

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. MOFFITT and DEPARTMENT OF THE AIR FORCE,
NEWARK AIR FORCE STATION, OH

*Docket No. 03-1867; Submitted on the Record;
Issued January 30, 2004*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective August 20, 2002 on the grounds that the position of telephone solicitor represented his wage-earning capacity; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

This is appellant's second appeal before the Board. In the prior appeal the Board reversed the Office's February 10, 1995, June 27 and April 21, 1994 decisions and remanded the case for resolution of a conflict in medical evidence.¹ The facts and the circumstances of the case are presented in the prior Board decision and are hereby incorporated by reference.²

Upon remand, on March 16, 1998 the Office referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Boyd W. Bowden, II, an osteopathic Board-certified orthopedic surgeon, for resolution of the conflict in medical evidence.

By report dated May 6, 1998, Dr. Bowden reviewed appellant's factual and medical history, noted his 1983 lumbar laminectomy at L2-3 and his April 9, 1985 reinjury, and discussed his present subjective complaints of extensive low back discomfort with pain down both legs to his heels, right worse than left. Dr. Bowden noted that appellant's daily activities consisted of sitting all morning drinking coffee, going out to eat with his wife or sitting during

¹ Appellant's claim had been accepted for lumbosacral strain and a permanent aggravation of his previous lumbar laminectomy.

² Docket No. 95-1795 (issued October 22, 1997). The conflict of medical opinion was found between appellant's treating physician, Dr. Richard E. Simon, a Board-certified family practitioner, who found appellant was unable to work and Dr. J. Richard Briggs, a Board-certified orthopedic surgeon, and Dr. Robert C.C. Chiu, a Board-certified orthopedic surgeon. Drs. Briggs and Chiu examined appellant at the request of the Office and opined that he could perform limited-duty work for eight hours per day.

the afternoon, and sitting and watching television in the evening. He noted appellant's range of spinal motion, deep tendon reflexes, and positive straight leg raising tests, and he indicated that appellant had good musculature and muscle strength with no muscle weakness ascertained. Dr. Bowden reviewed radiologic findings of the 1983 L2-3 laminectomy, bulging discs at L3-4 and L4-5, an old laminectomy at L3-4, L4-5 ligamentous flavus thickening and mild spinal stenosis, and disc degeneration at L5-S1 with a right herniated nucleus pulposus. He noted a normal electromyogram (EMG) and upper extremity neurologic workup, and he diagnosed "unstable lumbar spine status post laminectomy L2-3." Dr. Bowden opined that appellant could return to gainful employment in a sitting position, could work at desk top level with a lifting limit of 20 pounds while in the sitting position, and could perform fine motor skills using both upper extremities, based upon the fact that he currently sat all day and drank coffee and was able to drive his car 75 miles per week. Dr. Bowden opined that appellant had a chemical dependency upon Valium and Tylenol #4, psychophysiological overlay and somatization. He recommended pain management and physical therapy for his low back instability. Dr. Bowden completed a Form OWCP-5 work capacity evaluation indicating that appellant could work eight hours per day in a sedentary position with walking and standing limited to 10 minute intervals, and lifting no more than 20 pounds in a sitting position.

The Office determined that a psychiatric evaluation was required, and on March 26, 1999 it referred appellant, together with a statement of accepted facts and question to be addressed, to Dr. Shiraz Rawji, a Board-certified psychiatrist.

By report dated April 30, 1999, Dr. Rawji reviewed appellant's factual and medical history, noted that he denied any chemical dependency or problems with drugs, indicated that his problems were essentially physical, but noted that he had some post-traumatic stress disorder type symptomatology related to his Vietnam experiences, including nightmares, hallucinations, and flashbacks of things he heard or experienced in Vietnam. He noted, however, that appellant had not experienced any of these symptoms for that least the past two years. Dr. Rawji noted that on mental status examination appellant appeared anxious because he believed his benefits were going to be withheld again like they were in the past. He found appellant to be rational, relevant, coherent, and appropriate with no psychosis, no organicity, no memory problems and no orientation problems. Dr. Rawji found no evidence of appellant's chemical dependency at that time, and he opined that appellant did not suffer from any psychological condition medically related to his work injury. Dr. Rawji completed a work capacity evaluation form indicating that no psychological restrictions were necessary.

On May 7, 1999 the Office advised appellant that the impartial medical specialist found that appellant could work at a sedentary job eight hours per day, and that he was found not to have an injury-related chemical dependency problem. It therefore referred him for vocational rehabilitation based upon Dr. Bowden's 1998 restrictions.

However, appellant did not respond to the rehabilitation specialist's letters and he refused to participate in vocational rehabilitation.

