

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

G.G., Appellant

and

PEACE CORPS, Namibia, Employer

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**Docket No. 06-528
Issued: August 7, 2006**

Appearances:
Humphrey S. Cummings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 6, 2006 appellant filed a timely appeal from a September 30, 2005 decision of the Office of Workers' Compensation Programs affirming an April 29, 2004 decision reducing her wage-loss benefits to zero based on her actual earnings and an April 30, 2004 decision denying disability compensation from March 17, 2003 to February 24, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual earnings as a patient surgical coordinator were representative of her wage-earning capacity as of September 3, 2002; (2) whether she established that she was disabled for work from March 17, 2003 to February 24, 2004 causally related to accepted major depression, post-traumatic stress disorder (PTSD) and an aggravation of irritable bowel syndrome; and (3) whether the Office properly determined in its September 30, 2005 decision that the only issue presented regarding the period March 17, 2003 to February 24, 2004 was whether appellant established a period of work-related disability.

FACTUAL HISTORY

The Office accepted that on January 5, 2002 appellant, then a 21-year-old volunteer, sustained PTSD, major depression and an exacerbation of preexisting irritable bowel syndrome when she was attacked and robbed at gunpoint by two men. Following the attack, the employing establishment evacuated her to Washington, D.C., where she received physical and psychiatric medical care. Appellant was medically separated from the employing establishment effective March 1, 2002. She received wage-loss compensation and medical treatment for the accepted conditions.

From September 3, 2002 to March 12, 2003 appellant worked in the private sector as a full-time surgical coordinator for a medical office, earning \$602.02 a week. As of September 3, 2002, the weekly pay rate for her date-of-injury position was \$541.62. In February 2004, appellant claimed wage-loss compensation for intermittent work absences from March 13, 2003 to April 1, 2004 which she attributed to the accepted conditions. She submitted timekeeping records from her employer documenting 487.5 hours of absences from March 13, 2003 to February 9, 2004.¹

Appellant submitted medical reports discussing her condition during the claimed period of disability. In an April 29, 2003 letter, Dr. Fred C. Fowler, an attending Board-certified gastroenterologist, stated that she had a “recurrent abdominal condition that may necessitate unexpected absences from work.” In a December 3, 2003 report, he noted that nausea, vomiting and constipation caused by the accepted PTSD were slightly worse. In February 25, 2004 reports, Dr. Fowler noted appellant’s account of worsening depression and that her “stress level [was] fairly high at work.” He opined that her gastrointestinal motility disorder continued to be related to PTSD caused by the January 5, 2002 attack. Dr. Fowler found appellant disabled for work for an indefinite period.

In a March 7, 2004 report, Dr. George D. Hall, an attending Board-certified family practitioner, noted treating appellant beginning on December 12, 2003 for major depressive disorder and PTSD, both secondary to the January 2002 assault. He held her off work through April 1, 2004 due to depression.

By decision dated April 29, 2004, the Office reduced appellant’s compensation to zero based on her actual earnings as a patient representative in the private sector. The Office found that her actual earnings effective September 3, 2002 were \$602.02 a week, exceeding the pay rate for her date-of-injury position of \$541.62 a week, her compensation would be reduced to zero. The Office noted that appellant’s medical compensation benefits continued.

By decision dated April 30, 2004, the Office denied appellant’s claim for wage-loss compensation for the period March 17, 2003 to February 24, 2004 on the grounds that she submitted insufficient medical evidence to establish a work-related disability for this period. The

¹ In a March 29, 2004 letter, the Office requested that appellant clarify if she claimed a recurrence of disability or a new injury. The record does not contain a response from her on this issue. Therefore, the Office processed the claim as one for a period of disability compensation.

Office found that appellant's physicians provided insufficient medical rationale establishing that she was disabled for work during the claimed period due to the accepted conditions.

On May 18, 2004 appellant requested an oral hearing regarding the April 29 and 30, 2004 decisions, held March 29, 2005. At the hearing, she noted that she had been working full time at the medical office since November 16, 2004 and was still under the care of Dr. Fowler, Dr. Hall and Sue Anne Wrenn, a social worker, who also testified at the hearing. Appellant submitted additional medical evidence.²

In a May 29, 2002 report, Dr. Fowler found that appellant was better while on medication, noting that she was applying to medical school. He diagnosed "anxiety/depression as a result of traumatic event recently" which "may be triggering" gastrointestinal symptoms. In March 26, 2003, February 25 and May 10, 2004 reports, Dr. Fowler opined that appellant's PTSD and motility disorder remained active and held her off work. In a June 21, 2004 report, he stated that she could not work full time due to PTSD, "unexpected episodes of pain and [illegible]." Dr. Fowler restricted appellant to part-time work for one year. In a September 15, 2004 report, he noted her continued motility problems and depression. In a March 8, 2005 letter, Dr. Fowler opined that appellant's work-related irritable bowel syndrome caused periods of significant disability. He stated that she was at times unable to work a full 40-hour week.

