wage loss. By the time the Office issued its July 8, 2003 decision, however, that evaluation was two years old. The evidence had grown stale. Its relevance was greatly diminished. As Board precedent holds, the Office may not base a determination of wage-earning capacity on such evidence.

In its July 8, 2003 decision, the Office noted that on April 29, 2002 Dr. Wise reported appellant to be stable. The Board has carefully considered this treatment note and finds that it is insufficient to reinstate the July 16, 2001 work capacity evaluation. Dr. Wise conducted no physical examination of appellant that day. He attempted no evaluation of work capacity or determination of specific work tolerance limitations. His statement that appellant "remains at a stable level" appears to be based solely on a comment from appellant. Further, the treatment note was itself over 14 months old when the Office issued its decision, raising a significant question as to its currency.

Because the medical evidence in this case was not clear and unequivocal in establishing appellant's current ability to handle the physical demands of the constructed position, the Office should have requested that a physician review the position description and render an opinion on the matter.⁵ By not doing so, the Office left the issue unresolved.

It is well established that once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶ The Office has not met its burden in this case. The evidence fails to establish that the Office gave "due regard," under section 8115(a) of the Act, to the nature of appellant's injury and the degree of his physical impairment.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation for wage loss.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.d (December 1993). Dr. Wise did not review the position description, but he did report on April 23, 2001 only a couple of months before the work capacity evaluation, that appellant's back was interfering with his attempt at jewelry making.

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 19, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member