

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

K.C., Appellant	)	
	)	
and	)	Docket No. 09-1381
	)	Issued: May 18, 2010
DEPARTMENT OF VETERANS AFFAIRS,	)	
VETERANS ADMINISTRATION MEDICAL	)	
CENTER, Miami, FL, 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 May 5, 2009 appellant filed a timely appeal from the February 12, 2009 merit decision of the Office of Workers' Compensation Programs, which denied modification of his 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 the case.

**ISSUE**

The issue is whether appellant met his burden of proof to establish that his 2004 wage-earning capacity determination should be modified.

**FACTUAL HISTORY**

This case has previously been before the Board. In a September 5, 2003 decision, the Board found that the Office did not meet its burden of proof to terminate appellant's

compensation benefits under section 8106(c)(2) based on his refusal of suitable work.<sup>1</sup> The Board determined that the Office had not adequately evaluated appellant's reasons for refusing the offered position prior to terminating benefits. The facts of the claim as set forth in the Board's prior decision are incorporated herein by reference.

Appellant subsequently elected benefits under the Federal Employees' Compensation Act and he was referred for vocational rehabilitation to assist with job placement.<sup>2</sup> On December 5, 2003 the rehabilitation counselor noted that appellant had transferable skills to work as an information clerk, Dictionary of Occupational Titles No. 237.367-022. However, appellant did not cooperate with rehabilitation efforts and his compensation was reduced to zero as of March 22, 2004 in an interrupted status. He was advised that his file would be closed if he did not contact vocational rehabilitation by May 22, 2004.

The vocational rehabilitation counselor proceeded to develop the issue of appellant's wage-earning capacity, noting that as of April 16, 2004 the position of information clerk was available in sufficient numbers so as to make it reasonably available to appellant within his commuting area as confirmed by the Georgia state employment service representative. The position was described as sedentary with no exposure to weather or proximity to moving mechanical parts at a weekly wage of \$260.00 to \$280.00. The vocational rehabilitation counselor noted that the position was within the work restrictions recommended by Dr. Tsai.<sup>3</sup> In April 2004, she contacted potential employers and, based on her contact with the state labor career center, confirmed an entry salary range of \$6.50 to \$7.00 an hour. The vocational rehabilitation counselor noted that appellant would not agree to a meeting. As of May 22, 2004, appellant did not contact the vocational rehabilitation counselor. On June 10, 2004 the vocational rehabilitation counselor again confirmed the availability of the information clerk position on a full-time and part-time basis and the salary range. She noted that the position involved a three- to six-month vocational preparation period.

In a July 9, 2004 decision, the Office reduced appellant's benefits effective July 11, 2004 on the grounds that he had a 53 percent wage-earning capacity in the constructed position of information clerk. It noted that appellant resubmitted a copy of a June 22, 2000 office note from

---

<sup>1</sup> Docket No. 02-2306 (issued September 5, 2003). On March 30, 1982 appellant, a 33-year-old purchasing agent, sustained injury when automatic doors closed and struck him in the back. The Office accepted that he sustained a low back contusion and sprain, a herniated disc at L5-S1 and lumbar disc displacement. Appellant underwent a lumbar laminectomy in May 1982. On January 17, 1983 he sustained injury to his cervical spine and a left knee contusion when his motor vehicle overturned.

<sup>2</sup> The Office noted it was developing a placement plan based on medical evidence concerning appellant's capacity for work from Dr. Stella I. Tsai, a Board-certified neurologist and impartial medical specialist, who advised that he was capable of full-time sedentary activity with weight restrictions, allowed frequent breaks and no driving or operating dangerous equipment.

<sup>3</sup> The Office received several handwritten treatment notes from Dr. Jeffrey A. Fried, a physician, dated March 14, 2002 to January 31, 2004. Dr. Fried did not address appellant's work restrictions or capacity for work. In a brief September 3, 2003 note, Dr. Frank S. Matovu, a family practitioner, stated that appellant was totally disabled and unable to do any type of work even at sedentary level. He did not set forth any findings based on examination of appellant or explain the basis for his statement.

Dr. Harvey A. Jones, an attending general surgeon; however, the weight of medical opinion was represented by Dr. Tsai, the impartial medical specialist.<sup>4</sup>

Appellant subsequently requested a hearing before an Office hearing representative that was held on May 25, 2005. He contended that he did not have the physical capacity to perform the duties of the selected position.