In a December 12, 2003 chart note, Dr. Hall related that appellant could not get up to go to work and had "lot of bad dreams about attacks in Africa." Her symptoms improved as of January 6, 2004. On February 15, 2004 Dr. Hall noted that appellant was depressed and had remained in bed for two weeks. He noted her continuing depression in reports from April 1 to November 16, 2004. Dr. Hall released appellant to full-time work on November 16, 2004.

In a March 7, 2005 letter, appellant's private sector employer stated that she worked 40 hours a week from September 3, 2002 to March 12, 2003. She used leave intermittently from March 13, 2003 to February 9, 2004 and was off work from February 10 to 24, 2004.

By decision dated and finalized September 30, 2005, the Office hearing representative affirmed the Office's April 29 and 30, 2004 decisions. Regarding the wage-earning capacity determination, the hearing representative found that appellant worked full-time as a surgical coordinator for more than 60 days from September 3, 2002 to March 12, 2003 and that her weekly pay rate exceeded that of her date-of-injury position. The hearing representative found that she submitted no evidence or argument to establish that the position was not suitable work. Regarding the denial of wage-loss compensation for the period March 17, 2003 to February 24, 2004, the hearing representative found that, while Dr. Fowler and Dr. Hall "stated that [appellant] had to work on a part-time basis or reduce her work hours, neither provided a rationalized opinion or discussion explaining how the work injury had deteriorated or resulted in [her] work absences. Additionally, neither physician provided any discussion explaining" how a change in her condition warranted the "extended period of disability as filed."

² Appellant also submitted an April 5, 2004 report from Ms. Wrenn. As she is a social worker, she is not a physician under the Act. Therefore, Ms. Wrenn's opinion has no probative medical value in this case. 5 U.S.C. § 8101(2). See *Frederick C. Smith*, 48 ECAB 132 (1996).

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation Act,³ 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.⁴ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,⁵ has been codified by regulation at 20 C.F.R. § 10.403. 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.⁶ The amount of compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁷

ANALYSIS -- ISSUE 1

The Office accepted that on January 5, 2002, appellant sustained PTSD, major depression and an aggravation of irritable bowel syndrome. Following a period of total disability, she returned to work on September 3, 2002 as a full-time surgical coordinator in a private sector medical office. Appellant's weekly pay rate was \$602.02, in excess of the \$541.62 weekly pay rate for her date-of-injury position. She performed this position without incident through March 16, 2003.

Appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.⁸ Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.⁹ Also, the rate of pay for the patient coordinator position exceeds the current pay rate for the grade and step of appellant's date-of-injury position. Therefore, she had no loss of wage-earning capacity

³ 5 U.S.C. §§ 8101-8193, 8115(a).

⁴ *Hayden C. Ross*, 55 ECAB ____ (Docket No. 04-136, issued April 7, 2004).

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining: Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁷ *See Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁸ 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. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁹ *Elbert Hicks*, 49 ECAB 283 (1998).

under the *Shadrick* formula as of September 3, 2002, as the Office found in its September 30, 2005 decision.¹⁰

As there was no evidence to show that appellant's actual earnings as a surgical coordinator did not properly represent her wage-earning capacity, the Office properly accepted these earnings as the best measure of her wage-earning capacity.¹¹

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.¹² Under the Act, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.¹³ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.¹⁴ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹⁵ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁶ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁷

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained major depression, PTSD and an aggravation of irritable bowel syndrome on January 5, 2002 in the performance of duty. She received wage-loss compensation for disability through September 3, 2002. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal

¹⁰ *Albert C. Shadrick*, *supra* note 5.

¹¹ *Afegalai L. Boone*, 53 ECAB 533 (2002).

¹² *Joe D. Cameron*, 41 ECAB 153 (1989).

¹³ *See Prince E. Wallace*, 52 ECAB 357 (2001).

¹⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁶ *Manuel Garcia*, 37 ECAB 767 (1986).

¹⁷ *Amelia S. Jefferson*, 57 ECAB __ 04-568 (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

relationship between her claimed disability from March 17, 2003 to February 24, 2004 and the accepted conditions.¹⁸

In support of her claim, appellant submitted reports from Dr. Hall, an attending Board-certified family practitioner, and Dr. Fowler, an attending Board-certified gastroenterologist. Dr. Hall submitted chart notes from December 12, 2003 to November 16, 2004 diagnosing depression and PTSD which he opined continued to be related to the accepted conditions. He noted appellant's waxing and waning symptoms of nightmares about the January 5, 2002 attack and episodes of incapacitating depression such that she could not leave her bed for two weeks. Thus, Dr. Hall consistently opined that the accepted conditions of PTSD and major depression disabled appellant for work intermittently from December 12, 2003 through February 24, 2004.