By letter dated April 6, 2000, the Office advised appellant that it had been advised that he had not responded to the rehabilitation specialist's letters or telephone calls and it advised him of the provisions of 5 U.S.C. § 8113(b), which stated that, if an individual without good cause fails

to apply for and undergo vocational rehabilitation when so directed, and the Office finds that in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, the Office may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation. The Office also advised appellant of the provisions of 20 C.F.R. § 10.519 which stated that, if an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, the Office will reduce the employee's future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation, or if the failure or refusal occurs early in the necessary stages of vocational rehabilitation, such as meetings with the Office nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations, the Office cannot determine what would have been the employee's wage-earning capacity, the Office will assume under section 10.519(c) that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and the Office will reduce the employee's monetary compensation accordingly to zero.³

By letter dated June 26, 2000, the vocational rehabilitation counselor advised appellant that the positions of order clerk and telephone solicitor were determined to be suitable to his condition and physical restrictions from Dr. Bowden. The counselor indicated that if appellant did not cooperate his vocational rehabilitation file would be closed. Thereafter, appellant did not follow through with appointments or testing and the vocational rehabilitation counselor submitted a closure report.

Therefore, the Office undertook consideration of a wage-earning capacity determination based on a constructed position of a telephone solicitor. The Office did not employ the 5 U.S.C. § 8106(b) or 20 C.F.R. § 10.501(b) penalty provisions, as it could have, within its discretion. The rehabilitation specialist determined under the standards of 5 U.S.C. § 8115(a) that it was a sedentary position and without heavy lifting, which met Dr. Bowden's restrictions, and was vocationally appropriate as appellant was a high school graduate who served in the Army and had worked in insurance sales in the 1970s. The rehabilitation specialist also noted that the job was performed in sufficient numbers within appellant's commuting area so as to be reasonably available.

On July 10, 2002 the Office issued appellant a notice of proposed reduction of compensation on the grounds that the position of telephone solicitor represented his wage-earning capacity. The Office advised that Dr. Bowden, the impartial medical examiner, had resolved the conflict in medical evidence and had determined that appellant could work at a sedentary position for eight hours per day with a 20-pound lifting limit and that Dr. Rawji had found that appellant had no injury-related psychological problems for which employment restrictions were needed.

³ 20 C.F.R. § 10.519(c).

Appellant disagreed with the proposed action and argued that he was totally disabled and that his back condition had only gotten worse since his original injury. He also argued that he had complied with vocational requirements.

By decision dated August 20, 2002, the Office finalized the loss of wage-earning determination on the grounds that the position of telephone solicitor represented his wage-earning capacity. The Office found that appellant had not cooperated with rehabilitation efforts, that the position of telephone solicitor was medically and vocationally suitable to appellant's condition, and that it was reasonably available within appellant's commuting area, such that the position of telephone solicitor represented appellant's wage-earning capacity. By additional decision dated August 20, 2002, citing to 5 U.S.C. §§ 8106 and 8115, the Office reduced appellant's compensation to reflect his ability to earn the wages of a telephone solicitor.

Appellant disagreed with the August 20, 2002 decisions and requested reconsideration. In support he submitted new medical evidence, that included July 19 and September 3, 2002 reports from Dr. Simon which noted that appellant had disc damage at L2-3 where the previous laminectomy was done, in addition to damage to the discs at L3-4 and L5-S1. Dr. Simon opined that appellant had injury and findings compatible with disc disease that had developed since his original injury. In a November 11, 2002 report, Dr. Simon noted that appellant had problems with chronic pain, progressive disc disease and arthritis.

Appellant also submitted an August 12, 2002 magnetic resonance imaging (MRI) scan which revealed a status post laminectomy defect involving the L2-3, L3-4 levels. Additionally appellant submitted a September 25, 2002 computerized tomography (CT) scan report which revealed probable early degenerative disc disease of C5-6 and C6-7.

By decision dated February 14, 2003, the Office denied appellant's request for further consideration of his case on its merits finding that the evidence submitted in support was duplicative, irrelevant and insufficient to warrant a merit review.

The Board finds that the Office properly reduced appellant's compensation effective August 20, 2002 on the grounds that the position of telephone solicitor represented his wage-earning capacity.

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.⁴ As part of its burden, the Office must show that the employee is physically capable of performing the duties of the job selected as representative of his or her wage-earning capacity.⁵

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ Section 8115(a) of the Federal Employees' Compensation Act (5 U.S.C. § 8115(a)) requires that, in determining wage-earning capacity, due regard be given to the nature of the injury and the degree of physical impairment.

Section 8115 of the Act,⁶ titled “Determination of wage-earning capacity” states in pertinent part:

“In determining compensation for partial disability, *** 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 --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.”

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.⁷ As part of its burden, the Office must show that the employee is physically capable of performing the duties of the job selected as representative of his or her wage-earning capacity.⁸

These same factors are to be considered in determining wage-earning capacity based on a constructed position.⁹

Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions given the nature of the employee’s injuries and the degree of physical impairment, his or her usual employment, the employee’s age and vocational qualifications, and the availability of suitable employment.¹⁰ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the

⁶ 5 U.S.C. § 8115.

⁷ *Harold S. McGough*, 36 ECAB 332 (1984).

⁸ Section 8115(a) of the Act (5 U.S.C. § 8115(a)) requires that, in determining wage-earning capacity, due regard be given to the nature of the injury and the degree of physical impairment.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(a) (December 1993).

