

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

M.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 07-1650
Issued: January 18, 2008**

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 June 6, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 16, 2007 which denied 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 the Office properly denied modification of appellant's May 13, 1996 loss of wage-earning capacity determination.

FACTUAL HISTORY

This case is on appeal to the Board for the third time. In a July 12, 2005 decision, the Board found that appellant's claim for total disability compensation for the period beginning May 17, 2004 raised the issue of whether modification of a May 13, 1996 wage-earning capacity was warranted. 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, 2004.¹ In the second appeal, the Board found that the November 30, 2005 decision of the Office did not fully comply with the Board's remand order to consider appellant's claim as a request for modification of a loss of wage-earning capacity decision.² The Office's decision failed to fully apprise appellant of the factual findings as to why it was denying modification of his wage-earning capacity. The facts and the history surrounding the prior appeal are set forth in the prior decision and are hereby incorporated by reference.³

The relevant evidence includes a June 21, 2004 letter from appellant, a November 19, 2004 rehabilitation job offer by the employing establishment and reports dated June 24 and October 30, 2004 by David C. Martin, Ph.D, a clinical psychologist. Appellant stated that on December 11, 2003 he had a flashback to the employment-related robbery incident of March 3, 1995. He stated that he felt the Office should reinstate the sick leave he used between December 11, 2003 and May 17, 2004 as this was due to his post-traumatic stress disorder, which was a result of the March 3, 1995 employment injury. Appellant related that he had planned to return to work on May 17, 2004, but was unable to do so because his condition had worsened.

On June 24, 2004 Dr. Martin diagnosed post-traumatic stress disorder and noted that appellant has been under his care since December 2003. He opined: "[t]here is no 'new injury' being treated, but an exacerbation of his original one." Dr. Martin stated that appellant was "a danger to himself and others, given his feelings of fear and unpredictable mental state." He indicated that appellant was currently scared to return to the employing establishment to work. On October 30, 2004 Dr. Martin opined:

“[C]urrent fears and hallucinations (sic) are definitely related to the original trauma in 1995 and represent psychotic manifestations of his [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 to protect himself from his hallucination (sic) was a definite worsening of his condition.”

¹ Docket No. 05-639 (issued July 12, 2005).

² Docket No. 06-689 (issued November 22, 2006).

³ 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 appellant a limited-duty position as a modified motor equipment operator, which he accepted June 15, 1995 and returned to work on June 22, 1995. The position was located at Hollowtree 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 days off 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 his actual earnings in the modified equipment operator fairly and reasonably represented his wage-earning capacity.

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

The November 19, 2004 letter of the employing establishment informed appellant that his rehabilitation job assignment was being revised due to the change in his medical restrictions, effective November 27, 2004. Appellant accepted the offered position on November 29, 2004. The physical restrictions of the position included up to 70 pounds lifting, 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 no confined work space. Appellant would work in a familiar large space where he did not work with many 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 January 30, 2007 the Office referred appellant to Dr. Russell Bruce Prince, a Board-certified psychiatrist, for a second opinion evaluation. The statement of accepted facts noted that appellant had returned to a limited-duty position on June 20, 2005. In a February 26, 2007 report, Dr. Prince reviewed the medical evidence, statement of accepted facts and provided findings on examination. He diagnosed chronic post-traumatic stress disorder. Dr. Prince noted that appellant reported that he had the same symptoms as those that occurred following the March 3, 1995 robbery, but “they are not endowed with the intense emotionality of feeling component that they were following the” 1995 robbery. Appellant informed Dr. Prince that his post-traumatic stress disorder symptoms increased following the employing establishment’s attempt to move him to a work area with more people. Dr. Prince concluded that appellant’s condition had worsened as a result of the attempt to reassign him on December 11, 2003 to a different work area. He noted that appellant’s symptoms diminished once the employing establishment returned appellant “to his original location with only himself and his supervisor.” Dr. Prince opined that appellant was capable of working “provided that his work environment is left as it now exists -- namely, that he works in a rather secluded area with only his supervisor and himself.”

By decision dated March 16, 2007, the Office denied modification of the May 13, 1996 loss of wage-earning capacity decision. It found that the chain of causation between appellant’s accepted March 3, 1995 employment injury and the May 13, 1996 loss of wage-earning capacity was broken by a new work factor, as any worsening or exacerbation of appellant’s condition was unrelated to his accepted May 13, 1996 employment injury.

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.⁴ The procedure manual indicates that, under

⁴ 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).

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.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

The Board finds that appellant has established a material change in the nature of his injury-related condition as of December 11, 2003. In reports dated June 24 and October 30, 2004, Dr. Martin opined that appellant sustained an exacerbation of his employment-related injury in December 2003 due to changes in appellant's job duties and work sites. He stated that appellant's hallucinations and fears were manifestations of his post-traumatic stress disorder and that given his mental state and fears, he was a danger to both himself and others. Dr. Martin opined that the exacerbation of his symptoms in December "appeared to be" based on his job when working in close proximity to his coworkers. Dr. Prince was in agreement that appellant's condition had worsened on December 11, 2003 when he was reassigned to a work area which included more people than he had been working with previously. The reports by Dr. Prince and Dr. Martin support appellant's contention that his employment-related condition changed as of December 11, 2003 and he was unable to work as a modified motor equipment operator. The attempt to reassign appellant to a new work area on December 11, 2003 resulted in an exacerbation of his post-traumatic stress disorder symptoms due to the close proximity of additional employees. There is no contrary evidence in the record. Appellant has established a material change in his accepted condition as of December 11, 2003.

CONCLUSION

The Board finds that appellant established a material change in his accepted condition such that modification of the May 13, 1996 wage-earning capacity was warranted.

⁵ 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).

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

⁷ *Harley Sims, Jr.*, *supra* note 5; *Stanley B. Plotkin*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 16, 2007 is reversed.

Issued: January 18, 2008
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