

whether appellant sustained an emotional condition while in the performance of duty.¹ In the second appeal, the Board set aside the August 13 and 12, 2003 decisions of the Office, finding that it did not properly compute appellant's pay rate for compensation purposes or his wage-earning capacity.² The facts of the case are set forth in the Board's prior decisions and incorporated herein by reference. As relevant to this instant appeal, appellant stopped work on October 8, 1991 and retired on September 4, 1992. The record reflects that he used leave from October 9, 1991 to January 18, 1992, following which he used leave without pay through September 3, 1992. Appellant started work as a real estate agent on or about May 1, 1993 and stopped working on July 31, 2002.

By decision dated August 4, 2005, the Office found that appellant's actual earnings as a real estate agent which he had performed since May 1, 1993 fairly and reasonably represented his wage-earning capacity. It calculated appellant's pay rate utilizing his gross wages as a real estate agent. The Office indicated that appellant had been employed as a real estate agent and earned wages of \$87,969.00 for the period January 1, 1994 to December 31, 2000, which averaged weekly earnings of \$241.01. Effective December 31, 2000, the pay rate for the position of postmaster which he held when injured was \$72,151.00 per year of \$1,387.52 per week. The Office calculated a 17 percent wage-earning capacity.

Appellant requested an oral hearing before an Office hearing representative.

On August 2, 2005 appellant filed a CA-2a, recurrence of disability claim, alleging that on July 31, 2002 he stopped work due to a worsening of his work-related depression and memory problems. In a letter dated August 2, 2005, he sought modification of his wage-earning capacity noting that his accepted condition had worsened and he could no longer work in any capacity.

Appellant submitted an October 29, 2003 report from Dr. Allen Shealy, a clinical psychologist, who treated appellant for major depressive disorder and chronic, irreversible memory deficits which resulted from his employment. In a November 26, 2003 report, Dr. Albert B. Stephens, a Board-certified neurologist, noted appellant's continued treatment for major depressive disorder with some improvement. He diagnosed major depressive disorder, recurrent severe, amnesic disorder, chronic, secondary to vascular disorder with multiple infarcts and organic brain disorder. Dr. Stephens advised that appellant experienced a progressive decline in his memory function and could not do any type of work because of his memory problems. He did not foresee appellant returning to a level where he could work more than one hour.

By letters dated October 21, 2005 and August 14, 2006, the Office advised appellant of the evidence needed to establish his claim for a recurrence of disability on July 31, 2002. It

¹ Docket No. 95-2943 (issued September 24, 1998). After further development of the claim, the Office accepted as compensable factors that appellant was threatened by a coworker, who also made intimidating gestures. The impartial medical specialist found that the incidents accepted as compensable contributed to appellant's emotional condition. On April 14, 2000 the Office accepted appellant's claim for post-traumatic stress disorder as of October 9, 1991.

² Docket No. 04-203 (issued July 15, 2005).

requested that he submit a physician's reasoned opinion addressing the relationship of his claimed recurrent disability and the original work injury.

In a November 15, 2005 report, Dr. Shealy diagnosed major depressive disorder with mild cognitive impairment manifested by a memory deficit. He noted that appellant was medically ordered to stop work in real estate because he was not competent to perform the job with his medical problems and the stress of trying to work with memory issues worsened his depression. On January 15, 2006 Dr. L.E. Shehi, Jr., a Board-certified psychiatrist and neurologist, treated appellant for major depressive disorder and mild cognitive impairment. He opined that appellant remained severely impaired and incapable of any type of gainful employment. In a report dated August 30, 2006, Dr. Shehi noted that appellant went back to work as a real estate agent from May 9, 1993 to July 31, 2002, but he was not able to function independently of his wife. He noted that neuropsychological testing revealed mild cognitive impairment and opined that appellant continued to decline cognitively. On September 21, 2006 Dr. Shehi noted appellant's accepted conditions were permanent and continued to be disabling.

On May 4, 2006 appellant withdrew his request for an oral hearing as he no longer wanted to appeal any action concerning his wage-earning capacity determination. The Office granted the request on May 15, 2006. Subsequently, appellant contended that he was totally disabled.

In a decision dated November 13, 2006, the Office denied modification of the August 4, 2005 decision.

On October 26, 2007 appellant requested reconsideration and indicated that he wanted his wage-earning capacity determination set aside. He submitted handwritten notes from Dr. Shealy from October 12, 2006 to August 23, 2007, addressing treatment for depression due to unresolved employment problems and memory issues. On September 17, 2007 Dr. Shealy diagnosed major depression, moderate and recurrent and mild cognitive impairment. He opined that appellant's accepted conditions were the result of his employment and continue to be disabling. On December 13, 2006 Dr. Shehi advised that he had no knowledge of appellant's condition prior to June 21, 2005 and could not address his deterioration prior to that date. In a report dated September 18, 2007, he diagnosed major depressive disorder, recurrent, amnesic disorder, post-traumatic stress disorder and mild cognitive impairment. Dr. Shehi opined that appellant's work-related injuries were permanent and continued to be disabling. Appellant also submitted copies of e-mails from May 16 to October 23, 2007 regarding his claim for a schedule award for loss of the brain due to a stroke and travel reimbursement.

