

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 11-1549
Issued: June 21, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 17, 2011 appellant filed a timely appeal from the February 25 and March 29, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to modify the June 17, 2005 wage-earning capacity determination.

FACTUAL HISTORY

On March 13, 1997 appellant, a 42-year-old customer services supervisor, filed an occupational disease claim for an emotional condition causally related to factors of employment.²

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant's primary allegations related to a proposed termination of his employment, which was later vacated, and reaction of coworkers to these events.

OWCP accepted the claim for major depressive disorder. Appellant retired from the employing establishment on October 28, 1997.

In August 2004, appellant was referred for vocational rehabilitation. On July 30, 2004 after completing vocational rehabilitation he accepted private employment as an auto parts delivery driver with First Place Logistics.

By decision dated September 30, 2004, OWCP issued a 51 percent loss of wage-earning capacity decision. It found that he had worked more than 60 days in the modified position and that the actual wages he earned as a delivery driver, \$461.74 a week, fairly and reasonably represented his wage-earning capacity.

On December 1, 2004 appellant requested an oral hearing. He contended that OWCP's wage-earning capacity determination was not correct and that his actual wages as a delivery driver were not \$461.74 a week. Appellant stated that his weekly pay was \$500.00; however, he paid \$125.00 to \$135.00 in gas expenses, which reduced his net weekly earnings to \$350.00 or \$360.00. He also claimed \$15.00 in weekly radio fees.³ Appellant requested that OWCP modify the September 30, 2004 determination.

By decision dated May 26, 2005, an OWCP hearing representative set aside the September 30, 2004 decision. She stated that the wage-earning capacity determination had been based on his monthly salary of \$2,000.00 but did not take into account that he used his own vehicle and paid his own transportation expenses, for which he did not receive reimbursement. The hearing representative stated that appellant's situation was comparable to self-employment in that he was required to pay his own expenses. Appellant was requested to document the expenses he incurred in conducting business, such as cost and maintenance of equipment, insurance, taxes, wages of any employees and other related expenses.⁴ His net actual earnings would be calculated by deducting these expenses from his gross annual earnings of \$24,000.00 and arriving at an amount which fairly and reasonably represented his wage-earning capacity.

By decision dated June 17, 2005, OWCP issued a 70 percent loss of wage-earning capacity decision. It found that the wages appellant actually earned in the delivery driver job with transportation expenses deducted was \$286.54 weekly, which fairly and reasonably represented his wage-earning capacity.

On August 3, 2006 appellant requested an oral hearing.

In a decision dated August 18, 2006, OWCP denied appellant's request for an oral hearing.

³ Appellant submitted two packets of information containing his purported weekly gas expenses, with receipts, over the course of several weeks in August and September 2004.

⁴ The hearing representative stated that the \$15.00 in weekly radio fees was already deducted from his paychecks.

On October 23, 2006 appellant filed an appeal with the Board.⁵ By decision dated August 14, 2007, the Board affirmed the August 18, 2006 decision.

On June 19, 2009 OWCP discontinued payments for travel reimbursement appellant had been receiving. It noted that he had received travel reimbursement for his work expenses by submitting forms for travel associated with medical appointments. Appellant advised OWCP that “someone in Washington, D.C.” had authorized him to claim travel for work. He asserted that he would no longer be able to work because he could not afford the gas or expenses of travel. OWCP informed appellant that the forms he submitted to claim reimbursement were only supposed to be used for travel associated with medical appointments. If he had to quit working, he could document his reimbursement information and request a modification of the 2005 loss of wage-earning capacity determination.

In a report dated October 12, 2009, Dr. Howard M. Cohen, a Board-certified psychiatrist, stated that appellant had been experiencing panic attacks, post-traumatic stress disorder (PTSD), and was feeling overwhelmed. He noted that appellant had previously been compensated for his mileage by the carrier he worked for, an arrangement which had been discontinued. Appellant asserted that he had to quit working as a delivery driver since he could no longer afford gas payments. Dr. Cohen related that appellant’s car had been repossessed and he felt overwhelmed, anxious and paranoid since that time. Appellant also experienced an inability to concentrate and increasing nightmares. Dr. Cohen found that appellant was unable to work due to his deteriorating emotional state. He prescribed medication and restricted appellant from driving.

