

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

S.S., Appellant)	
)	
and)	Docket No. 08-643
)	Issued: December 10, 2008
U.S. POSTAL SERVICE, ALRIDGE POST OFFICE, Ft. Lauderdale, FL, Employer)	
)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2007 appellant filed a timely appeal from June 28 and September 27, 2007 decisions regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.2, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has established that the November 14, 2005 wage-earning capacity determination should be modified.

FACTUAL HISTORY

The Office accepted that on or before October 1994 appellant, then a 44-year-old mail processor, sustained an anxiety disorder due to harassment by supervisors and coworkers.¹

¹ Appellant had two prior appeals before the Board regarding other emotional condition claims. By decision and order issued March 29, 2004 (Docket No. 04-236, File No. xxxxxx293), the Board set aside July 16 and October 28, 2003 Office decisions denying appellant's claim for an emotional condition due to an October 11, 2001 work incident. The Board remanded the case to the Office for further development. By decision and order issued August 9, 2004 (Docket No. 04-1102, File No. xxxxxx992), the Board affirmed a December 12, 2003 decision denying appellant's emotional condition claim related to work factors from June 28 to November 14, 2001.

Following intermittent absences, appellant returned to work as a part-time flexible mail processor. By decision dated August 7, 1996, the Office found that appellant's actual earnings as a mail processor beginning on May 13, 1996 properly represented appellant's wage-earning capacity.² Beginning on April 23, 2001, appellant worked in a limited-duty clerk position. The position was terminated in July 2002 pursuant to a grievance settlement. He stopped work in July 2002 and received compensation on the periodic rolls.

Appellant was followed by Dr. Anthony F. Yacona, an attending Board-certified psychiatrist. He submitted reports from October 1996 through May 2003 diagnosing work-related anxiety, depression, post-traumatic stress disorder and panic attacks. Dr. Yacona opined that appellant's anxiety and panic attacks disabled him from driving more than 35 miles to or from work.

On May 27, 2003 the Office obtained a second opinion from Dr. Jack Greener, a Board-certified psychiatrist, who opined that the accepted anxiety disorder had ceased. In an April 22, 2004 supplemental report, Dr. Greener opined that appellant was unable to drive on busy roads due to anxiety.

On February 9, 2005 the Office referred appellant for vocational rehabilitation. In a March 8, 2005 report, a vocational rehabilitation counselor noted that the employing establishment could not accommodate appellant's restrictions against highway driving or commuting more than 35 miles each way. From March to May 2005, appellant underwent vocational skills analyses and work tolerance studies. He had attended college for two years and had strong aptitudes for detailed, mathematical tasks. Appellant was physically able to perform light- to medium-duty work. The vocational counselor identified the positions of clerk and cashier as within appellant's vocational aptitudes and work limitations. A May 27, 2005 labor market survey showed that entry level clerk and cashier positions were reasonably available in appellant's commuting area with wages of \$6.50 an hour.

The vocational counselor provided appellant with more than 50 job leads from May through August 2005. He also sent appellant information on resume preparation and interview skills. Appellant applied for several positions but did not obtain employment. The Office closed the vocational rehabilitation effort effective September 6, 2005. The employing establishment advised the Office that as of September 16, 2005, the current pay rate for appellant's job and step when injured was \$857.72 a week.

By notice dated October 3, 2005, the Office proposed to reduce appellant's monetary compensation based on his ability to perform the selected position of Cashier II (U.S. Department of Labor's, *Dictionary of Occupational Titles* No. 211.462-010). The position was described as light, with a vocational preparatory period of not more than 30 days.

² On August 7, 1996 the Office denied a second emotional condition claim (File No. xxxxxx524) affirmed by decisions dated August 8, 1997 and September 2, 1999. It accepted anxiety and depression under File No. xxxxxx747 for work factors on or before February 8, 2000. Benefits were terminated in February 2001 as the accepted conditions had ceased. By decision dated April 6, 2001 under File No. xxxxxx239, the Office accepted that appellant sustained an exacerbation of anxiety disorder and depression due to work factors occurring on or before October 19, 1996. By decision dated July 25, 2001 and affirmed by decision dated June 5, 2002, it denied appellant's claim under File No. xxxxxx624 for a consequential gastrointestinal condition.

Appellant responded by October 27, 2005 letter. He contended that the vocational rehabilitation program did not prepare him to seek or obtain employment. Appellant asserted that many of the job leads were more than 30 minutes from his house, in violation of his driving restrictions. He submitted a July 25, 2005 report from Dr. Yacona specifying that appellant should not drive more than 30 minutes continuously due to anxiety. He also advised that appellant should have Saturday and Sunday off and work overtime only at his discretion.³

By decision dated November 14, 2005, the Office reduced appellant's compensation effective November 27, 2005 based on his ability to earn wages in the selected position of Cashier II. It calculated that appellant had a 71 percent loss of wage-earning capacity, as his date-of-injury position then paid \$857.72 a week while an entry level cashier position paid \$251.60 a week.

