

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

MELVIN DESHAZER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 05-639
Issued: July 12, 2005**

Appearances:
Melvin Deshaer, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 21, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 23, 2004, finding that he had not established a recurrence of disability on May 17, 2004 causally related to his federal employment injury. 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 the Office properly adjudicated appellant's claim for recurrence of total disability rather than as a request for modification of his wage-earning capacity determination.

FACTUAL HISTORY

On March 3, 1995 appellant, a 40-year-old motor vehicle operator, filed a traumatic injury claim alleging that he sustained a left ear contusion when he was shot with a stun gun in the ear during a robbery. He stopped work on March 3, 1995 and returned to a limited-duty

position on June 20, 2005. The Office accepted the claim for left open ear wound and stress disorder. On June 15, 1995 the employing establishment offered appellant a limited-duty position as a modified motor equipment operator, which he accepted June 15, 1995 and returned to work on June 22, 1995. The Office issued a loss of wage-earning capacity decision on May 13, 1996 finding that appellant's actual earnings as a modified equipment operator fairly and reasonably represented his wage-earning capacity.

On May 21, 2004 the Office received appellant's claim for compensation beginning May 17, 2004, a May 20, 2004 statement by Michelle Daniels, supervisor, and an attending physician's report (Form CA-20), by Dr. David C. Martin, Ph.D, a clinical psychologist. On the Form CA-7, appellant claimed leave without pay commencing May 17, 2004 to date unknown. The employing establishment noted that he had worked in a modified job, had used sick leave for a period of time until May 14, 2004 and that the limited-duty job remained available.¹

Dr. Martin diagnosed post-traumatic stress disorder and checked "yes" that the condition was employment related. In support of this conclusion, he stated that the "stress at the workplace appears to provoke more flashbacks." The period of disability was noted as December 12, 2003 to unknown.

In her May 20, 2004 statement, Ms. Daniels noted that appellant, on December 11, 2003 told her that he was working in the vault area moving boxes because he was preparing stock for the destruction committee, "that he felt as though he was doing all the work and no one else was working harder than him," that she held a meeting with appellant and his coworkers to investigate the allegation, that the coworkers denied that they were not doing their fair share and that appellant left because his "feet hurt." Ms. Daniels stated that appellant called in on May 17, 2004 to request leave without pay.

On May 26 and 27, 2004 the Office received a January 14, 2004 psychiatric evaluation and treatment notes dated February 11, March 17, April 14 and May 12, 2004, from Dr. L. Das Surapu, a treating physician. He diagnosed post-traumatic stress disorder and depression.

In a letter dated May 28, 2004, the Office informed appellant that the evidence was insufficient to support his claim for compensation. The Office advised him that it appeared he sustained a new injury on December 11, 2003 based upon Ms. Daniels' statement.

In a June 2, 2004 report, Dr. Martin stated that he continued to treat appellant for his post-traumatic stress disorder. He indicated that he had been treating him since December 2004, that [appellant] did "not believe that he is able to return to work at this time" and his return to work date "continues to be indefinite."

In a letter dated June 21, 2004, appellant responded to the Office's May 28, 2004 letter and submitted a June 24, 2004 report by Dr. Martin in support of his claim. He stated that on December 11, 2003 he had a flashback to the robbery incident of March 3, 1995. Appellant then stated that he felt the Office should reinstate the sick leave he used between December 11, 2003

¹ The date of commencement of the sick leave is illegible.

and May 17, 2004 as this was due to his post-traumatic stress disorder, which was a result of the March 3, 1995 employment injury.

In his June 24, 2004 report, Dr. Martin diagnosed post-traumatic stress disorder and that appellant has been under his care since December 2003. He opined “[t]here is no ‘new injury’ being treated, but an exacerbation of his original one.” Dr. Martin concluded that appellant’s “mental condition worsens under the stress of the job in a particular manner” and that he does better when he is kept occupied and busy. In concluding, he opined that appellant was “a danger to himself and others, given his feelings of fear and unpredictable mental state” and indicated that [he] was “currently scared to return to the [employing establishment] to work.”

