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

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| **HARRY PORTOLOS, Appellant** | ) | |
| **and** | ) | **Docket No. 06-84** |
| | ) | **Issued: June 15, 2006** |
| **DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer** | ) | |

*Appearances:*
*Harry Portolos, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On October 12, 2005 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated September 2, 2005, denying modification of a May 23, 2002 decision which found that the selected position of personnel recruiter represented his wage-earning capacity. 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 appellant has established that the May 23, 2002 determination of his wage-earning capacity in the constructed position of personnel recruiter should be modified.

### ***FACTUAL HISTORY***

This case has previously been on appeal before the Board. On May 31, 1991 appellant, then a 55-year-old letter carrier, filed an occupational disease claim alleging that on April 22, 1988 he first realized that his osteoarthritis of the left and right knees was caused or aggravated by factors of his federal employment. By letter dated January 28, 1992, the Office accepted his

claim for aggravation of osteoarthritis of both knees. The Office subsequently expanded the acceptance of appellant's claim to include depression.

In a May 23, 2002 decision, the Office found that the constructed position of personnel recruiter represented appellant's wage-earning capacity based on an August 9, 1996 impartial medical opinion of Dr. Mark S. Shelub, a Board-certified physiatrist. He opined that appellant could work within certain physical limitations.[1] In a June 17, 2002 letter, appellant requested an oral hearing before an Office hearing representative.[2]

Prior to a March 6, 2003 hearing, appellant submitted a job journal. He also submitted Dr. Fleming's August 22, 1991 medical report which found that he had multiple degenerated lumbar discs from L1 to S1 that caused episodic pain, particularly when he had to perform heavy lifting. Dr. Fleming restricted heavy lifting or any other physical activity that could strain his back. He concluded that appellant should not be in a sedentary job. In a June 6, 2002 report, Dr. Fleming stated that appellant suffered from long-standing chronic back pain of a mechanical nature and that he was unable to perform activities that involved significant physical work, particularly lifting and bending. Appellant also had difficulty with jobs that required him to be sedentary or seated for long periods of time. Dr. Fleming stated that optimally, appellant could be employed in a position that involved some combination of very light physical activity as long as it did not involve significant bending, carrying of heavy objects and prolonged required sitting. He opined that it was unlikely that appellant could work longer than 20 hours a week.

Following the hearing, appellant submitted newspaper articles addressing a declining economy. He also submitted a November 25, 1997 vocational report of Theodore Alper, Ph.D., a clinical psychologist, which found that he was capable of completing a Bachelor of Arts and Masters of Business Administration program based on his academic skills and that he could work in a middle management position based on his vocational interests and hands-on nature. In a June 13, 2001 letter to appellant's vocational rehabilitation counselor, John R. Brandes, Ph.D., a clinical psychologist, expressed his interest in offering an opinion as to whether appellant could perform any selected jobs from a psychological standpoint. Appellant submitted a vocational rehabilitation plan dated July 8, 1999.

In a March 28, 2003 letter, appellant contended that the evidence he submitted was sufficient to modify the May 23, 2002 wage-earning capacity determination. He also contended that he was unable to obtain a job as a personnel recruiter despite his diligent efforts.

By decision dated May 27, 2003, an Office hearing representative affirmed the May 23, 2002 wage-earning capacity determination.

In a May 7, 2004 letter, appellant requested reconsideration of his claim. He explained that he had an extremely difficult time finding work and he was recently employed as an adjunct

[1] Dr. Shelub was selected to resolve the conflict in the medical opinion evidence between Dr. Richard L. Fleming, an attending Board-certified internist, and Dr. Joseph R. Mariotti, an Office referral physician, regarding appellant's capacity to work.

[2] Effective July 1, 2002 appellant elected to receive retirement benefits from the Office of Personnel Management.

instructor with earnings of less than $6,000.00 annually, considerably less than what the Office had determined to be his wage-earning capacity. Appellant also advised the Office that his physician had limited him to part-time work.

By decision dated July 23, 2004, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was of a repetitious nature and, thus insufficient to warrant a merit review of its prior decisions.

In an April 4, 2005 decision, the Board set aside the Office's July 23, 2004 decision and remanded the case for a merit review of appellant's claim. It found that the Office improperly identified appellant's May 7, 2004 letter as a request for reconsideration subject to the limitations set forth in 20 C.F.R. §§ 10.606, 10.607 and 10.608 rather than a request for modification of its wage-earning capacity determination.[3]

On remand, the Office issued a decision dated September 2, 2005, finding that the evidence submitted by appellant did not warrant modification of the May 23, 2002 wage-earning capacity determination. It found that his difficulty in obtaining employment was insufficient to establish that the original rating was made in error. Further, the Office found that the medical evidence of record failed to establish a worsening of his work-related conditions which would preclude him from performing the duties of a personnel recruiter.

## ***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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[4]

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.[5] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[6]

## ***ANALYSIS***

The Board finds that appellant did not meet his burden of proof to modify the May 23, 2002 wage-earning capacity as the evidence fails to establish that the original determination was made in error or that there was a material change in his accepted condition.

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[3] Docket No. 05-203 (issued April 4, 2005).

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

[5] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[6] *Id.*

As noted, a conflict of medical opinion arose between Dr. Fleming, appellant's attending Board-certified internist, and Dr. Mariotti, an Office referral physician, as to the nature and extent of appellant's work capacity. Dr. Shelub, selected as the impartial medical specialist to resolve the conflict, set forth physical limitations defining appellant's capacity for work. Based on this report, the Office determined appellant's wage-earning capacity based on the constructed position of a personnel recruiter.

Appellant has not submitted any evidence establishing a material change in the nature and extent of his employment-related lumbosacral strain and depression. The relevant medical evidence includes Dr. Fleming's reports which found that appellant has chronic back pain and was unable to perform work that involved significant lifting, bending, carrying heavy objects and prolonged required sitting. He also found that appellant could not work more than 20 hours a week. The Board finds that Dr. Fleming's reports do not contain a rationalized medical opinion explaining how appellant's employment-related injuries prevented him from performing the position of personnel recruiter either on a full or part-time basis.

Moreover, appellant has not submitted any evidence to show that the original May 23, 2002 determination regarding his wage-earning capacity was erroneous. He contends that he was unable to secure employment as a personnel recruiter. The Board, however, has held that the Office is not obliged to actually secure a job for an appellant. The lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. Appellant's inability to secure a position as a personnel recruiter, therefore, does not establish error in this case.[7]

Lastly, appellant has not alleged nor is there any indication from the record that he has been retrained or otherwise vocationally rehabilitated.

As appellant did not submit evidence showing a material change in the nature and extent of his employment-related lumbosacral strain and depression, that he has been retrained or vocationally rehabilitated or that the Office's original determination with regard to his wage-earning capacity was erroneous, he has not met his burden of proof to establish that the Office's wage-earning capacity decision should be modified.

## ***CONCLUSION***

The Board finds that appellant has failed to establish a basis for modification of the May 23, 2002 wage-earning capacity rating as a personnel recruiter.

[7] *See Kenneth Tappen*, 49 ECAB 334 (1998); *Alfred R. Hafer*, 46 ECAB 553 (1995) (the Board held that a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 2, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board