

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

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**P.N., Appellant**

**and**

**DEPARTMENT OF JUSTICE, U.S. MARSHALS  
SERVICE, Seattle, WA, Employer**

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**Docket No. 07-958  
Issued: February 5, 2008**

*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 February 26, 2007 appellant filed a timely appeal from a December 7, 2006 merit decision of the Office of Workers' Compensation Programs denying modification of a loss of 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 appellant has met her burden of proof to establish that modification of the wage-earning capacity determination was warranted.

## **FACTUAL HISTORY**

This is the third appeal before the Board.<sup>1</sup> In an August 18, 2005 decision, the Board set aside and remanded an Office decision denying appellant's recurrence of disability claims. The Board found that the medical evidence raised the issue of whether modification of a July 3, 1996 wage-earning capacity determination was warranted.<sup>2</sup> In the second appeal, the Board set aside and remanded the Office's December 21, 2005 decision on the grounds that it failed to make adequate findings regarding the wage-earning capacity issue.<sup>3</sup> The factual history of the claim, as set forth in the prior Board decisions, are incorporated herein.

On May 1, 1996 appellant began work as a child support attorney for the Child Support Enforcement Unit, Devils Lake, North Dakota with a monthly salary of \$2,376.00. By decision dated July 3, 1996, the Office reduced appellant's compensation based upon her actual earnings as an attorney effective May 1, 1996, the date of her reemployment.<sup>4</sup> In a letter dated August 4, 1997, appellant informed the employing establishment that she had secured new employment with the U.S. Probation and Pretrial Services Office effective that date.<sup>5</sup> She subsequently resigned from this position effective December 2, 2000. Appellant contended that she was constructively discharged due to hostility directed at her. She asked whether an adjustment to her wage-loss compensation was available until she was reemployed. On March 28, 2003 appellant filed a claim for a recurrence of disability commencing December 6, 2000.

In progress notes dated November 30, 2000, Dr. Naveed Haider, a treating Board-certified psychiatrist, diagnosed recurrent major depressive disorder and eating disorder. He noted that appellant stated that her binge eating was approximately the same frequency but she purged less than before. Appellant informed him that she was quitting her job. An examination revealed good mood with an appropriate and bright affect. Dr. Haider found no formal thought disorder or psychotic symptomatology.

In a report dated November 30, 2000, Tracy M. Foldesi, a social worker, diagnosed recurrent major depressive disorder and eating disorder. Appellant related that she took a leave of absence for two months following her mother's death in May 2000. When she returned to work, appellant described a hostile work environment and felt that her chief supervisor was not

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<sup>1</sup> On October 15, 1987 appellant, a 33-year-old criminal investigator, filed an occupational disease claim attributing her major depression, weight gain, anxiety, cryptitis, rectal fissure and thrombosed external hemorrhoid to her federal employment. The Office accepted the claim for temporary aggravation of preexisting personality disorder, major depression and consequential eating disorder. Appellant was placed on the periodic rolls in receipt of compensation for temporary total disability.

<sup>2</sup> Docket No. 05-351 (issued August 18, 2005).

<sup>3</sup> Docket No. 06-662 (issue September 14, 2006).

<sup>4</sup> The Office determined appellant's weekly pay rate to be \$555.60, her adjusted earning capacity in the position was \$400.03 per week, which resulted in loss in earning capacity of \$155.57 per week. Appellant's compensation rate every four weeks was found to be \$547.00.

<sup>5</sup> Appellant noted that her starting salary was \$29,886.00 per year which would increase to \$31,800.00 after six months, \$33,747.00 after one year and \$37,507.00 after two years.

supportive of her and was going to put her through a fitness-for-duty examination; however, this never occurred. Appellant alleged that there was gossip about her throughout the agency and her credibility with her coworkers was destroyed. Ms. Foldesi stated that appellant felt overwhelmed in her job setting and eventually quit. She concluded that appellant's symptoms had intensified due to her work situation, the death of her mother and dealing with her father's declining health.

In letters dated December 12, 2001 and November 18, 2002, appellant informed the Office that she was hired part time at Barnes and Noble booksellers. She requested that her wage-loss compensation be increased due to the change in her employment circumstances.

In a report dated April 15, 2003, Dr. Haider, diagnosed recurrent major depressive disorder, mild to moderate in severity, multiple chronic stressors, eating disorder with a panic disorder in remission. Appellant felt anxious when she went back to work and kept her work hours around 20 hours. Dr. Haider advised that appellant's depression was under a fair amount of control. On September 18, 2003 he noted that she took time off work to care for her father and, upon her return, experienced a hostile environment. Dr. Haider stated that the "lack of support resulted in a relapse in the patient's depression" and that "[s]he had to quit her job in December 2000" due to her depressive symptoms. Appellant returned to work at Barnes and Noble with less hours and pay. Dr. Haider opined that appellant met the criteria for depression and an eating disorder and that "[d]uring this time she has been unable to regain her full functional capacity." An examination revealed mild depression.

