

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

N.W., Appellant)	
)	
and)	Docket No. 09-1008
)	Issued: March 24, 2010
DEPARTMENT OF THE NAVY, MARINE)	
CORPS LOGISTICS BASE, Albany, GA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2009 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated July 3 and October 3, 2008 and February 11, 2009 denying modification of a July 18, 2006 loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that a modification of the Office's July 18, 2006 loss of wage-earning capacity determination was warranted.

FACTUAL HISTORY

On October 11, 1988 appellant, then a 38-year-old sandblaster, sustained a low back strain while in the performance of his duties. On January 11, 1989 he underwent surgery for excision of an extruded fragment of a herniated disc at L5-S1 on the left. Appellant was placed on the periodic compensation rolls effective December 26, 1988 to receive compensation for temporary total disability. He returned to limited-duty work on October 2, 1989.

On February 28, 1991 appellant sustained a lumbosacral strain at work that was accepted under OWCP File No. xxxxxx280. On March 9, 1994 he sustained a recurrence of total disability and returned to work on April 18, 1994. On March 18, 1996 the Office accepted a November 28, 1995 recurrence of disability and a left-side herniated disc at L5-S1.

On May 21, 1996 he underwent surgery for excision of another extruded fragment of the herniated disc at L5-S1. In reports dated August 20 and September 26, 1996, Dr. Robert E. Hanchey, an attending neurosurgeon, stated that appellant could not return to his job as a sandblaster but could return to his light-duty job as a timekeeper.¹ On October 15, 1996 appellant returned to work in his limited-duty job as a timekeeper. On April 2, 1997 the Office issued a loss of wage-earning capacity decision based on his reemployment as a timekeeper. On June 5, 1998 the employing establishment withdrew the position because it could not accommodate his physical restrictions. Appellant's claim was placed back on the periodic rolls and appellant was paid temporary total disability benefits.

Appellant was referred to the Office's vocational rehabilitation program in November 1999 and underwent a vocational evaluation of his job skills and interests. He completed two semesters of prevocational development studies training at the Albany Technical College in 2000 and then commenced a two-year program in computer information systems at the college. Appellant's courses included Business English, Business Mathematics, Introduction to Computers, Computer Concepts, Interpersonal Relations, Program Design and Development, Word Processing, Networking Concepts, Introduction to Data Communications, Multiple Networks and WANS (wide area networks), Operating Systems Concepts, Advanced Routers and Switches, Microsoft Installation and Maintenance, WAN Design, Client Serve Database Management and Business Communication. In an August 7, 2002 progress report, a rehabilitation counselor reported that appellant repeated two courses, Networking Concepts and Business English, because he received a grade of D in each, but passed the courses the second time. He noted that appellant needed four more courses to receive a diploma in computer information systems, Math 098, a prerequisite to Math 103 (Algebraic Concepts), Introduction to Visual Basic Programming and Implementing Windows 2000 Professional and Service. A computer instructor and appellant's adviser stated that appellant should be employable if he passed the two computer courses, even without a diploma and could complete the mathematics requirement at night while working. The Office authorized an additional quarter at the college, the 2002 fall quarter, so that he could complete the two computer courses.

On October 3, 2002 the rehabilitation counselor noted that appellant was scheduled to begin a job search in January 2003 pursuant to his rehabilitation plan. On February 11, 2003 he stated that appellant had completed all requirements to earn his certificate in computer information systems at the end of December 2002 with the exception of Math 103, Algebraic Concepts.² The rehabilitation counselor advised appellant during the last college term that no further extensions of training would be provided and he was scheduled to begin an active job search by January 2003. His authorized job placement assistance expired April 6, 2003. On March 18, 2003 the rehabilitation counselor stated that, during the effort to find appellant a

¹ Appellant began performing his job as a timekeeper following the November 28, 1995 recurrence.

