

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

_____)
CHRISTOPHER P. VAHAN, Appellant)
)
and)
)
DEPARTMENT OF AGRICULTURE, FOREST)
SERVICE, KOOTENAI NATIONAL FOREST,)
Libby, MT, Employer)
 _____)

Docket No. 05-178
Issued: June 23, 2005

Appearances:
 Christopher P. Vahan, pro se
 Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Chairman
 COLLEEN DUFFY KIKO, Member
 DAVID S. GERSON, Alternate Member

JURISDICTION

On October 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 6 and July 23, 2004 merit decisions denying his request for modification of its wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied modification of its determination of appellant's wage-earning capacity.

FACTUAL HISTORY

On August 10, 1982 appellant, then a 31-year-old forestry technician, filed a traumatic injury claim alleging that he sustained an injury on August 9, 1982 when he fell from some logs which he was walking across and was hit by several logs while on the ground. The Office accepted that appellant sustained a bruised right hip and arm, muscle spasms with a compressed

nerve of the left arm, weakness of the 4th and 5th digits of the left hand, post-traumatic thoracic outlet syndrome and chronic pain syndrome secondary to thoracic outlet syndrome. He stopped work approximately a month after the injury and last worked for the employing establishment in 1983.

Appellant received medical treatment for his work-related conditions as well as several nonwork-related conditions including chronic kidney stones with frequent left flank pain, bronchial asthma and depression which affected his physical condition. His attending physicians generally indicated that he was capable of attempting some form of employment.

Appellant moved to Spokane, Washington and in 1993 he began to attend college in order to earn a bachelor's degree in sociology. In late 1995 the Office referred appellant for participation in a vocational rehabilitation program. Appellant continued to attend college upon his own initiative and in 1996 he earned a bachelor's degree in sociology with an emphasis on social work. He moved to San Diego in July 1996 and continued to participate in an Office-sponsored vocational rehabilitation program.

In April 1997 the Office referred appellant to Dr. Gary R. Hudak and Dr. Robert Moore, both Board-certified in psychiatry and neurology. In a May 7, 1997 report, Dr. Hudak stated that appellant's condition did not warrant a psychiatric diagnosis and determined that he did not have any psychiatric-based work restrictions. In a May 30, 1997 report, Dr. Moore noted that appellant had a normal neurological examination except for some sensory loss in his left ulnar nerve. He indicated that appellant could work on a full-time basis with some work restrictions including occasional carrying of up to 40 pounds and frequent carrying of up to 20 pounds.

In a report dated December 4, 1997, Dr. Robert L. Magnuson, an attending physician Board-certified in physical medicine and rehabilitation, determined that appellant could work 8 hours per day but that his physical condition prevented him from working with his arms elevated or sustaining any given activity for more than 10 minutes at a time. In a report dated January 12, 1998, Dr. George Pratt, an attending Board-certified psychiatrist and neurologist, stated that appellant's psychological condition prevented him from working more than four hours per day over a six- to eight-hour period.

In mid 1998 appellant's vocational rehabilitation counselor determined that appellant was capable of working as a social services aide and determined that the position was reasonably available in his commuting area. The position involved interviewing individuals, compiling information and providing advice on social service matters. It required occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.

The Office determined that there was a conflict in the medical evidence regarding appellant's physical and psychological condition and referred him for impartial medical evaluations to Dr. Barry A. Freidman, a Board-certified orthopedic surgeon, Dr. Jody Corey-Bloom, a Board-certified neurologist, and Dr. Stephen M. Stahl, a Board-certified psychiatrist and neurologist.

In reports dated May 19 and 22, 1998, Dr. Friedman indicated that appellant exhibited slightly restricted motion of his left shoulder on examination and diagnosed mild adhesive

capsulitis of the left shoulder. He determined that appellant could work eight hours per day and work in any position that did not require prolonged or frequent overhead activities with his left arm. Dr. Friedman indicated that appellant was physically able to perform the social service aide position.

In reports dated June 11, 1998, Dr. Corey-Bloom diagnosed chronic pain syndrome with possible fibromyalgia, recurrent nephrolithiasis, cardiomyopathy, and degenerative changes of the cervical, thoracic and lumbar spines. Dr. Corey-Bloom indicated that appellant could lift 30 pounds with his right arm and 10 pounds with his left arm and concluded that he could perform the social service aide position.

In reports dated July 28, 1998, Dr. Stahl diagnosed pain disorder associated with psychological factors, recurrent major depressive disorder (currently mild), personality disorder with avoidance, dependent and schizoid traits, and probable opioid dependence. Dr. Stahl determined that, although appellant's long absence from the workplace might pose problems, his psychological condition did not disable him from performing the social service aide position.