In March 26, 2003, February 25 and May 10, 2004 reports, Dr. Fowler held appellant off work due to irritable bowel syndrome aggravated by continuing PTSD. In April 29, 2003 and March 8, 2005 letters, he explained that her irritable bowel syndrome was recurrent in nature and could cause unexpected work absences or prevent her from working full time. In December 3, 2003 and February 25, 2004 reports, Dr. Fowler opined that appellant was indefinitely disabled for work due to worsening irritable bowel syndrome, manifesting as abdominal pain, nausea, vomiting and severe constipation, due to the accepted PTSD. Thus, he stated in several reports during the period in question that appellant was partially or totally disabled for work due to a continuation of the accepted aggravation of irritable bowel syndrome.

Although Dr. Fowler's and Dr. Hall's opinions are not sufficiently rationalized¹⁹ to meet appellant's burden of proof in establishing her claim, they stand uncontroverted in the record and are, therefore, sufficient to require further development of the case by the Office.²⁰ Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.²¹ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner. Therefore, the Board finds that the case must be remanded to the Office for further development regarding Dr. Fowler's opinion that appellant was partially disabled from March 17, 2003 to February 24, 2004 due to the accepted work-related aggravation of irritable bowel syndrome and Dr. Hall's opinion that she was disabled due to the accepted depression and PTSD. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

¹⁸ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

¹⁹ See *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001), (medical reports lacking rationale on causal relationship are entitled to little probative value).

²⁰ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 280 (1978).

²¹ *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Marco A. Padilla*, 51 ECAB 202 (1999); *John W. Butler*, 39 ECAB 852 (1988).

LEGAL PRECEDENT -- ISSUE 3

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. Compensation payments are based on the wage-earning capacity determination.²²

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.²³ 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."²⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁵

ANALYSIS -- ISSUE 3

The Office accepted that appellant sustained PTSD, major depression and an aggravation of irritable bowel syndrome on January 5, 2002. By decision dated April 29, 2004, the Office found that she had no loss of wage-earning capacity as of September 3, 2002 based on her actual earnings as a surgical coordinator. On April 30, 2004 the Office issued a decision denying appellant's claim for partial disability for work from March 17, 2003 to February 24, 2004. The Office denied the claim on the grounds that she submitted insufficient medical evidence to establish the claimed period of partial disability. However, the April 30, 2004 decision did not address whether the April 29, 2004 wage-earning capacity determination should remain undisturbed. Thus, the April 30, 2004 decision improperly failed to address the wage-earning capacity issue in the case.²⁶

Following issuance of the April 29, 2004 wage-earning capacity determination, the Office issued an April 30, 2004 decision finding that appellant had not established a period of partial work-related disability from March 17, 2003 to February 24, 2004. She submitted medical evidence regarding the claimed period of disability. The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with

²² See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

²³ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

²⁵ *Sue A. Sedgwick*, *supra* note 23.

²⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a), (December 1995).

respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.²⁷

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss." This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. However, in its September 30, 2005 decision, the Office failed to address the wage-earning capacity issue, finding only that appellant had failed to establish a period of work-related disability from March 17, 2003 to February 24, 2004. Under the circumstances of this case, however, the Board finds that the issue presented was whether the April 29, 2004 wage-earning capacity determination required modification due to a possible change in her accepted medical condition as of March 17, 2003. In its September 30, 2005 decision, the Office should have considered whether the medical evidence submitted was sufficient to warrant modification of the standing wage-earning capacity determination. However, the Office did not do so, addressing only the claim for a period of work-related disability. Thus, the case must be remanded for further development on the wage-earning capacity issue. Following such development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation to zero effective September 3, 2002 based on her actual earnings as a surgical coordinator. The Board further finds that the case is not in posture for a decision regarding the claimed period of disability from March 17, 2003 to February 24, 2004, as the case must be remanded for further development of the medical evidence consistent with this opinion. The Board further finds that the case must be remanded to the Office for proper consideration of the loss of wage-earning capacity issue as the Office did not consider it in its decision dated and finalized September 30, 2005.

²⁷ See *Sharon C. Clement*, *supra* note 22. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB 734 (2003), (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Worker's Compensation Programs dated September 30, 2005 is affirmed in part regarding the wage-earning capacity determination, set aside in part regarding whether appellant established a work-related disability from March 17, 2003 to February 24, 2004 and remanded in part for consideration of the loss of wage-earning capacity issue for the period March 17, 2003 to February 24, 2004.

Issued: August 7, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board