In a report dated April 17, 2004, Dr. Ronald M. Burd, a Board-certified psychiatrist, diagnosed anxiety disorder, moderate recurrent major depression and eating disorder. He reviewed the history of injury and medical treatment and provided findings on examination. Dr. Burd advised that appellant's current symptoms and difficulty with function were a consequence of the experiences she had at work. Appellant's symptoms were consistent with those experienced previously.

On June 23, 2004 Dr. Peggy A. Sheldon, a Board-certified internist, noted that she had treated appellant for many years. She agreed with Dr. Burd's report regarding appellant's recurrence of disability.

In a letter dated August 4, 2004, appellant stated that she left the Child Support Enforcement Unit because her capacity to concentrate was waning. She returned to federal service, but quit her job in December 2000, describing the situation at the U.S. Probation and Pretrial Services Office as "an excluding and hostile environment." After moving back to Moorehead, Minnesota, appellant found part-time employment at Barnes and Nobel in Fargo.

In a February 16, 2005 progress note, Dr. Kimberly A. Fitch diagnosed moderate to severe recurrent major depression and generalized anxiety. She reported that appellant had difficulty concentrating, extremely low motivation and was eating in a compulsive manner. Appellant currently worked part-time at a bookstore and was "adding a second part-time job, but feels quite overwhelmed by this idea since she has difficulty tolerating her current demands." Dr. Fitch noted that appellant was struggling with depression and anxiety, which appeared to be worsening. On March 16, 2005 she reiterated the diagnoses and advised that a mental status

examination revealed appellant's "affect varied with normal range" and her "thought processes appeared logical and goal directed." Dr. Fitch submitted a December 2, 2004 report, which diagnosed recurrent moderate major depression, employment and financial difficulties and generalized anxiety disorder. She noted that appellant was a licensed attorney, but was unable to practice law because of her cognitive difficulties. Appellant most recently worked for Federal Probation and Pretrial Services for about three years, but this was a negative experience for her. An April 20, 2005 treatment record reported improvement in appellant's anxiety condition due to medication, but no real change with her depression. A mental status examination revealed intact insight and judgment and "affect varied within normal range."

In a March 23, 2005 report, Dr. Karla J. Stormo, Ph.D., a clinical psychologist, reviewed appellant's history. She diagnosed generalized anxiety disorder, recurrent major depressive disorder, in partial remission, history of eating disorder and panic disorder without agoraphobia. Dr. Stormo stated: "[that the] [r]esults of the present evaluation revealed a long-standing history of recurrent depression and anxiety occurring concomitant with multiple and significant psychosocial stresses." In subsequent progress reports dated through June 7, 2005, she discussed her follow-up treatment. On April 20, 2005 appellant related that she could no longer function at the level of a basic job based upon her past trying and failing twice to resume a higher level of function. Dr. Stormo reported exploring "some of the stresses and challenges [appellant] experienced on her previous jobs." On June 7, 2005 she advised that appellant had limitations both for physical and mental health reasons. On July 13, 2005 appellant reported feeling "overwhelmed if there are any significant changes" and was very afraid to take on responsibilities in jobs based on her past work experiences.

On October 11, 2005 Dr. Fitch stated that appellant was only able to work a very minimal amount as she was "very stressed due to very difficult financial situation." Additional treatment records reiterated the diagnoses of moderate recurrent major depression and generalized anxiety disorder. On November 28, 2005 Dr. Fitch stated that appellant struggled to work part time. On February 28, 2006 she advised that appellant was currently working three days a week and reported feeling overwhelmed and "kind of falls apart if she works more than [two] days in a row." Dr. Fitch opined that appellant was limited in what she could do and was only able to work three days per week. On August 2, 2006 she again reported that appellant had a difficult time working more than three days a week.

By decision dated December 7, 2006, the Office denied modification of the loss of wage-earning capacity determination.<sup>6</sup> It found that she had not established that her accepted medical condition had changed and caused disability as of December 6, 2000.

### **LEGAL PRECEDENT**

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

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<sup>6</sup> The Board notes that, following the December 7, 2006 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB \_\_\_ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

resumption of compensation for total wage loss.<sup>7</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>8</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 rehabilitated or the original determination was, in fact, erroneous.<sup>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>10</sup>

### ANALYSIS

Appellant did not allege that the July 3, 1996 wage-earning capacity determination was erroneous when issued.<sup>11</sup> The determination was made following her commencement of work with the Child Support Enforcement Unit in Devils Lake, North Dakota on May 1, 1996. Appellant continued to work in this position for approximately a year after the Office determined that her actual earnings fairly and reasonably represented her wage-earning capacity. Thereafter, she advised that she was employed by the U.S. Probation and Pretrial Services office as of April 4, 1997. Appellant resigned from this position effective December 2, 2000. She filed a claim for wage-loss compensation beginning December 6, 2000. Appellant subsequently became employed part-time at Barnes and Noble in 2001.

