United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 09-904**
	)	**Issued: May 25, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Phoenix, AZ, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 23, 2009 appellant filed a timely appeal of the November 20, 2008 merit decision of the Office of Workers' Compensation Programs denying modification of a November 25, 2005 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied modification of appellant's wage-earning capacity in the constructed position of residence counselor.

On appeal, appellant contends that the evidence establishes that the constructed position was not vocationally suitable.

FACTUAL HISTORY

This case has previously been before the Board. In a May 18, 2001 decision, the Board affirmed in part and reversed in part the Office's February 2, 1999 termination decision.[1] The Board found that the Office met its burden of proof in terminating appellant's compensation on the grounds that he no longer had any residuals of his accepted employment-related physical conditions. The Board found, however, that the Office did not meet its burden of proof in terminating appellant's compensation on the grounds that he no longer had any residuals of his accepted employment-related emotional condition. The Board affirmed the Office's April 12, 1999 decision which denied appellant's request for an oral hearing on the grounds that it was not timely filed pursuant to 5 U.S.C. § 8124(b).

Appellant did not return to work due to his accepted employment-related emotional condition.[2]

On December 27, 2002 the Office requested that appellant submit a detailed medical report addressing his current condition and ability to work. He was afforded 30 days to submit the requested evidence. Appellant did not respond.

By letter dated February 10, 2003, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Larry D. Iversen, a Board-certified orthopedic surgeon, for a second opinion medical examination. It also referred appellant to Dr. David D. Bot, a Board-certified psychiatrist, for a second opinion medical examination.

In a March 3, 2003 report, Dr. Iversen advised that there were no objective findings to support appellant's current thoracic and lumbar problems. He opined that appellant's preexisting back conditions likely contributed to his current symptoms and prevented him from performing his work duties as a nursing assistant. Dr. Iversen found no permanent employment-related aggravation of the preexisting conditions. He noted appellant's permanent physical restrictions and stated that he could participate in a vocational rehabilitation program.

In a March 7, 2003 report, Dr. Bot advised that appellant's pain disorder with psychological factors associated with physical complaints of back pain and not otherwise specified personality disorder with narcissistic features did not preclude him from obtaining employment. He did not suffer from an anxiety or a mood disorder. Dr. Bot opined that from a psychological standpoint appellant could work without limitation in a position within his physical capacity.

In reports dated June 3 and August 1, 2003, Dr. James B. Gaddy, an attending Board-certified family practitioner, advised that appellant suffered from incurable chronic back pain

[1] Docket Nos. 99-1405 and 99-2245 (issued May 18, 2001).

[2] The Office accepted that on February 9, 1979 appellant, then a 26-year-old nursing assistant, sustained temporary aggravation of his preexisting Scheuermann's disease and cogenital spondylolysis, thoracic, acute dorsal and lumbar strains and adjustment reaction with depression and anxiety while in the performance of duty. It referred him to a vocational rehabilitation counselor. On May 17, 1987 appellant graduated with honors from Whitworth College with a Bachelor of Science degree in health management.

and depression. He further advised that appellant was willing to seek treatment for a possible return to work. Dr. Gaddy stated that he could benefit from physical therapy, medication and counseling.

On September 5, 2003 the employing establishment offered appellant a medical clerk position in Phoenix, Arizona based on the opinions of Dr. Iversen and Dr. Bot. On September 18, 2003 appellant accepted the job offer, indicating that he would have to relocate from Spokane, Washington.

By letter dated October 17, 2003, the Office determined that the offered position was not suitable because the employing establishment could not pay appellant's relocation expenses.

On October 24, 2003 the Office referred appellant to a vocational rehabilitation counselor. Appellant attended Spokane Falls Community College where he completed HIV/AIDS training for health care personnel on September 1, 2004. On August 17, 2005 a vocational rehabilitation counselor identified the position of residence counselor in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and completed a Form CA-66 job classification. The job duties included providing individual and group guidance services relative to problems of scholastic, educational and personal-social nature to dormitory students, suggesting remedial or corrective actions, assisting students in making better adjustments and in planning intelligent life goals, planning and directing program to orient new students, assisting in their integration into campus life, initiating and conducting group conferences to plan and discuss programs and policies related to assignment of quarters, social and recreational activities, and dormitory living, supervising dormitory activities, investigating reports of misconduct and attempting to resolve or eliminate causes of conflict. The job may involve interviewing all dormitory students to determine the need for counseling. The job was considered a sedentary position with occasional lifting up to 10 pounds. Under specific vocational preparation, the rehabilitation counselor circled the box indicating that the position required two to four years of vocational preparation. He advised that appellant had the specific vocational preparation for the job, based on his Bachelor of Science degree in health management which he received on May 17, 1987 and completion of three quarters of coursework in social service aide training at Spokane Falls Community College from the fall of 2004 through the spring of 2005. The rehabilitation counselor reported that the position was available in sufficient numbers on a full-time basis in appellant's commuting area based on a labor market survey.