² The record shows that appellant passed the prerequisite course, Math 098, Pre-Algebra, but received a D in Math 103, Algebraic Concepts, in the 2003 spring quarter.

position, it became apparent that having an “A Plus Certification” as a computer technician would make him even more marketable. He registered for the first of two sections of the certification course beginning April 7, 2003. The counselor indicated that he would see if the Office would be willing to fund the cost of the two certification tests costing \$149.00 each. On September 17, 2003 the rehabilitation counselor stated that, based on appellant’s experience, education, medical restrictions and a labor market survey, he was employable as a Quality Assurance Analyst. He noted that appellant completed a two-year computer training program with the exception of a mathematics course. The Dictionary of Occupational Titles (DOT) describes the position of Quality Assurance Analyst as follows:

“Evaluates and tests new or modified software programs and software development procedures used to verify that programs function according to user requirements and conform to establishment guidelines: Writes, revises, and verifies quality standards and test procedures for program design and product evaluation to attain quality of software economically and efficiently. Reviews new or modified program, including documentation, diagram, and flow chart, to determine if program will perform according to user request and conform to guidelines. Recommends program improvements or corrections to programmers. Reviews computer operating log to identify processing errors. Enters instructions into computer to test program for validity of results, accuracy, reliability, and conformance to establishment standards. Observes computer monitor screen during program test to detect error codes or interruption of program and corrects errors. Identifies differences between establishment standards and user applications and suggests modifications to conform to standards. Sets up tests at request of user to locate and correct program operating error following installation of program. Conducts compatibility tests with vendor-provided programs. Monitors program performance after implementation to prevent reoccurrence of program operating problems and ensure efficiency of operation. Writes documentation to describe program evaluation, testing and correction. May evaluate proposed software or software enhancement for feasibility. May develop utility program to test, track, and verify defects in software program. May write programs to create new procedures or modify existing procedures. May train software program users.”³

The physical strength demand for the position was described as “light.” The vocational training necessary for the position was one to two years. The counselor reported that this position was reasonably available in appellant’s commuting area and paid \$384.00 a week. After 90 days of placement assistance, appellant failed to find employment in these positions or any other position. On September 29, 2003 an Office rehabilitation specialist stated that appellant received vocational and college level training in computer information systems and was qualified for employment as a quality assurance analyst. His rehabilitation file was closed because, although he had not secured a quality assurance analyst position, the position continued to be performed in sufficient numbers in his commuting area.

³ An attachment to the DOT position description lists the skills and physical requirements needed to perform the position and rates the importance of each skill. Three of the 42 skills and physical requirements are rated as “extremely important”: written comprehension, written expression and mathematical reasoning. Rated as “important” skills are wrist-finger speed and handling and moving objects.

On March 2, 2006 appellant underwent a functional capacity evaluation to determine his physical ability to perform work. The evaluation revealed that he could perform duties in the light work category. On April 28, 2006 the Office asked Dr. Paul E. Peach, an attending Board-certified psychiatrist, to review the job descriptions, including the physical requirements, for the positions of network control operator and quality assurance and advise the Office as to whether appellant could perform those positions. On May 9, 2006 Dr. Peach stated that, based on the March 2, 2006 functional capacity evaluation and his review of the position descriptions, appellant was physically capable of performing both the network control operator and quality assurance analyst positions which were considered to be in the light physical demand category.

On May 31, 2006 the Office advised appellant that the quality assurance analyst position was medically and vocationally suitable for him and fairly and reasonably represented his wage-earning capacity. It advised that it proposed to reduce his compensation benefits based on his ability to earn the wages of a quality assurance analyst at the rate of \$384.00 a week. Appellant was allotted 30 days in which to submit evidence or argument regarding his capacity to earn wages in the selected position. The Office noted that appellant's rehabilitation counselor had confirmed that the position remained reasonably available within appellant's commuting area and paid a weekly salary of \$384.00.