On November 30, 2000 Dr. Haider addressed appellant's symptoms, noting that she told him she was quitting her job. His examination that day noted no formal thought disorder and no psychotic symptoms. Dr. Haider did not advise that appellant was disabled due to any worsening of her accepted emotional condition. The only other report contemporaneous to the time appellant stopped work is that of Ms. Foldesi, a social worker. However, a social worker is not a "physician" as defined under the Federal Employees' Compensation Act.<sup>12</sup> Therefore, her report does not constitute probative medical opinion.<sup>13</sup>

Dr. Haider submitted subsequent reports to the record, but did not address how appellant's accepted emotional condition worsened or caused disability for work as of December 6, 2000. On April 15, 2003 he noted that appellant had kept her work hours limited to

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<sup>7</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 420 (2005).

<sup>8</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 320 (2005).

<sup>9</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>10</sup> *Harley Sims, Jr.*, *supra* note 8; *Stanley B. Plotkin*, *supra* note 9.

<sup>11</sup> Appellant did not contend that she was retrained or vocationally rehabilitated.

<sup>12</sup> See 5 U.S.C. § 8101(2).

<sup>13</sup> *Sedi L. Graham*, 57 ECAB \_\_\_\_ (Docket No. 06-135, issued March 15, 2006) (the reports of a social worker do not constitute competent medical evidence, as a social worker is not a physician as defined by section 8101(2)).

20 hours, but that her depression was under “a fair amount of control,” and her panic disorder was in remission. On September 18, 2003 Dr. Haider noted that she took time off to care for her father. He observed that appellant had to quit her job in December 2000, due to her depressive symptoms. However, Dr. Haider did not provide an adequate discussion of how appellant’s condition worsened in December 2000 such as to cause her disability for work. His treatment notes do not provide sufficient medical rationale, especially in light of the three years that had passed since the period of the claimed disability. Dr. Haider noted that, on examination, appellant’s affect appeared appropriate but mildly depressed. He did not explain why she became disabled for the attorney position but could continue working for a local bookstore. Dr. Haider’s reports appear largely based on appellant’s opinion that she could not continue working. His discussion of appellant’s symptoms on examination does not find her disabled based on a change in the accepted conditions.

On April 17, 2004 Dr. Burd diagnosed anxiety disorder, moderate recurrent major depression and eating disorder. He stated that appellant’s symptoms were a function of the experience she had at work. Dr. Burd stated that appellant’s “current symptoms are consistent with those experienced previously and that her recent situation is also similar to her previous symptoms.” The Board notes that this medical opinion is not well rationalized. It does not adequately explain how appellant’s symptoms caused disability as of December 6, 2000 or describe a worsening of her accepted condition as of that time. Dr. Burd does not attempt to distinguish between the symptoms revealed on examination in 2004 with those of 2000. He found appellant’s delay in seeking “review of her situation and difficulty in following up on the details necessary for reconsideration is actually increased evidence of her disability.” Dr. Burd provided no opinion as to whether appellant was capable of performing the attorney position on which the loss of wage-earning capacity decision had been based. Again, his discussion of disability appears largely based on appellant’s perception of her medical condition. Dr. Burd’s report is insufficient to warrant modification of the 1996 wage-earning capacity determination.

In a June 23, 2004 report, Dr. Sheldon noted that she had treated appellant for many years and agreed with Dr. Burd’s report regarding appellant’s disability. She provided no medical rationale explaining the basis for her conclusion or otherwise establishing that appellant’s disability as of December 6, 2000 was due to a worsening of the accepted medical condition.<sup>14</sup> This report is not sufficient to warrant modification of appellant’s wage-earning capacity. Similarly, Dr. Stomo noted only a long-standing history of recurrent depression but did not provide any discussion of appellant’s disability commencing December 6, 2000.

Dr. Fitch found that appellant was anxious and depressed in a December 2, 2004 treatment noted. She noted that appellant was an attorney but unable to practice due to cognitive difficulties. Appellant reported difficulty in concentrating, extremely low motivation and eating in a compulsive manner. On February 16, 2005 Dr. Fitch stated that appellant was “struggling with a lot of depression and anxiety, they seem to be worsening.” On October 11, 2005 she stated that appellant was only able to work “a very minimal amount.” In November 28, 2005 progress notes, Dr. Fitch stated that appellant believed her concentration to be only 40 percent of what it had been and “[s]he is struggling to work part time.” On February 28 and August 2, 2006

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<sup>14</sup> See *T.F.*, 58 ECAB \_\_\_ (Docket No. 06-1186, issued October 19, 2006) (Medical reports not containing rationale on causal relationship are of diminished probative value).

she opined that appellant was only able to work three days per week. The Board finds that the medical reports of Dr. Fitch are not well rationalized. She does not provide a medical opinion addressing appellant's disability as of December 6, 2000. The record indicates that Dr. Fitch did not begin treating appellant until 2004 and described appellant's symptoms as of that time. She does not adequately explain how appellant's symptoms worsened to the point that she was unable to continue work as an attorney in 2000, noting only that appellant was unable to practice law due to cognitive difficulties. The nature of such cognitive difficulties is not explained by Dr. Fitch. These treatment records are not sufficient to establish that modification of the 1996 wage-earning capacity is warranted.

**CONCLUSION**

The Board finds that appellant has not established that modification of the 1996 wage-earning capacity determination is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 7, 2006 affirmed.

Issued: February 5, 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