In an October 20, 2005 notice, the Office advised appellant that it proposed to reduce his wage-loss compensation because the medical and factual evidence of record established that he was no longer totally disabled. It found that he had the capacity to earn the wages of a residence counselor.

In a November 14, 2005 letter, appellant disagreed with the proposed action, contending that the employing establishment was required to provide him with a position in his commuting area and that he did not have the education or skills to perform the duties of the constructed position. He further contended that the Office improperly calculated his loss of wage-earning capacity as it did not use the correct current pay rate for his date-of-injury position.

By decision dated November 25, 2005, the Office finalized the proposed reduction in compensation, effective November 27, 2005, based on appellant's capacity to earn wages as a residence counselor. On December 15, 2005 appellant requested an oral hearing before an Office hearing representative.

In a January 19, 2007 decision, an Office hearing representative affirmed the November 25, 2005 reduction of appellant's wage-loss compensation based upon the constructed position of residence counselor. The hearing representative found that the constructed position complied with the restrictions set forth by Dr. Iversen and Dr. Bot.

In a January 8, 2008 letter, appellant requested reconsideration. A November 14, 2007 "Vocational Assessment Report" and affidavit of Daniel R. McKinney, Sr., a Board-certified disability analyst and professional counselor, advised that appellant did not have the specific vocational preparation, skills and abilities necessary to obtain and maintain employment as a residence counselor. He noted appellant's degree in health management and stated that appellant had never worked in the field. Mr. McKinney further noted that he completed three quarters of a six-quarter program for a social service aide at the community college. He stated, however, that appellant did not complete the program and was not certified as a social service aide. Mr. McKinney indicated that he was 55 years old and had not been gainfully employed in over 25 years. At best, appellant could only obtain an entry-level job at the Washington state minimum wage rate with increases based on his experience. Mr. McKinney concluded that he did not have transferable skills based on his work history and incomplete and remote education. He recommended that appellant receive either compensation for permanent total disability or adequate training to compete for a position with a salary similar to his preinjury salary.

By decision dated November 20, 2008, the Office denied modification of the November 25, 2005 wage-earning capacity determination.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[3] The Office's procedure manual provides that, "[i]f 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. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[4] 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

[3] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

fact, erroneous.[5] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[6]

Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[7] The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.[8]

ANALYSIS

Appellant does not contend that there has been a material change in the nature and extent of his injury-related conditions or that he has been retrained or otherwise vocationally rehabilitated. The issue is whether the 2005 wage-earning capacity determination was erroneous.

The vocational rehabilitation counselor appointed by the Office found that appellant was capable of employment as a residence counselor as it was within his physical limitations, vocational skills and geographical area. He conducted a labor market survey and determined that the selected position was available in sufficient numbers on a full-time basis in appellant's commuting area. Appellant disagreed with the determination that this position was vocationally suitable and submitted his own vocational evidence. In a November 14, 2007 "Vocational Assessment Report" and affidavit, Mr. McKinney, a Board-certified disability analyst and professional counselor, advised that appellant did not have the specific vocational preparation, skills and abilities necessary to obtain and maintain employment as a residence counselor. He stated that, although appellant earned a degree in health management, he had never worked in the field. Mr. McKinney further stated that appellant completed three quarters of a six-quarter program for a social service aide but, he did not complete the program and was not certified as a social service aide. Noting that appellant was 55 years old and had not been gainfully employed in over 25 years, Mr. McKinney advised that, at best, he could only obtain an entry-level job at the Washington state minimum wage rate with increases based on his experience. He concluded that appellant did not have transferable skills based on his work history and incomplete and remote education. Mr. McKinney recommended that he receive either compensation for permanent total disability or adequate training to compete for a position with a salary similar to his preinjury salary.

[5] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[6] *Id.*

[7] *See* Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (June 1996).

[8] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

The Board finds that the case is not in posture for decision. When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open labor market, that fits the employee's capabilities with regard to his physical limitation, education, age and prior experience.[9] A rehabilitation specialist is an expert in the field of vocational rehabilitation and the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.[10] However, the evidence currently in the record is not sufficient to establish that appellant has the proper prior experience for a job as a residence counselor. The position description for residence counselor, as listed by the Office's vocational counselor, indicated that appellant needed two to four years of vocational preparation. The vocational counselor noted that appellant received a Bachelor of Science degree in health management and completed three quarters of coursework in social service aide training. However, in denying modification, the Office did not address the fact that appellant did not complete his social service aide training or that he had not been gainfully employed for over 25 years, points raised by Mr. McKinney. Without addressing these elements in appellant's vocational background, the Office has not fully considered appellant's request for modification.

CONCLUSION

The Board finds that the case is not in posture for decision.

[9] *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

[10] *Dorothy Jett*, 52 ECAB 246 (2001).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 25, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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