

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

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**E.J., Appellant**

**and**

**DEPARTMENT OF DEFENSE,  
Fort Meade, MD, Employer**

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**Docket No. 07-2295  
Issued: September 8, 2008**

*Appearances:*  
*Jeffrey P. Zeelander, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 15, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has established a consequential emotional condition causally related to his May 23, 1990 back injury; and (2) whether appellant met his burden of proof to modify the October 18, 1995 wage-earning capacity determination.

**FACTUAL HISTORY**

The case was before the Board on prior appeals with respect to the wage-earning capacity determination. In a decision dated May 6, 1998, the Board affirmed the October 18, 1995 wage-earning capacity decision based on the selected position of estimator.<sup>1</sup> By decision dated

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<sup>1</sup> Docket No. 96-469 (issued May 6, 1998).

January 5, 2001, the Board affirmed a July 16, 1999 Office decision denying modification of the wage-earning capacity determination.<sup>2</sup> Appellant continued to receive compensation for wage-loss based on his loss of wage-earning capacity. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

By letter dated August 11, 2006, appellant's representative requested that the wage-earning capacity be modified as appellant had an employment-related emotional condition that had worsened. Appellant submitted an August 10, 2006 report from Dr. Harry Doyle, a psychiatrist, who provided a history, results on examination and reviewed medical records. Dr. Doyle diagnosed major depressive disorder, single episode and chronic pain disorder associated with both psychological factors and a general medical condition. He opined that the medical record documented that appellant experienced pain and developed secondary symptoms of anxiety and depression from the work injury. Dr. Doyle indicated that appellant had preexisting post-traumatic stress disorder (PTSD) and his preexisting cognitive and personality conditions that had been aggravated by residuals of his accepted conditions. He opined that the diagnosed conditions of major depressive disorder and chronic pain disorder were caused by the May 23, 1990 work injury.

The Office referred the case to an Office medical adviser for an opinion as to the causal relationship between an emotional condition and the employment injury. In a report dated January 17, 2007, the medical adviser reviewed the medical records and noted that appellant sustained a soft tissue injury to the low back. He opined that appellant's "psychiatric condition is clearly unrelated to the injury of May 23, 1990.... There is nothing to support this patient's major depressive disorder or chronic pain condition as being related to the soft tissue sprains occurring on May 23, 1990."

By decision dated March 13, 2007, the Office denied modification of the wage-earning capacity determination. The Office found that the medical evidence did not establish an employment-related emotional condition and there was no evidence of worsening of the accepted low back strain and herniated L4-5 disc.

Appellant requested a review of the written record by an Office hearing representative. By decision dated August 15, 2007, the hearing representative affirmed the March 13, 2007 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.<sup>3</sup> If a subsequent injury is the direct and natural result of a compensable primary injury, it is

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<sup>2</sup> Docket No. 99-2413 (issued January 5, 2001).

<sup>3</sup> *Carlos A. Marrero*, 50 ECAB 117, 120 (1998); 1 A. Larson, *The Law of Workers' Compensation* § 10.01 (2002).

compensable.<sup>4</sup> Where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury is deemed, because of the chain of causation, to arise out of and in the course of employment.<sup>5</sup>

The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.<sup>6</sup> The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant attributed a consequential emotional condition as a result of the May 23, 1990 employment injury to his back. The medical evidence is in conflict on the issue. An attending psychiatrist, Dr. Doyle, opined that appellant had major depressive disorder, single episode and chronic pain disorder causally related to the May 23, 1990 injury. He also reported aggravation of preexisting PTSD by the employment injury. An Office medical adviser opined that the psychiatric conditions were not causally related to the employment injury.

The case will be remanded to resolve the conflict under 5 U.S.C. § 8123(a). Since appellant's request to modify the wage-earning capacity determination was based on establishing an emotional condition as employment related, the Board will not address the modification of wage-earning capacity determination at this time. The referee physician should provide an opinion as to whether there is a psychiatric condition causally related to the employment injury and, if so, whether there was a material worsening of the condition after October 18, 1995. After such further development as the Office deems necessary, it should issue an appropriate decision as to causal relationship of an emotional condition with employment and modification of the loss of wage-earning capacity determination.

### **CONCLUSION**

The medical evidence is in conflict on the issue of a consequential emotional condition and the case is remanded for resolution of the conflict.

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<sup>4</sup> *Debra L. Dillworth*, 57 ECAB 516, 519 (2006).

<sup>5</sup> *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>6</sup> 5 U.S.C. § 8123.

<sup>7</sup> 20 C.F.R. § 10.321 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 15 and March 13, 2007 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 8, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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