In progress notes dated July 14, 2004, Dr. Surapu diagnosed post-traumatic stress disorder. In the August 11, 2004 progress notes, he diagnosed depression and paranoia.

On October 4, 2004 the Office received a July 14, 2004 work capacity evaluation (Form OWCP-5a), Dr. Surapu diagnosed post-traumatic stress disorder, depression and indicated that appellant was unable to work at this time.

On October 4, 2004 the Office also received a September 29, 2004 statement by appellant, who stated that he used sick leave until May 2004 and that he did not sustain a new injury on December 11, 2003 but that “this injury is a[n] ongoing thing. It is an ongoing problem.”

On October 12, 2004 the Office requested that appellant provide additional medical and factual information regarding his claim for compensation beginning May 17, 2004. He was informed as to the type of information required and provided 30 days to submit the evidence.

On November 12, 2004 the Office received an October 30, 2004 report by Dr. Martin and a June 7, 2004 statement by David B. Tillman, a coworker. In the October 30, 2004 report, Dr. Martin, reiterated his opinion that appellant’s hallucinatory flashbacks were “an exacerbation” of his original March 3, 1995 employment injury and not a new injury. He opined:

“The exacerbation of [appellant’s] symptoms in December appeared to be based on the interpersonal stresses of his current job and an increase in his paranoid fears that emerged when employees worked in close proximity to him and especially behind him. [His] bringing a gun to work to protect him from his hullcination (sic) was a definite worsening of his condition and prompted me to advise him to not return to work until he was comprehensively evaluated and treated.”

With regards to appellant’s disability, Dr. Martin stated that he had approved his “disability on a monthly basis since December of 2003” and that he was unaware that he had returned to work.

On November 15, 2004 the Office received an October 28, 2004 Form OWCP-5a from Dr. Martin and progress notes dated November 3, 2004 by Dr. Surapus. Dr. Martin indicated

that appellant was capable of working four hours a day and that he was unable to perform his usual job.

By decision dated December 23, 2004, the Office denied appellant's claim for a recurrence of disability beginning May 17, 2004 on the grounds that the medical evidence was insufficient to establish a causal relationship between his accepted March 3, 1995 employment injury and the disability on May 17, 2004. The Office determined that appellant sustained a new injury on May 17, 2004 as he attributed his condition to an increased workload and not to the March 3, 1995 employment injury and instructed him to file a CA-1 form.

LEGAL PRECEDENT

Under section 8115(a) of the Federal Employees' Compensation Act,² wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³ Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.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, "[i]f a 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. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁶

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.⁷

² 5 U.S.C. §§ 8101-8193, 8115(a).

³ *Hayden C. Ross*, 55 ECAB ____ (Docket No. 04-136, issued April 7, 2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁵ *See Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); *see also Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

⁷ *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003); *Sue A. Sedwick*, 45 ECAB 211 (1993).

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of total disability on May 17, 2004. Under the circumstances of this case, the Board finds that the Office should have developed the issue of whether the May 13, 1996 wage-earning capacity determination should be modified.

According to the evidence of record appellant returned to work on June 22, 1995 in a limited-duty position as a modified equipment operator for which the Office determined on May 13, 1996 that this position fairly and reasonably represented his wage-earning capacity. He filed a claim for compensation beginning May 17, 2004. Appellant also requested that the Office reinstate the sick leave he used between December 11, 2003 and May 17, 2004, but the record contains no claim for compensation filed for this period. Dr. Martin stated that he has been totally disabled due to aggravation of his post-traumatic stress disorder since December 11, 2003. He opined that this condition was due to the March 3, 1995 employment injury. Dr. Surapu diagnosed post-traumatic stress disorder in various treatment and progress notes and concluded that appellant was totally disabled in his July 14, 2004 work capacity evaluation. The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of the wage-earning capacity is warranted.⁸

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests a resumption of compensation for "total wage loss." This section of the procedure manual covers the situation when a claimant has stopped working, as in this case. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the May 13, 1996 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

⁸ *Katherine T. Kreger, supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 23, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 12, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member