

FACTUAL HISTORY

This case has previously been before the Board. In a May 18, 2001 decision, the Board found that OWCP properly terminated appellant's compensation on the grounds that he no longer had any residuals of his accepted employment-related physical conditions, but improperly terminated his compensation for his emotional condition.² The Board also affirmed an 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). In a May 25, 2010 decision, the Board set aside a November 20, 2008 OWCP decision which denied modification of a November 25, 2005 wage-earning capacity determination.³ The Board remanded the case for further development as to whether appellant possessed the vocational skills to perform the constructed position of residence counselor. The Board instructed OWCP to address the fact that appellant did not complete his social services aide training and had not been gainfully employed for over 25 years. The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.⁴ The facts and the history relevant to the present appeal are hereafter set forth.

On July 10, 2003 OWCP referred appellant to vocational rehabilitation services based on his unemployment since 1982 and accepted emotional and physical conditions. On July 26, 2004 it approved the rehabilitation counselor's plan which included appellant's enrollment in classroom and practicum courses related to chemical dependency and social services at Spokane Falls Community College to prepare for the positions of residence counselor, social services aide or substance abuse counselor. On June 6, 2005 the rehabilitation counselor reported that appellant obtained practicum work experience as a counselor at Holy Family Adult Care commencing May 18, 2005. On July 28, 2005 he advised that he was capable of performing the positions of case aide, social services aide, residence counselor or substance abuse counselor. These positions were available in appellant's commuting area. Appellant's May 17, 1987 Bachelor of Science degree in health science with honors from Whitworth College and completion of three quarters of coursework at the community college from the fall of 2004 through the spring of 2005 satisfied the vocational requirement of two to four years of vocational preparation for the residence counselor position.⁵ The rehabilitation counselor conducted a labor market survey and determined that the constructed position was reasonably available in appellant's commuting area.

Appellant submitted a November 14, 2007 "Vocational Assessment Report" and affidavit of Daniel R. McKinney, Sr., a disability analyst and professional counselor, who advised that appellant did not have the specific vocational preparation, skills or abilities necessary to obtain

² Docket Nos. 99-1405 and 99-2245 (issued May 18, 2001).

³ Docket No. 09-904 (issued May 25, 2010).

⁴ OWCP accepted that on February 9, 1979 appellant, then a 26-year-old nursing assistant, sustained temporary aggravation of his preexisting Scheuermann's disease and congenital spondylolysis, thoracic, acute dorsal and lumbar strains and adjustment reaction with depression and anxiety while in the performance of duty. Appellant stopped work in 1982.

⁵ The rehabilitation counselor also determined that appellant's bachelor's degree and college coursework vocationally prepared him for the positions of substance abuse counselor trainee, case aide and social services aide.

and maintain employment as a residence counselor. Appellant had a degree in health management, but never worked in the field. He only completed three quarters of a six-quarter program for a social services aide at the community college and was not certified as a social services aide. Appellant was 55 years old and had not been employed in over 25 years. At best, he could obtain an entry-level minimum wage job at the state level with salary increases based on his experience. Mr. McKinney concluded that appellant did not have transferable skills based on his work history and incomplete and remote education.

In an August 6, 2010 decision, OWCP denied modification of the November 25, 2005 wage-earning capacity determination. It found that appellant's four-year bachelor's degree in health science and community college coursework and practicum work experience met the specific vocational preparation requirement of the constructed residence counselor position. The fact that he did not complete the social services aide program at the community college and was not certified as a social services aide did not establish that he was not vocationally prepared for the constructed position. OWCP explained that the rehabilitation plan never indicated that appellant would become a certified social services aide or that he would complete the entire course. It further explained that the college courses were intended to supplement the knowledge and skills appellant already possessed to enable him to obtain employment as a social services aide or residence counselor. OWCP stated that the evidence of record did not establish that appellant was required to be a certified social services aide to work as a residence counselor. It further stated that the fact that appellant was 55 years old and had not worked in over 25 years was considered and the rehabilitation counselor developed a plan which involved supplementing his education with community college classroom and practicum courses relevant to the constructed position. OWCP found that there was no evidence establishing that the *Dictionary of Occupational Titles* allowed discrimination based on age. The rehabilitation counselor did not indicate that appellant's age impeded his ability to obtain a residence counselor position. OWCP concluded that the evidence established that the constructed position was within his vocational and physical capabilities and was reasonably available in the general labor market and his commuting area.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁶

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the work-related condition, the employee has been retrained or otherwise vocationally rehabilitated

⁶ Jason C. Armstrong, 40 ECAB 907 (1989).

or the original determination was in fact erroneous.⁷ The burden of proof is on the party attempting to show the award should be modified.⁸

ANALYSIS

In the prior appeal, the Board remanded this case for OWCP to determine whether appellant had the vocational skills to obtain the constructed position of residence counselor. On remand, OWCP denied modification of the November 25, 2005 wage-earning capacity determination, finding that the constructed position was vocationally suitable. The Board finds that it properly determined that the constructed position was vocationally suitable to appellant. There is no dispute that appellant was physically capable of performing the duties of the constructed position or that he had been retrained or otherwise vocationally rehabilitated.

The report of Mr. McKinney, a Board-certified

disability analyst and professional counselor, stated that appellant did not have the specific vocational preparation, skills or abilities necessary to obtain and maintain employment as a residence counselor based on his work history and incomplete and remote education. Mr. McKinney stated that appellant had a degree in health management, but never worked in the field. He also stated that he completed three quarters of a six-quarter program for a social services aide and was not certified as a social services aide. Mr. McKinney advised that at best, appellant could only obtain an entry-level minimum wage state position due to his age of 55 years and unemployment for over 25 years. He recommended that he receive permanent total disability compensation or adequate training to compete for a position with a salary similar to his preinjury salary.

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations, but also take into account work experience, age, mental capacity and educational background.⁹ In this case, the rehabilitation counselor determined that appellant had the skills necessary to perform the position of residence counselor based on his Bachelor of Science degree in health management, completion of community college coursework and practicum work experience at a family adult care center. He further found that the constructed position was reasonably available within appellant's commuting area. The rehabilitation counselor considered appellant's age and lengthy unemployment history and developed a training plan as instructed by OWCP. His plan included community college courses and practicum work experience relevant to not only a social services aide position, but also to the constructed residence counselor position. Although appellant only completed three quarters of the coursework, OWCP correctly noted that the rehabilitation plan did not indicate that he would only become a certified social services aide or complete the entire program. The rehabilitation counselor considered whether the social services aide and substance abuse counselor positions

⁷ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁸ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁹ *N.J.*, 59 ECAB 171 (2007); *Loni J. Cleveland*, 52 ECAB 171 (2000); *W.D.*, Docket No. 09-188 (issued August 21, 2009).

were suitable and determined that appellant was vocationally prepared for these positions. As indicated by OWCP, there was no evidence establishing that appellant was required to be a certified social services aide to obtain a residence counselor position. In addition to appellant's completion of his coursework, the rehabilitation counselor stated that he had practicum work experience as a counselor at an adult care facility commencing May 18, 2005.

As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available.¹⁰ The Board finds that appellant's bachelor's degree in health science and recent community college coursework and work experience constitute adequate vocational preparation for the constructed rehabilitation counselor position. For these reasons, the Board finds that he did not show that modification of OWCP's wage-earning capacity decision was warranted and it properly denied his modification request.

Appellant contended on appeal that he did not receive specific vocational preparation to obtain the constructed residence counselor position. For the reasons noted, the Board finds that the position was vocationally suitable.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not established that OWCP's November 25, 2005 determination of his wage-earning capacity should be modified.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (2) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board