The Office requested that Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and Office medical consultant, review the medical record and evaluate the nature of appellant's left shoulder condition. In a report dated January 7, 1999, Dr. Harris determined that the medical record did not support a diagnosis of adhesive capsulitis of the left shoulder and posited that appellant's left shoulder motion was restricted due to his pain syndrome.

In January and November 2002 appellant's vocational rehabilitation counselor reconfirmed that appellant was capable of working as a social service aide and that the position was reasonably available in his commuting area.

By letter dated November 4, 2002, the Office advised appellant that it proposed to reduce his compensation due to the fact that his wage-earning capacity was represented by his ability to work as a social service aide.

In a letter dated November 28, 2002, appellant argued that he was unable to perform the position of social service aide. He stated that the reports of the impartial medical specialists were more than four years old and therefore did not reflect his current physical or psychological condition. Appellant asserted that the recent reports of his attending physicians showed that he was unable to perform the position.

Appellant submitted November 13 and December 11, 2002 and January 8, 2003 reports in which Dr. Magnuson indicated that he had firmness and tenderness in his left scapula and trapezius muscles on examination as well as tenderness in his costochondral junction, upper ribs, and pectoralis muscles on the left. Dr. Magnuson diagnosed chronic and myofascial pain syndromes which were symptomatically controlled by long-acting opiates.¹

¹ Dr. Magnuson stated that appellant was "released to return to prior work with defined limitations" but he did not identify the nature of the work or the limitations.

By decision dated January 29, 2003, the Office adjusted appellant's compensation to reflect that his wage-earning capacity was represented by his ability to work as a social service aide.

Appellant requested a hearing before an Office hearing representative which was held on December 8, 2003. Appellant testified that he felt that the medical evidence did not show that he was capable of performing the social service aide position.²

Appellant submitted a December 4, 2003 report in which Dr. Magnuson stated that he continued to have firmness and tenderness in his left scapula and trapezius muscles on examination as well as tenderness in his costochondral junction, upper ribs and pectoralis muscles on the left. Dr. Magnuson indicated that appellant had suffered from myofascial pain syndrome since 1982 and recommended that he start working one hour per week with restrictions and gradually work his way up to full-time restricted work.

By decision dated and finalized April 6, 2004, the Office hearing representative denied modification of the Office's January 29, 2003 determination that appellant's wage-earning capacity was represented by his ability to work as a social service aide.

By letter dated June 16, 2004, appellant again requested reconsideration of his claim. He continued to argue that the 1998 opinions of the impartial medical specialists did not provide a sufficient basis for the Office to meet its burden of proof to adjust his compensation. Appellant asserted that the reports of his attending physicians showed that he was unable to perform the social service aide position.

Appellant submitted a June 30, 2004 report in which Dr. Magnuson diagnosed controlled chronic and myofascial pain syndromes and recommended that he only work three hours per day every other day.³

By decision dated July 23, 2004, the Office affirmed its April 6, 2004 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.⁵ If the actual earnings do not fairly and reasonably

² Appellant provided additional argument in a December 21, 2003 letter to the Office hearing representative.

³ Dr. Magnuson stated that appellant was "released to return to prior work with redefined limitations since [the Office] has stopped the medical and psychological support that was controlling symptoms in 2001."

⁴ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984). The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background. See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *Pope D. Cox*, 39 ECAB 143, 148 (1988).

represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity.⁶ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁷

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁸

After a loss of wage-earning capacity is determined, a modification of such a 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.⁹ The burden of proof is on the party attempting to show that the award should be modified.¹⁰

The Board has held that a wage-earning capacity determination must be made on a reasonably current medical evaluation.¹¹ In the case of *Keith Hanselman*,¹² the relevant medical report was almost two years old when the Office issued its decision modifying the claimant's compensation. The relevant work restriction evaluation form was over one year old, was not fully completed, listed no current findings and was unaccompanied by evidence that it was made with the benefit of a concurrent examination. The Board held that these reports could not form a valid basis for a loss of-wage-earning capacity determination.

⁶ *Id.*; 5 U.S.C § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁸ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

⁹ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹⁰ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

¹¹ *Anthony Pestana*, 39 ECAB 980, 986-87 (1988).

¹² 42 ECAB 680, 687 (1991).

