

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

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M.D., Appellant )  
and ) Docket No. 06-689  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: November 22, 2006  
Atlanta, GA, Employer )  
\_\_\_\_\_  
)

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 20, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated November 30, 2005 which denied modification of a loss in wage-earning capacity decision. 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 denied modification of appellant's May 13, 1996 wage-earning capacity determination.

**FACTUAL HISTORY**

This case is on appeal to the Board for the second time.<sup>1</sup> In a July 12, 2005 decision, the Board found that appellant's claim for compensation for the period beginning May 17, 2004 raised the issue of whether modification of a May 13, 1996 wage-earning capacity was

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<sup>1</sup> Docket No. 05-639 (issued July 12, 2005).

warranted.<sup>2</sup> The Board set aside the Office's December 23, 2004 decision, which found that appellant had not established a recurrence of total disability beginning May 17, 2004. The facts and the history of the claim are set forth in the prior decision and are hereby incorporated by reference.<sup>3</sup>

In a June 24, 2004 report, Dr. Martin noted that appellant's symptoms worsened in December 2003 when he began to bring a gun to work for protection against the "the 'man' he saw in his flashbacks." He opined that appellant's "mental condition worsens under the stress of the job" when he is not occupied or busy. Dr. Martin reported that appellant was afraid to return to the employing establishment and believed him to be a danger to others and himself due to "his feelings of fear and unpredictable mental state."

Subsequent to the Board's decision, the Office received progress notes dated August 10, and September 14, 2005 from Dr. L. Bass Surapu, an attending physician, who noted that appellant felt anxious and depressed.

In a letter dated September 30, 2005, the Office informed appellant that the evidence of record was insufficient to warrant modification of his loss of wage-earning capacity. It advised him regarding the type of medical and factual evidence required to support his claim.

Appellant submitted a June 7, 2004 statement by David B. Tillman, a coworker; an October 24, 2004 statement; an October 30, 2004 report from Dr. Martin; a November 19, 2004 revised rehabilitation job assignment; and progress notes dated October 12 and November 9, 2005 from Dr. Surapu.

Dr. Martin opined, as follows:

"[Appellant's] [c]urrent fears and hallucinations are definitely related to the original trauma in 1995 and represent psychotic manifestations of his PTSD [post-traumatic stress disorder]. The exacerbation of his 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. [Appellant]'s bringing a gun to work

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<sup>2</sup> At the time appellant filed his claim for compensation beginning May 17, 2004, he submitted a May 20, 2004 statement by Michelle Daniels, supervisor, accountable paper; a May 12, 2004 attending physician's report (Form CA-20) indicating disability for the period December 12, 2003 to unknown; and a March 31, 2004 report by David C. Martin, Ph.D, a clinical psychologist.

<sup>3</sup> 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 him a limited-duty position as a modified motor equipment operator, which he accepted on June 15, 1995 and returned to work on June 22, 1995. The position was located at Hollow Tree Warehouse with physical requirements of lifting up to 50 pounds, walking and standing as needed, no mail truck driving and working in an open environment. Appellant's off days were Saturday and Sunday and his work hours were 7:30 a.m. to 4:00 p.m. The Office issued a loss of wage-earning capacity decision on May 13, 1996 finding that appellant's actual earnings in the modified equipment operator fairly and reasonably represented his wage-earning capacity.

to protect himself from his hallucination was a definite worsening of his condition.”

Dr. Martin related that appellant previously had changes in his job duties and work sites due to exacerbations of his accepted condition. He noted that appellant worked best when working in an environment with a large space. Dr. Martin recommended appellant “be transferred back to that warehouse environment.”

In a November 19, 2004 revised rehabilitation job assignment, the employing establishment noted that appellant’s work as a modified motor equipment operator was being revised effective November 27, 2004 due to the change in his medical restrictions. Appellant accepted the offered position on November 29, 2004. The physical restrictions of the position included lifting up to 70 pounds, intermittent walking, bending, standing, writing and stooping, forklift driving as needed, four hours per day for two weeks which then increased to eight hours per day and “[n]o confined workspace. Best suited to work in a familiar large space where he does not work with a lot of other employees.” The employing establishment noted that the work location was Hollow Tree Warehouse with work hours of 7:50 a.m. to 4:00 p.m. Monday to Friday.

On November 21, 2005 the Office received a November 9, 2005 progress note from Dr. Surapu who reported that appellant felt depressed and anxious.

By decision dated November 30, 2005, the Office found that the evidence was insufficient to warrant modification of the May 13, 1996 loss of wage-earning capacity determination.

#### **LEGAL PRECEDENT**

The Office’s procedure manual provides that, if 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.<sup>4</sup> 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.<sup>5</sup>

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

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB \_\_\_\_ (Docket No. 04-1048, issued March 25, 2005).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB \_\_\_\_ (Docket No. 04-1916, issued February 8, 2005).

rehabilitated or the original determination was, in fact, erroneous.<sup>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

### **ANALYSIS**

The Board finds that there is no indication in the record that the original May 13, 1996 wage-earning capacity determination was erroneous. Appellant worked in this position for approximately eight years after the Office determined that his actual wages fairly and reasonably represented his wage-earning capacity. Furthermore, there is no evidence in the record that appellant was retrained or otherwise vocationally rehabilitated.

Appellant filed a claim for compensation beginning May 17, 2004 due to his accepted stress disorder contending that his accepted condition had worsened. In support of his claim, appellant submitted reports from Dr. Surapu and Dr. Martin to support his claim of total disability.

The record contains various progress notes from Dr. Surapu reporting appellant was anxious and depressed. They contain no opinion as to whether appellant's condition had worsened or whether he was capable of performing his modified position. These progress notes are insufficient to meet appellant's burden of proof.

Dr. Martin, a clinical psychologist, opined that appellant's accepted stress condition had worsened. In a June 24, 2004 report, he opined that appellant's symptoms worsened in December 2003 based upon appellant's bringing a gun to work for protection against "the 'man' he saw in his flashbacks." Dr. Martin stated that appellant's "mental condition worsens under the stress of the job" when he is not occupied or busy. On October 30, 2004 he attributed appellant's current hallucinations and fears to the original 1995 employment injury and accepted post-traumatic stress disorder. As to the worsening of appellant's condition, he opined that appellant's "exacerbation of his 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." Dr. Martin concluded that appellant worked best when working in an environment with a large space and recommended that he "be transferred back to that warehouse environment."

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter.<sup>8</sup> While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>9</sup> In the instant case, although the reports of Dr. Martin contain insufficient rationale to discharge appellant's burden of proof that his condition had worsened or

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<sup>6</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>7</sup> *Harley Sims, Jr.*, *supra* note 5; *Stanley B. Plotkin*, *supra* note 6.

<sup>8</sup> *Phillip L. Barnes*, 55 ECAB 426 (2004).

<sup>9</sup> *Donald R. Gervasi*, 57 ECAB \_\_\_\_ (Docket No. 05-1622, issued December 21, 2005); *William B. Webb*, 56 ECAB \_\_\_\_ (Docket No. 04-1413, issued November 23, 2004).

changed, they constitute substantial evidence in support of his claim and raise an unrefuted inference of causal relationship sufficient to require further development of the case record by the Office.<sup>10</sup> There is no probative opposing medical evidence in the record for this period.

Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision on the issue of modifying appellant's loss of wage-earning capacity determination.

### **CONCLUSION**

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 30, 2005 is set aside and the case remanded for further proceedings consistent with the above decision.

Issued: November 22, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> *John J. Carbone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); see also *Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).