On November 9, 2009 Dr. Cohen stated that appellant’s condition had not changed. He reiterated his previous findings and conclusions. Dr. Cohen submitted treatment reports dated January 6 and July 21, 2010. He noted that appellant was extremely distraught and was very depressed because he was unable to work.

On September 13, 2010 appellant filed a Form CA-7 claim for wage-loss compensation for total disability commencing June 10, 2011.

In an OWCP memorandum dated October 5, 2010, it was noted that appellant had inquired as to the status of his compensation claim. He had not worked since January 2009 and OWCP advised that the June 17, 2005 decision would remain in place unless he submitted information that warranted modification.⁶ It reiterated that appellant was not entitled to travel reimbursement other than for medical appointments.

In a report dated October 19, 2010, Dr. Cohen stated that appellant had not experienced any improvement in his overall status and felt helpless and hopeless. Appellant did not believe he was capable of working in the future. Dr. Cohen stated that appellant continued to have problems with sleep, nightmares and flashbacks, his coping skills had declined and he showed

⁵ Docket No. 07-146 (issued August 14, 2007).

⁶ Appellant had previously submitted a letter to OWCP, received on August 19, 2010, in which he requested an increase in compensation stating that he had not worked since January 2010.

exaggerated responses to stressful situations. Appellant had some symptoms of depression which were persistent and not improving.

By decision dated November 9, 2010, OWCP denied modification of the June 17, 2005 decision. It denied appellant's claims for total wage-loss compensation, finding that he failed to submit evidence sufficient to establish one of the three criteria required to modify the wage-earning capacity decision.

On October 21, 2010 Dr. Cohen noted that appellant had been treated since November 12, 2007 and was currently unable to work due to his ongoing psychiatric disorders. Appellant's conditions included major depressive disorder, PTSD, generalized anxiety disorder and panic disorder. Dr. Cohen stated that appellant's symptoms were only mildly managed as he had not responded to medication or any alternative treatments and was not likely to perform full or part-time work in the near future.

By decision dated November 9, 2010, OWCP denied modification of the 2005 wage-earning capacity determination.

On November 9, 2010 appellant filed a Form CA-2a alleging a recurrence of total disability as of July 19, 2009. He noted that he stopped work due to a recurrence of disability on July 21, 2010.⁷

By letter dated November 22, 2010, appellant requested reconsideration.

By decision dated February 25, 2011, OWCP denied modification of its June 17, 2005 decision. It denied appellant's claims for total wage-loss compensation, finding that he failed to submit evidence sufficient to establish that modification was warranted.

In a February 22, 2011 report, Dr. Cohen reiterated appellant's diagnoses of major depressive disorder, panic attacks and PTSD. He noted that appellant had recently experienced suicidal thoughts, though he denied any specific plan or intent to actuate these thoughts.

In a letter received by OWCP on March 18, 2011, appellant requested reconsideration. He stated that from 2005 until June 19, 2009 he was paid \$3,200.00 per month by OWCP for his mileage in his delivery driver job. Appellant spoke with an OWCP claims examiner on June 19, 2009 after experiencing a problem with one of his reimbursements, and was told that he was making more money than she was and that she was going to stop his travel reimbursements because no one had approved them. At this time he began to experience symptoms of PTSD as a consequence of his accepted major depressive disorder.