In a December 7, 2005 letter, appellant requested a hearing, held on August 15, 2006. He asserted that he was entitled to a rehabilitation job at the employing establishment. Appellant submitted additional evidence.

In an April 11, 2006 affidavit of earning and employment (Form EN-1032), appellant noted part-time self-employment operating his wife's food vending cart from October 1, 2005 to March 28, 2006. He worked an average of 86 hours a month.

Appellant submitted reports from March through September 2006 from Dr. Sonal Parikh, an attending Board-certified psychiatrist, who provided a history of injury and treatment. Dr. Parikh diagnosed a history of anxiety disorder, possible panic disorder and insomnia. He prescribed and gradually increased a variety of medications. Dr. Parikh noted in September 1996 that appellant had worked as a food vendor but was unsuccessful due to financial difficulties and anger management problems.

By decision dated and finalized November 8, 2006, an Office hearing representative affirmed the November 14, 2005 wage-earning capacity determination. The hearing representative found that appellant did not submit evidence establishing a material change in the accepted condition, that the original determination was in error or that he had been vocationally retrained.

The employing establishment separated appellant from federal employment effective May 27, 2006 as he was unable to perform the essential elements of his position.

In a December 22, 2006 letter, appellant requested reconsideration. He asserted that the Cashier II position was not within his medical restrictions. Appellant contended that he was entitled to a rehabilitation job offer at the employing establishment. He submitted additional evidence.

In an April 3, 2007 affidavit of earnings and employment, appellant noted working at his wife's food cart business, performing occasional cooking and watching the premises. He stated that he did not earn a salary.

³ Appellant also included medical evidence from File No. xxxxxx101, accepted for plantar fasciitis.

Dr. Parikh submitted reports from November 30, 2006 to May 18, 2007 noting continued anxiety and depression with a trend of improvement. Appellant was able to work as a food vendor but became frustrated with customers.

In a June 29, 2007 letter, appellant requested reconsideration. He submitted June 22 and August 24, 2007 reports from Dr. Parikh, opining that appellant was calmer and able to work at his wife's retail food business.

By decision dated September 27, 2007, the Office affirmed the November 14, 2005 loss of wage-earning capacity determination. It noted that Dr. Parikh found appellant's emotional conditions had improved and that he was able to work in a position involving similar duties to a Cashier II.

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, which remains undisturbed until properly modified.⁴

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. 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.⁵

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

Appellant requested modification of his November 14, 2005 wage-earning capacity determination. The first criteria for modifying a wage-earning capacity determination is premised on whether the original rating was in error.

Appellant underwent vocational rehabilitation from February to September 2005, including skills assessments and job placement assistance. The Office determined that the position of Cashier II was commensurate with his work limitations and vocational aptitudes. It

⁴ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

found that this position reasonably represented appellant's wage-earning capacity. In calculating the new compensation rate, the Office obtained a labor market survey and current wage information for his date-of-injury position. Appellant submitted no evidence establishing that the Office erred in the wage-earning capacity determination. He also failed to submit argument or evidence in support of the third criteria for modification of a wage-earning capacity determination, that he had been retrained or otherwise vocationally rehabilitated after November 14, 2005. Therefore, appellant has failed to meet the first and third criteria for modifying the November 14, 2005 wage-earning capacity determination.

The second criteria for modifying a wage-earning capacity determination is a material change in the nature and extent of the injury-related condition. Appellant submitted reports from Dr. Parikh, an attending Board-certified psychiatrist, dated from March 24, 2006 to August 24, 2007. Dr. Parikh diagnosed anxiety, depression and panic attacks with a trend of improvement. He noted that appellant worked consistently at his wife's food vending business. These reports establish that appellant is not totally disabled for work. The reports are not sufficient to establish a change in the nature and extent of the injury-related condition. Dr. Parikh did not explain how the accepted anxiety changed such that he could no longer perform the selected Cashier II position. Without medical explanation of how appellant sustained a change in the nature and extent of his accepted employment injury, these reports are not sufficient to meet his burden of proof.⁸

Appellant did not meet his burden of proof in establishing that there was a material change in the nature and extent of his injury-related condition, that the original determination was in fact erroneous or that he was vocationally rehabilitated. He has failed to establish that the November 14, 2005 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to modify the November 14, 2005 wage-earning capacity decision.

⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 27 and June 28, 2007 are affirmed.

Issued: December 10, 2008
Washington, DC

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

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

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