

FACTUAL HISTORY

Appellant, a 55-year-old former able seaman, has an accepted claim for scalp contusion, cervical strain and somatoform pain disorder due to a December 1, 1988 employment injury. After being released to resume his regular duties, appellant resigned from the employing establishment in 1989 and then worked approximately 13 months in the private sector as a truck driver. On November 6, 1990 appellant suffered a recurrence of disability and the Office placed him on the periodic compensation rolls.

In a decision dated September 28, 1994, the Office determined that the selected position of order taker represented appellant's wage-earning capacity. The Office, therefore, reduced his wage-loss compensation based on his ability to earn \$210.40 a week as an order taker. Appellant sought review of the Office's loss of wage-earning capacity determination on several occasions, including two appeals to the Board.² When the case was last on appeal, the Board issued a July 11, 2003 decision finding that appellant failed to carry his burden to justify modification of the Office's September 28, 1994 loss of wage-earning capacity determination.³

On July 6, 2004 appellant requested reconsideration. In support of his request, he submitted two recent reports from Dr. Charlotte Higgins-Lee, a psychologist. In a March 30, 2004 report, Dr. Higgins-Lee noted that she had recently examined appellant and administered a battery of tests over a two-day period in February 2004. She also reviewed certain medical reports. Dr. Higgins-Lee diagnosed cognitive deficit and depression and she noted that the recent test results revealed that appellant had a severe impairment. She also indicated that there was no evidence of malingering. However, Dr. Higgins-Lee did not specifically address appellant's ability to perform the duties of an order taker or otherwise indicate what, if any, type of work appellant was capable of performing. Dr. Higgins-Lee also provided an April 26, 2004 supplemental report. She reviewed the order taker position description and found that the job was not a good choice for appellant because of the fatigue he exhibited while attempting to complete certain tests with his arms.

By decision dated September 23, 2004, the Office denied modification.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵ The Office's procedure manual provides that if a

² Docket Nos. 99-913 and 02-1823. The Board's May 4, 2001 and July 11, 2003 decisions are incorporated herein by reference.

³ By order dated September 29, 2003, the Board denied appellant's request for reconsideration of the July 11, 2003 decision.

⁴ See 20 C.F.R. §§ 10.403, 10.520 (1999).

⁵ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.⁶ The procedure manual further indicates that, under these circumstances, “the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity] decision.”⁷

Once the wage-earning capacity of an injured employee 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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

Appellant does not claim that he has been retrained or otherwise vocationally rehabilitated and the record does not support such a finding.¹⁰ Thus, the only remaining avenues for modification of the Office’s loss of wage-earning capacity determination would be to establish a material change in the nature and extent of the injury-related condition or demonstrate that the original September 28, 1994 determination was erroneous.¹¹

The job duties of an order taker include the processing of orders for material or merchandise received by mail, telephone or personally from customers or company employees. The job can be performed either manually or by using a computer calculating machine. Additional duties include editing orders, data entry, recordkeeping, filing and providing customer information regarding pricing, shipping date and any anticipated delays in delivery. The position is sedentary, requiring a maximum of 10 pounds of lifting, carrying, pushing and pulling.

In her March 30, 2004 report, Dr. Higgins-Lee diagnosed cognitive deficit and depression and she noted that recent test results revealed that appellant had a severe impairment, but she did not otherwise comment on appellant’s ability to work. However, on April 26, 2004 Dr. Higgins-Lee indicated that the order taker position was not a good choice for appellant because of the fatigue he exhibited while attempting to complete the Tactual Performance Test (TPT). This particular test is undertaken while blindfolded and the individual is required to place a number of different shaped wooden objects into their corresponding spaces on a vertically

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁷ *Id.*

⁸ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁹ *Id.*

¹⁰ Appellant reiterated a number of arguments raised in his two prior appeals, which the Board will not revisit. Additionally, the Board will not revisit the evidence that was part of the record when the case was last before us. The Board’s July 11, 2003 findings of fact and conclusions of law have been incorporated herein.

¹¹ *Tamra McCauley*, *supra* note 8.

mounted board. The first trial is performed using the dominant hand and the second trial is undertaken using the opposite hand. The third and final trial is performed using both hands. Appellant successfully completed the first two components of this test and his results were noted to be within the “average range.” According to Dr. Higgins-Lee, appellant could not proceed with the third portion of the test because he was sore and fatigued from holding up his right and then left arm up during the first two trials. She also noted that appellant had a headache. Because appellant was unable to complete all three trials of the TPT Dr. Higgins-Lee counted his scores as impaired notwithstanding the fact that the results of the first two trials were within the average range.

Dr. Higgins-Lee indicated that the order taker position required appellant to work at a “slanted board.” She also noted that the TPT board was mounted on an easel and slanted at an angle. Because appellant was unable to complete the TPT, Dr. Higgins-Lee found that the order taker position was not a good choice because it too would have appellant working at a slanted board.

The order taker position description that accompanied the Office’s September 28, 1994 loss of wage-earning capacity determination did not identify any specific job duties that involved work at a “slanted board.” On June 4, 1993 Dr. Gregory T. Smith, an Office referral psychologist, reviewed the order taker job description and approved the position with certain modifications.¹² It was Dr. Smith who initially recommended that appellant be provided a “slanted writing surface for optimal neck alignment.” Use of a slanted writing surface was not a job requirement, but merely a recommended accommodation from another physician of record. Dr. Higgins-Lee apparently mistook Dr. Smith’s recommendation as a specific requirement of the order take position. Thus, her opinion regarding appellant’s ability to perform the job is not based on the actual duties appellant would be required to perform as an order taker.

Dr. Higgins-Lee’s opinion is also of questionable probative value because it is not clear how appellant’s failure to complete the TPT due to arm fatigue correlates to an inability to perform the job of order taker from a psychiatric standpoint. Appellant’s arms reportedly grew tired over an unspecified period of time while he was attempting to place wooden objects into corresponding holes in a board while blindfolded. First, appellant would not be expected to perform his duties as an order taker blindfolded regardless of the angle or position of the writing surface. Second, the order taker position is sedentary and does not specifically preclude appellant from taking breaks when and if he became fatigued, regardless of the cause of his fatigue. Third, Dr. Higgins-Lee did not state that appellant was unable to perform the duties of an order taker because of an employment-related psychiatric condition. While she diagnosed cognitive deficit and depression, she did not indicate that either condition specifically precluded appellant from performing the selected position of order taker. The only reported limiting factor was arm fatigue. Dr. Higgins-Lee did not explain what, if any, connection there was between appellant’s noted arm fatigue and his current psychiatric condition. The Board finds that Dr. Higgins-Lee’s opinion is insufficient to establish either a material change in appellant’s condition or that the prior decision was erroneous. Appellant, therefore, failed to carry his

¹² Dr. Smith evaluated appellant in conjunction with Dr. Linda Jensen, a neurologist, who coauthored the June 1993 report.

burden to justify modification of the Office's September 28, 1994 loss of wage-earning capacity determination.

CONCLUSION

The Board finds that appellant has not met any of the requirements for modification of the Office's September 28, 1994 loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board