On July 18, 2006 the Office finalized its decision to reduce appellant's wage-loss compensation effective July 13, 2006 because the factual and medical evidence established that he was no longer totally disabled and the selected position of quality assurance analyst, paying \$384.00 a week, fairly and reasonably represented his wage-earning capacity. It provided a copy of its wage-earning capacity computation form and loss of wage-earning capacity worksheet. Appellant was advised to submit within 30 days evidence or argument regarding his capacity to earn wages in the position described.⁴

On August 9, 2006 appellant requested an oral hearing that was held on January 25, 2007. He testified that the quality assurance analyst job description used by the Office was from 1991 and did not reflect the technology in 2006. Appellant testified that he had no keyboard experience and could not type. He contended that he had received no training at the Albany Technical College in several of the tasks listed in the quality assurance analyst job description. Appellant's training involved basic education in installing, maintaining and repairing computers. He asserted that the selected position was more advanced than the training he received. Additionally, appellant never successfully completed a required mathematics course. Following the hearing, he submitted reports dated July 27 and September 27, 2006 in which Dr. Peach described chronic low back pain. In a February 22, 2007 report, Dr. Harry C. Weiser, a Board-certified neurosurgeon, opined as to whether appellant could perform the position of a network control operator. He did not provide an opinion regarding the selected position of quality assurance analyst.

By decision dated April 9, 2007, an Office hearing representative affirmed the July 18, 2006 decision, finding that appellant failed to establish that he was unable to perform the selected position of quality assurance analyst.

⁴ The Office initially finalized the reduction of appellant's compensation on July 13, 2006 but issued a revised decision on July 18, 2006 using his recurrent pay rate rather than his date of injury pay rate.

On April 8, 2008 appellant requested reconsideration. He argued that the position of quality assurance analyst required training and certification in a contemporary major network protocol, such as Microsoft DB2, A+ or Cisco, which was not included in his coursework at the college. Appellant contended that he was not vocationally rehabilitated and that the July 18, 2006 wage-earning capacity decision should be modified. In an undated statement, Michael G. Ray, vice-president of a computer company, stated that, based on his experience in the computer networking and information industry and his review of the job description for quality assurance analyst and the computer information systems coursework completed by appellant, it was his opinion that appellant was not qualified for the position. The classes appellant completed were basic, entry level courses that would provide an overview and understanding of computer networks. Mr. Ray stated that the quality assurance analyst position would require, at a minimum, Microsoft Certified Professional Developer Certification. Appellant's minimal course work in Cisco and Microsoft technologies did not qualify him for the position.

By decision dated July 3, 2008, the Office denied modification of the July 18, 2006 wage-earning capacity decision on the grounds that appellant did not establish any of the three accepted reasons for modification of a loss of wage-earning capacity decision: that the July 18, 2006 wage-earning capacity decision was issued in error, his medical condition had materially changed or he was vocationally rehabilitated and his wage-earning capacity had substantially increased.

On September 16, 2008 appellant requested reconsideration. He argued that Dr. Peach erred in stating that he could perform the quality assurance analyst position. Appellant stated that Dr. Hanchey performed his two back surgeries and knew his condition better than Dr. Peach who was selected by the rehabilitation counselor and prescribed pain medication but did little else. He submitted reports dated January 3, 2007 to July 25, 2008 in which Dr. Peach diagnosed chronic low back pain and left lower extremity neuropathy. In reports dated August 13 and September 4, 2008, Dr. Mark A. Wolgin, a Board-certified orthopedic surgeon, provided a medical history and findings on physical examination. He stated that x-rays of appellant's lumbar spine revealed narrowing of the L4-5 and L5-S1 disc spaces. A magnetic resonance imaging (MRI) scan revealed mild facet arthrosis at L5 to S1 and significant disc degeneration at L4-5. It also revealed bilateral foraminal stenosis at the L4-5 level and some suggestion of a mild herniation at the L4-5 level. Dr. Wolgin noted that appellant had a 20-year history of low back pain. He did not provide an opinion regarding appellant's capacity for work.

By decision dated October 3, 2008, the Office denied modification of its July 18, 2006 loss of wage-earning capacity determination on the grounds that appellant failed to provide sufficient evidence that modification of the decision was warranted.