In a decision dated December 27, 2007, the Office denied modification of the prior decision.

LEGAL PRECEDENT

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.³ The burden of proof is on the party attempting to show modification of the award.⁴

ANALYSIS

On appeal, appellant asserts that he is totally disabled and that his post-traumatic stress condition has worsened, warranting modification of the 2005 wage-earning capacity determination. The Office determined that appellant's actual earnings as a real estate agent represented his wage-earning capacity.⁵ The issue is whether he established a material change in his condition that would render him unable to perform those duties.⁶ For a physician's opinion to be relevant on this issue, the physician must address the duties of the actual position.⁷ The medical evidence submitted by appellant following the loss of wage-earning capacity determination does not sufficiently explain why the duties of a real estate agent are unsuitable due to his accepted condition.

Appellant submitted a report from Dr. Shealy, a clinical psychologist, who treated him for major depressive disorder and chronic, irreversible memory deficits. He opined that these conditions clearly resulted from appellant's employment at the employing establishment. The Board notes that Dr. Shealy's opinion is conclusory and fails to provide any medical rationale⁸ as to how these conditions, could disable appellant from a position of a real estate agent. On November 15, 2005 Dr. Shealy noted that appellant was medically ordered to stop working in real estate because he was not competent to work with his medical problems and the stress of working with memory issues worsened his depression. However, he did not provide sufficient medical rationale explaining how appellant's injury-related conditions had changed materially such that he was disabled from the position of a real estate agent. For example, Dr. Shealy did not explain the reasons why the accepted condition had changed to such an extent that appellant could no longer perform the duties of a real estate agent. He also did not address a material change in appellant's condition around July 31, 2002 that would render him unable to perform the position of a real estate agent. On September 17, 2007 Dr. Shealy diagnosed major depression and mild cognitive impairment and opined that appellant's condition was the result of his work with the employing establishment and he was permanently disabled. However, he failed to provide any medical rationale explaining how appellant's injury-related condition would disable him from the position of a real estate agent.

³ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁴ *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986); *James D. Champlain*, 44 ECAB 438 (1986).

⁵ The Board notes that the above-described criteria for modifying formal loss of wage-earning capacity decisions remains the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal loss of wage-earning capacity decision.

⁶ *Phillip S. Deering*, 47 ECAB 692 (1996).

⁷ *Id.*

⁸ See *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Appellant submitted a report from Dr. Stephens dated November 26, 2003. Dr. Stephens diagnosed major depressive disorder, recurrent severe, amnesic disorder, chronic, secondary to vascular disorder with multiple infarcts and organic brain disorder. He advised that appellant experienced a progressive decline in his memory function and could not do any type of work because of his memory problems. However, Dr. Stephens did not provide a sufficient description of the nature of the change in appellant's cognitive capacity or explain how this related to the accepted condition. He did not explain that there was a material change in the accepted post-traumatic stress disorder or how it disabled appellant from work. Rather, Dr. Stephens appears to attribute appellant's inability to work to loss of memory function which he opined was secondary to vascular disorder and multiple infarcts.

On January 15, 2006 Dr. Shehi noted treating appellant since June 21, 2005 for major depressive disorder and mild cognitive impairment. He opined that appellant remained severely impaired and incapable of any type of gainful employment. On August 30, 2006 Dr. Shehi noted that appellant went back to work as a real estate agent from May 9, 1993 to July 31, 2002, but he was not able to function independently of his wife and continued to deteriorate cognitively. In reports dated September 21, 2006 and September 18, 2007, he noted appellant's work-related injuries were permanent and he was disabled from all work. However, Dr. Shehi did not specifically address the accepted post-traumatic stress disorder or explain how it had materially changed such that appellant was disabled as of 2002. Rather, in a report dated December 13, 2006, he advised that he had no knowledge of appellant's condition prior to June 21, 2005 and could not address his deterioration prior to that date. Due to this lack of an accurate medical history of the accepted condition, Dr. Shehi's opinion is of diminished probative value and is insufficient to warrant modification of appellant's wage-earning capacity.

The Board finds there is no medical evidence which establishes a change in appellant's accepted condition such that a modification of the Office's wage-earning capacity determination would be warranted. The evidence from the attending physicians does not establish that appellant became disabled as a real estate agent due to a material change in his accepted condition. Rather, his cognitive impairment was attributed to vascular disease and multiple infarcts. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that he had been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous. Consequently, he has failed to carry his burden of proof to establish modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant did not submit sufficient medical evidence, following the Office's August 4, 2005 decision, to justify modification of the Office's loss of wage-earning capacity determination.⁹

⁹ With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 27, 2007 is affirmed.

Issued: February 6, 2009
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