

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

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**R.L., Appellant**

**and**

**PEACE CORPS, VOLUNTEER SERVICES,  
Lusaka, Zambia, Employer**

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**Docket No. 07-1851  
Issued: February 7, 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 June 25, 2007 appellant filed a timely appeal from the June 20, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether appellant has met his burden to warrant modification of the Office's 2002 wage-earning determination.

**FACTUAL HISTORY**

On July 6, 1995 appellant, then a 55-year-old volunteer, injured his right hip and leg in the performance of duty when he was thrown during a motorcycle training class. The Office accepted his claim for hip contusion and right buttocks inflammation and, later, sciatica. Appellant received compensation for wage loss and permanent impairment.

Appellant returned to work in the private sector. In 2002 the Office determined that he had a capacity to earn wages, based on his average actual earnings from 1996 to 2001. The Office paid compensation for appellant's partial loss of wage-earning capacity.

In December 2004 appellant filed a claim alleging that he sustained a recurrence of total disability on February 13, 2004. Asked to explain how the recurrence happened, he stated: "I did not re-currence, I has [been] the same damaged leg, getting more debilitating over the last [nine] years. My doctor t[o]ld me to move t[o] a warmer climate, so I would have less pain. I moved to [Texas]."

Appellant's former employer advised as follows: "[Appellant] was employed at Blackstone Valley Vocational Regional School District from September 17, 2001 [to] February 13, 2004. His ending salary was \$615.08/week. [Appellant] resigned his position as a Computer Support Technician to relocate to Florida." On June 24, 2004 Dr. Alan J. Bell, a neurologist, reported: "Please be advised that [appellant] was a patient of mine. It was told to him that by moving to a warmer climate for health reasons his quality of life could improve."

In a decision dated July 20, 2005, the Office denied appellant's recurrence claim. The Office found that the evidence failed to establish that his claimed disability for work beginning February 13, 2004 was due to the accepted work injury. The Office noted that, while the medical evidence indicated partial disability, no physician had provided a well-reasoned opinion explaining that appellant was unable to work due to his accepted condition or that there was a material worsening of the accepted conditions with no intervening cause resulting in appellant's inability to work.

The Office received medical evidence diagnosing mild right-sided S1 radiculopathy with severe lumbar spasm and additional evidence finding his neurological status stable. On April 27, 2006 Dr. Jim C. Whitley, a clinical psychologist, reported that he knew appellant for approximately one month and that appellant's depression was a direct result of an injury he experienced while serving in the Peace Corps. The psychologist reported that appellant was no longer employable; he was unable to work, and his constant and debilitating pain precluded him from participating in any type of retraining or employment. The psychologist concluded that appellant was physically and psychologically disabled on a permanent basis.

In a decision dated June 8, 2006, the Office reviewed the merits of appellant's case and denied modification of the 2002 loss of wage-earning determination. The Office found that appellant submitted no documents establishing that he suffered a recurrence of disability or that his work-related conditions had materially worsened to such a degree that he could no longer perform his light-duty job duties.

On July 19, 2006 Dr. Whitley reported that appellant displayed symptoms consistent with chronic post-traumatic stress disorder. He stated that appellant's sense of betrayal by the Peace Corps and the Office had exacerbated his condition. The Office received additional evidence of appellant's functional capacity. On June 24, 2005 Dr. James G. Boyd, Jr., an orthopedist, diagnosed right shoulder arthritis, rule out right rotator cuff tear, right greater trochanteric bursitis and mild degenerative joint disease of the hips. He stated that appellant would be very limited in the amount of lifting or reaching that he could do with the right arm and that repetitive

tasks would be difficult for him. He did not feel that any changes seen on x-rays of pelvis and knee would account for any significant disability but would limit prolonged walking or standing.

In a decision dated June 20, 2007, the Office denied modification of the wage-earning capacity determination. It found no evidence to establish that the original rating was in error or that appellant's compensable medical condition had changed for the worse or that he had been vocationally rehabilitated. The Office stated: "You have failed to submit any rationalized, probative and objective medical evidence to support the claim of total disability."

### **LEGAL PRECEDENT**

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."<sup>1</sup>

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity."<sup>2</sup> 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.<sup>3</sup>

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.<sup>4</sup>

### **ANALYSIS**

After his July 6, 1995 employment injury, which the Office accepted for hip contusion, right buttocks inflammation and sciatica, appellant returned to work in the private sector. His actual earnings from this employment over a period of time demonstrated his capacity to earn a certain level of wages. Appellant's employment injury had left him only partially disabled, and the Office paid compensation for his partial loss of wage-earning capacity.

On February 13, 2004, however, appellant stopped work and claimed compensation for total disability. He has the burden of proof to submit evidence sufficient to establish a material

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<sup>1</sup> 5 U.S.C. § 8102(a).

<sup>2</sup> *Id.* at § 8115(a).

<sup>3</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

<sup>4</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

change in the nature and extent of his injury-related condition.<sup>5</sup> Appellant has not met that burden.

None of the submitted medical reports explains that appellant had to stop work on February 13, 2004 because his hip contusion had materially worsened, or because his right buttocks inflammation had materially worsened, or because his sciatica had materially worsened to the point that he could no longer earn wages. Dr. Whitley, the clinical psychologist, reported that appellant was totally disabled by constant and debilitating pain. He diagnosed depression which he attributed to the employment injury. Dr. Whitley added that appellant was psychologically disabled on a permanent basis, but the Office has not accepted that the motorcycle incident on July 6, 1995 caused depression or post-traumatic stress disorder. His reports do not establish a material change in the nature and extent of an injury-related condition.

The contemporaneous evidence indicates that appellant stopped work on February 13, 2004 because Dr. Bell, his neurologist, told him that he could improve the quality of his life by moving to a warmer climate for health reasons. This is not a recognized basis for modifying a determination of wage-earning capacity. A working claimant may relocate to a warmer climate to improve the quality of his life, but that, in itself, does not mean he has lost his capacity to earn wages. In the absence of a well-reasoned medical opinion showing a material worsening of one of appellant's accepted conditions, the Board will affirm the Office's decision denying modification of its 2002 determination of wage-earning capacity.

### **CONCLUSION**

The Board finds that appellant has not met his burden to show a modification of the Office's 2002 determination of wage-earning capacity.

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<sup>5</sup> Appellant is not claiming that he has been retrained or vocationally rehabilitated, and he does not seek reconsideration of the 2002 determination of wage-earning capacity on the grounds that it was in error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 20, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 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