In the case of *Ellen G. Trimmer*,¹³ the Board found that the Office did not meet its burden of justifying the reduction of the employee's monetary compensation because of fatal defect in its determination of wage-earning capacity. The Office had based its decision on a work-tolerance limitations report by the employee's attending physician, but by the time the Office determined that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened its relevance.

In *Samuel J. Russo*,¹⁴ the Office determined the claimant's wage-earning capacity without a current medical evaluation of the claimant's work limitations. The most recent medical reports regarding such limitations in that case were prepared two years prior to the Office's determination. In *Anthony Pestana*,¹⁵ the Board held that the Office failed to ensure that the record contained a detailed current description of the claimant's disabled condition and ability to perform work. In that case, the Office made its wage-earning capacity determination nearly five years after the claimant's most thorough physical examination and evaluation.

ANALYSIS

On August 9, 1982 appellant sustained injury due to a fall at work and the Office accepted that he sustained various upper extremity, hip and pain syndrome conditions. He last worked for the employing establishment in 1983 and the Office later received information from his attending physicians who found that he was not totally disabled for work and had a partial capacity to perform work subject to restrictions. Appellant's vocational rehabilitation counselor determined that he was able to perform the position of social service aide and that the position was reasonably available within his commuting area. By decision dated January 29, 2003, the Office adjusted appellant's compensation to reflect that his wage-earning capacity was represented by his ability to work as a social service aide. By decisions dated April 6 and July 23, 2004, the Office denied appellant's requests for modification of the January 29, 2003 determination.

The Board finds that appellant has shown that the Office's original January 29, 2003 determination with regard to his wage-earning capacity was erroneous. As noted above, a modification of a wage-earning capacity determination is warranted when the original determination was in fact erroneous.¹⁶

The Office based its January 29, 2003 determination regarding appellant's wage-earning capacity on the opinions of several impartial medical specialists: Dr. Freidman, a Board-certified orthopedic surgeon, Dr. Corey-Bloom, a Board-certified neurologist, and Dr. Stahl, a

¹³ 32 ECAB 1878, 1882 (1981).

¹⁴ 28 ECAB 43, 47 (1976).

¹⁵ 39 ECAB 980, 985 (1988).

¹⁶ See *supra* note 9 and accompanying text.

Board-certified psychiatrist and neurologist.¹⁷ The Office found that the May 19 and 22, 1998 reports of Dr. Friedman, the June 11, 1998 reports of Dr. Corey-Bloom, and the July 28, 1998 reports of Dr. Stahl showed that appellant was able to perform the position of social service aide.¹⁸

The Board notes that these reports were produced approximately four and a half years prior to the Office's November 4, 2002 proposed reduction of appellant's compensation and its January 29, 2003 decision reducing his compensation. Pursuant to *Hanselman*,¹⁹ *Trimmer*,²⁰ and *Russo*,²¹ the Board finds that the reports of Drs. Freidman, Corey-Bloom, and Stahl were not reasonably current and could not form a valid basis for a loss of wage-earning capacity decision. Appellant consistently argued that the reports of these physicians were too old or otherwise insufficient to show that he could perform the social service aide position around the time of the Office's January 29, 2003 determination.

Under the circumstances of the present case, the reports of the physicians on whom the Office relied did not clearly represent appellant's wage-earning capacity at the time of the January 29, 2003 wage-earning capacity and therefore appellant has shown that the Office's original determination was erroneous.²² Appellant has shown that the Office did not initially meet its burden of proof to show that the position of social service aide was consistent with his work tolerance limitations at the time the January 29, 2003 decision was issued.²³ Therefore, he has shown that he was entitled to modification of the Office's wage-earning capacity determination.

CONCLUSION

The Board finds that the Office improperly denied modification of its determination of appellant's wage-earning capacity.

¹⁷ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

¹⁸ The Office also appears to have partially relied on a January 7, 2003 report of Dr. Harris, a Board-certified orthopedic surgeon and Office medical consultant.

¹⁹ *Supra* note 12.

²⁰ *Supra* note 13.

²¹ *Supra* note 14.

²² Moreover, the record contained medical evidence from around the time of the Office's initial wage-earning capacity determination which suggested that appellant was unable to perform the social service aide position. In reports dated November 13 and December 11, 2002 and January 8, 2003, Dr. Magnuson, an attending physician Board-certified in physical medicine and rehabilitation, indicated that appellant required work restrictions due to pain in his left shoulder and upper body caused by chronic and myofascial pain syndromes.

²³ *See supra* notes 4 through 7 and accompanying text regarding the Office's initial burden of proof.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 23 and April 6, 2004 decisions are reversed.

Issued: June 23, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member