On November 20, 2008 appellant requested reconsideration. He argued that Dr. Peach did not have sufficient understanding of his physical condition until after his May 9, 2006 report stating appellant could perform the quality assurance analyst position. Dr. Peach was not fully aware of his physical condition until August 2006 when he referred him to Dr. Weiser for diagnosis and treatment. Appellant also reiterated his contention that his coursework in computer information systems did not qualify him for the quality assurance analyst position. In reports dated October 29 and November 14, 2008, Dr. Peach stated that appellant had chronic low back pain, failed back syndrome, left lower extremity neuropathy, hamstring contractures, hypertension and diabetes. Appellant was totally disabled due to these conditions. In reports dated October 17 to November 20, 2008, Dr. Wolgin provided findings on physical examination

and noted that an August 19, 2008 MRI scan revealed residual disc degeneration at the L4-5 level since his two back surgeries with foraminal stenosis on the left at L4-5. He opined that appellant's accepted injury had not resolved and was disabling. Appellant's symptoms represented an aggravation of his employment injury. Dr. Wolgin stated that appellant had severe degeneration of his spine at the L4-5 level and, without surgery, he was totally disabled. By decision dated February 11, 2009, the Office denied modification of its July 18, 2006 decision on the grounds that the evidence did not warrant modification.⁵ It found that appellant did not meet his burden of proof to establish one of the accepted reasons for seeking modification of the July 18, 2006 loss of wage-earning capacity decision.

LEGAL PRECEDENT

Once a loss of wage-earning capacity is determined, 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.⁶ The burden of proof is on the party attempting to show modification of the award.⁷ When a formal decision on loss of wage-earning capacity is in place and a claimant requests compensation for total wage loss, the Office must evaluate the request according to the established criteria for modifying a formal loss of wage-earning capacity.⁸

ANALYSIS

The Board finds that appellant met his burden of proof to establish that the July 18, 2006 loss of wage-earning capacity decision should be modified.

Appellant has established that the July 18, 2006 wage-earning capacity decision was erroneous. On February 11, 2003 appellant's rehabilitation counselor stated that he had completed all requirements to earn his certificate in computer information systems at the end of December 2002 with the exception of Math 103 and Algebraic Concepts. On September 29, 2003 an Office rehabilitation specialist stated that appellant received vocational and college level training in computer information systems and was qualified for employment as a quality assurance analyst. Appellant's rehabilitation file was closed because, although he had not secured a quality assurance analyst position, the position continued to be performed in sufficient numbers in his commuting area. However, an attachment to the DOT position description for quality assurance analyst lists the skills and physical requirements needed to perform the position and rates the importance of each skill. Three of the 42 skills and physical requirements are rated as "extremely important": written comprehension, written expression and mathematical

⁵ Subsequent to the February 11, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁶ *W.G.*, 58 ECAB 243 (2006); *Elmer Strong*, 17 ECAB 226 (1965); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a, 11.a (December 1995).

⁷ *S.M.*, 58 ECAB 166 (2006); *Jack E. Rohrbaugh*, 38 ECAB 186 (1986); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11.b (December 1995).

⁸ See *D.S.*, 58 ECAB 392 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.a (December 1995).

reasoning. The record shows that appellant did not complete a required mathematics course, Math 103 and Algebraic concepts. Because mathematical reasoning is rated as “extremely important” in the DOT list of skills required for the quality assurance analyst position, appellant’s failure to complete a required mathematics course establishes that he did not have the necessary mathematics skill level necessary for the quality assurance analyst position. Appellant argued that he was not qualified for the quality assurance analyst position because he did not receive typing or keyboard training. The DOT job description for quality assurance analyst rates wrist-finger speed and handling and moving objects as “important” skills. The evidence establishes that the Office’s July 18, 2006 wage-earning capacity decision was erroneous in finding that appellant was capable of earning wages in the position of quality assurance analyst.

CONCLUSION

The Board finds that appellant met his burden of proof that the July 18, 2006 loss of wage-earning capacity should be modified.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers’ Compensation Programs dated February 11, 2009 and October 3, 2008 are set aside and the case is remanded for further action consistent with this decision.

Issued: March 24, 2010
Washington, DC

David S. Gerson, Judge
Employees’ Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees’ Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees’ Compensation Appeals Board