In a September 19, 2005 decision, an Office hearing representative affirmed the July 9, 2004 wage-earning capacity determination. He found that the weight of medical opinion was represented by the report of the impartial medical specialist.

On September 18, 2006 appellant requested reconsideration, again contending that he lacked the capacity to perform the duties of the selected position. He submitted a July 10, 2006 treatment note and September 4 and 12, 2006 functional capacity questionnaires from Dr. Fried and an August 24, 2006 functional capacity questionnaire from Dr. Jones.

In a February 20, 2008 decision, the Office denied modification of the 2004 wage-earning capacity determination. It found that the treatment note of Dr. Fried failed to set forth any findings on examination or provide a firm medical diagnosis, noting only that appellant was unable to work. The questionnaires submitted by the physicians checked boxes pertaining to a pre-hearing procedure before the Social Security Administration. No medical rationale was provided for the opinions expressed on the forms or addressed how the specific conditions accepted by the Office had materially changed or disabled appellant from performing the duties of the constructed position.

On August 29, 2008 appellant requested reconsideration. In a June 5, 2008 report, Dr. Jones stated that from 2002 through 2004 he took a leave of absence from his practice and that appellant went without consistent medical care. Once he returned to practice, appellant resumed treatment and should not be found at fault for not being seen during the interval. In an August 2, 2008 treatment note, Dr. Fried provided a review of appellant's treatment for degenerative arthritis of the lumbar spine. He advised that appellant could not do significant bending, twisting or stooping, any kneeling, crawling or squatting and should avoid pushing and pulling, with lifting limited to about 10 pounds. Dr. Fried noted that appellant continued to be overweight and had hypertension and gouty arthritis. He stated: "The patient is basically disabled at this time from being employed in the economy." In a July 16, 2008 note, Dr. Dwayne L. Clay, Board-certified in physical medicine and rehabilitation, stated that appellant had been disabled since 1983 and was unable to do any type of work including light sedentary work. In a June 27, 2005 treatment note, Dr. Patrick J. Fernicola stated that appellant was seen in follow-up for a total left knee arthroplasty and right knee arthroscopy six days prior. He addressed the nature of the wounds and found no evidence of infection.<sup>5</sup>

---

<sup>4</sup> The record reflects that appellant elected OPM benefits as of July 11, 2004. The Office subsequently determined that he was in receipt of dual monetary benefits under the Act and from the Veterans Administration. As appellant did not respond to letters requesting that he make an election of benefits, any compensation payable for loss of wage-earning capacity was suspended as of August 20, 2004.

<sup>5</sup> Appellant resubmitted treatment records of his hospitalization from December 4, 2003 to January 6, 2004 at a VA medical center for degenerative joint disease and therapy services.

In a February 12, 2009 decision, the Office denied modification of the 2004 wage-earning capacity determination. It found that the evidence submitted did not establish that he was unable to perform the duties of the selected position. The medical evidence was found insufficient to establish that residuals of appellant's accepted conditions had materially changed or prevented him from performing the duties of an information clerk.

### **LEGAL PRECEDENT**

Once a 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 conditions, 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 that the wage-earning capacity decision should be modified.<sup>6</sup> When a formal 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 such instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination.<sup>7</sup>

### **ANALYSIS**

Appellant's claim was accepted by the Office for a low back contusion and sprain, herniated disc at L5-S1 for which he underwent a lumbar laminectomy in 1982 and for injury to his cervical spine and a left knee contusion. The Board previously found that the report of Dr. Tsai, a Board-certified neurologist selected as the impartial medical specialist, constituted the weight of medical opinion and established that he had the physical capacity for full time sedentary work within specified restrictions. Based on her opinion, an Office rehabilitation counselor determined that appellant had the capacity to perform the duties of an information clerk. The duties of the position include answering inquiries from persons entering the establishment, providing information concerning location of departments, offices or employees within the organization and informing customers of location of merchandise or concerning available services. The position was described as sedentary and performed indoors with no exposure to weather or proximity to moving mechanical parts. The rehabilitation counselor noted that appellant's prior employment and experience as a purchasing agent met the specific vocational preparation with a three- to six-month training period. She contacted the state employment services office to determine that the position was performed in sufficient numbers so as to be reasonably available to appellant in his commuting area. The state labor career office confirmed an entry salary of \$6.50 an hour.<sup>8</sup>

It is well established that, when the Office makes a medical determination that a recipient of compensation is partially disabled and has specific work limitations, it may refer the case to a vocational rehabilitation counselor for selection of a position that fits the employee's