¹⁰ See generally 5 U.S.C. § 8115(a); A. Larson *The Law of Workers’ Compensation* § 81.01 (2000); see also *Betty F. Wade*, 37 ECAB 556 (1986).

employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.¹¹

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report which lists jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.¹² After determining vocational suitability of the constructed position, the Office must determine the medical suitability, taking into regard medical conditions due to the accepted employment injuries and any preexisting medical conditions, but not medical conditions that arose subsequent to the work-related injury.¹³ The Office properly did so in this case.

In this case, the Office determined that appellant was not cooperating with vocational rehabilitation, despite being informed of the provisions of 5 U.S.C. § 8113(b)¹⁴ and 20 C.F.R. § 10.519(c);¹⁵ however, it did not pursue either of the recourses pursuant to these two sections. Instead, the Office undertook consideration of a wage-earning capacity determination based on a constructed position of a telephone solicitor. The Office did not employ the 5 U.S.C. § 8106(b) or 20 C.F.R. § 10.501(b) penalty provisions within its discretion, but determined under the standards of 5 U.S.C. § 8115(a) that it was a sedentary position and without heavy lifting, which met Dr. Bowden's restrictions, and was vocationally appropriate as appellant was a high school graduate who served in the Army and had worked in insurance sales in the 1970s and noted that the job was performed in sufficient numbers within appellant's commuting area so as to be reasonably available. The Office therefore applied the criteria under 5 U.S.C. § 8115 and found, considering appellant's injury, his degree of physical impairment, his usual employment, his age, his qualifications, the availability of the position and other relevant factors, that the sedentary position of telephone solicitor was within appellant's medical restrictions as determined by

¹¹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹² *Dorothy Jett*, 52 ECAB 246 (2001); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

¹³ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹⁴ 5 U.S.C. § 8113(b), which states that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, and the Office finds that in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, the Office may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation.

¹⁵ 20 C.F.R. § 10.015(b) states that, if an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, the Office will reduce the employee's future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation, or if the failure or refusal occurs early in the necessary stages of vocational rehabilitation, such as meetings with the Office nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations, the Office cannot determine what would have been the employee's wage-earning capacity, the Office will assume under section 10.519(c) that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and the Office will reduce the employee's monetary compensation accordingly to zero.

Dr. Bowden and vocational qualifications, and was reasonably available within his commuting area. The Office, accordingly, properly determined appellant's wage-earning capacity.

Appellant was advised of the proposed reduction of his compensation but he did not submit any evidence to support that it was not an appropriate position for his partially disabled condition. He merely disagreed and claimed that he was totally disabled.

As the Office has that broad discretion, it met its burden of proof to modify appellant's wage-loss compensation under 5 U.S.C. § 8115(a) and it accordingly reduced his compensation to reflect his wage-earning capacity as a telephone solicitor.

The Board, however, finds that the Office improperly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In this case, it is clear from appellant's written reconsideration request that he was seeking to establish that he had experienced a material worsening of his originally accepted employment injuries/conditions, as demonstrated by new and recent medical evidence, and was now totally disabled.¹⁶ Appellant was clearly not seeking reconsideration of the original loss of wage-earning capacity decision as the Office surmised.

Once 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 injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹⁷ The burden of proof is on the party attempting to show the award should be modified.¹⁸

In this case, appellant submitted new and relevant, previously unconsidered, medical evidence regarding changes in his accepted conditions. The request should have been considered as a claim for material changes and worsening in his existing conditions, which could potentially warrant a modification in his loss of wage-earning capacity.

Appellant submitted new medical evidence that included July 19 and September 3, 2002 reports from Dr. Simon, a Board-certified family practitioner, which noted that appellant had disc damage at L2-3 where the previous laminectomy was done, in addition to damage to the discs at L3-4 and L5-S1, and noted that appellant had injury and findings compatible with disc disease that had developed since his original injury. In a November 11, 2002 report, Dr. Simon noted that appellant had problems with chronic pain, progressive disc disease and arthritis.

Appellant also submitted an August 12, 2002 magnetic resonance imaging (MRI) scan which revealed a status post laminectomy defect involving the L2-3, L3-4 levels, and a

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (2). (The original condition had changed.)

¹⁷ *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

¹⁸ See *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Joseph M. Popp*, 48 ECAB 624 (1997); *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

September 25, 2002 computerized tomography (CT) scan report which revealed probable early degenerative disc disease of C5-6 and C6-7. This evidence should have been considered on its merits to determine whether or not it demonstrated a material worsening of appellant's accepted conditions.

Therefore, the case is remanded for consideration of the new medical evidence submitted by appellant in support of his claim of material change in the nature and extent of his injury-related condition and a request for modification of his wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated August 20, 2002 is hereby affirmed: the decision dated February 14, 2003 is set aside and the case is remanded for further action in accordance with this decision and order of the Board.

Dated, Washington, DC
January 30, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member