---

<sup>6</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>7</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>8</sup> The rehabilitation specialist is recognized as an expert in the field of vocational rehabilitation and the Office may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable. See *Lawrence D. Price*, 54 ECAB 590 (2003).

capabilities.<sup>9</sup> When vocational rehabilitation efforts are unsuccessful, the counselor will submit a closure report to the Office with a listing of two to three jobs which are medically and vocationally suitable for the employee and set forth information from a labor market survey as to the availability of the positions and wage rate.<sup>10</sup> The record reflects that appellant refused to meet with the vocational rehabilitation counselor. Based on the evidence of record, she proceeded to prepare a closure report which found that he had the vocational and medical capacity to perform the sedentary duties of an information clerk and that such positions were reasonably available within the general labor market of his commuting area.<sup>11</sup>

Appellant contested the suitability of the information clerk position and submitted a copy of a June 22, 2000 report of Dr. Jones, an attending surgeon. As noted in the Board's prior decision, the Office found a conflict in medical opinion between Dr. Jones and an Office referral physician which necessitated the selection of an impartial medical specialist. At the time of the July 9, 2004 decision, the weight of medical opinion was represented by the report of Dr. Tsai which established that the selected position was suitable to appellant's physical capacity.<sup>12</sup> Appellant has not established that the July 9, 2004 decision was erroneous.

In support of his request for modification of the wage-earning capacity determination, appellant submitted a July 10, 2006 note from Dr. Fried and functional capacity questionnaires from Dr. Fried and Dr. Jones. The Board notes that this evidence does not provide any rationalized medical opinion from either physician explaining how appellant's accepted conditions materially changed such that he could no longer perform the duties of the selected position. The questionnaires provided check marked answers to questions pertaining to a Social Security proceeding and the treatment note of Dr. Fried did not provide any findings based on physical examination or explanation of how appellant was disabled from performing the sedentary duties of an information clerk. This evidence does not have a direct bearing to the wage-earning capacity determination and is of reduced probative value.<sup>13</sup> Similarly, the June 5, 2008 report of Dr. Jones explained his leave of absence from 2002 to 2004. This evidence is not relevant as it does not address the information clerk position or how appellant's condition had materially changed such that he no longer could perform the sedentary duties. On August 2, 2008 Dr. Fried reviewed appellant's treatment for degenerative arthritis of the lumbar spine, noting limitations on certain activities requiring bending, twisting, stooping, kneeling, crawling or squatting. His opinion that appellant was "basically disabled" is not well rationalized or explained with reference to the selected position. Appellant submitted treatment records from Dr. Clay together with a brief July 16, 2008 note that stated appellant had been disabled since 1983 and unable to do any type of work, including light sedentary duty. This report is insufficient to establish a material change in appellant's accepted conditions warranting modification of the 2004 wage-earning capacity determination. Dr. Clay's opinion does not

---

<sup>9</sup> *Richard Alexander*, 48 ECAB 432 (1997).

<sup>10</sup> *See Sylvia Birdcut*, 48 ECAB 162 (1996); *Philip S. Deering*, 47 ECAB 692 (1996).

<sup>11</sup> Where vocational rehabilitation efforts do not succeed, the employee's wage-earning capacity must be determined on the basis of a position deemed suitable but not actually held. *Roberta R. Moncrief*, 52 ECAB 418 (2001).

<sup>12</sup> *See Carl C. Green, Jr.*, 47 ECAB 737 (1996).

<sup>13</sup> *See Barry C. Petterson*, 52 ECAB 120 (2000); *Lester Covington*, 47 ECAB 539 (1996).

address the duties of the selected position, the medical history of the case, or explain how residuals of the conditions accepted by the Office caused disability as of his examination in April 2008.<sup>14</sup> The report of Dr. Fernicola addressed appellant's knee wounds following surgery in 2005. He did not address the relevant issue of appellant's capacity for work as an information clerk or how appellant's surgeries or disability related to the accepted conditions in this case. For these reasons, appellant has not established that the 2004 wage-earning capacity determination should be modified.

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that modification of his wage-earning capacity determination was warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 12, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 18, 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

---

<sup>14</sup> Where residuals of an accepted employment-related condition prevent an employee from performing regular duties, physical ailments that preexisted the accepted condition must be taken into consideration. Physical ailments acquired subsequent to and unrelated to the accepted injury and excluded from any wage-earning capacity determination. *Lee A. Dent*, 54 ECAB 704 (2003).