In a March 9, 2011 report, Dr. Cohen stated that the recent change in appellant's condition occurred after a change in his job situation on June 19, 2009. He related that when appellant no longer was reimbursed for mileage incurred during the course of his employment, it resulted in significant financial hardship with the development and aggravation of PTSD, major depression and panic disorder. Dr. Cohen advised that appellant felt traumatized by his

⁷ Appellant also noted on this claim form that he was requesting compensation commencing October 3, 2007.

experiences at the employing establishment; he experienced persistent feelings of anger and of being abused by management. These thoughts had begun to dominate appellant's entire life, which hindered his efforts at finding and maintaining employment in the private sector. He experienced headaches, panic attacks, sweating, fear of people, cat and dogs and was increasingly suicidal. Appellant experienced nightmares, had difficulty focusing or concentrating and had flashbacks on a daily basis. Dr. Cohen opined that appellant was unable to perform full or part-time work.

In a letter received by OWCP, on March 18, 2011, appellant requested reconsideration.

By decision dated March 29, 2011, OWCP denied modification of the June 17, 2005 decision, finding that he failed to submit evidence sufficient to warrant modification of the decision.

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.⁸ Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁹ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰

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 fact, erroneous.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.¹³

⁸ See *Katherine T. Kreger*, 55 ECAB 633 (2004). See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁹ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

¹⁰ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹¹ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹² *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹³ *M.E.*, Docket No. 07-2306 (issued March 24, 2008).

ANALYSIS

OWCP accepted that appellant sustained a major depressive condition in March 1997. Appellant retired from the employing establishment on October 28, 1997. He underwent vocational rehabilitation training in August 2004 and on September 2, 2004 secured a position in the private sector working as a delivery driver, earning \$2,000.00 per month. On June 17, 2005 OWCP issued a wage-earning capacity decision, finding that the wages appellant actually earned in the delivery driver job, with transportation expenses deducted, was \$286.54 weekly, which fairly and reasonably represented his wage-earning capacity.

In its February 25 and March 29, 2011 decisions, OWCP denied modification of the June 17, 2005 determination. It found that appellant had not established a basis for modification of the 2005 determination.¹⁴

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 fact, erroneous. Appellant sought modification contending a material change in his work-related condition that rendered him totally disabled. The Board finds that he did not meet his burden of proof.

The medical reports from Dr. Cohen noted that appellant related a change in his emotional condition being informed on June 19, 2009 that OWCP was stopping the dual payments for travel reimbursement. OWCP explained that appellant was being reimbursed for medical travel expenses, but that the expenses for which he sought reimbursement were related to his work as a delivery driver.

Dr. Cohen explained that appellant stopped work in 2009 because he could no longer afford to buy gasoline for his vehicle and then developed increasing symptoms because he was not working. This suggests that appellant's emotional condition was due to this new employment event, rather than a material change in his condition. As noted, the Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.¹⁵

The October 12 and 19, 2009 reports from Dr. Cohen are not sufficient to establish that appellant's disability as of June 19, 2009 was causally related to the accepted major depression disorder. Dr. Cohen did not adequately explain how appellant sustained a material change in his accepted work-related major depressive condition. He did not address how appellant's condition

¹⁴ The Board notes that these decisions also contained legal precedent regarding recurrence of disability. The Board has held that where it is clear that the claim is that appellant cannot work in the position that OWCP determined represented his wage-earning capacity for the foreseeable future, the issue is modification of LWEC, not recurrence of disability. *Katherine T. Kreger, supra* note 8. However, OWCP is not precluded from acceptance of a limited period of employment-related disability, such as necessary for medical treatment, without modification of LWEC. *See Sharon C. Clement, supra* note 11.

¹⁵ *See supra* note 7.

after June 2009 was a consequence of his accepted major depressive disorder, or due to a material worsening of the accepted condition.

In a report received by OWCP on November 17, 2010, Dr. Cohen reiterated that appellant was unable to work because of his ongoing psychiatric disorders, which included major depressive disorder, PTSD, generalized anxiety disorder and panic disorder. He noted generally that these symptoms were prevalent and had begun to dominate his entire life and his efforts at finding and maintaining gainful employment. Dr. Cohen did not explain, with sufficient medical rationale, what caused the diagnoses. The Board finds that appellant failed to establish a material change in the nature and extent of the injury-related condition, sufficient to warrant modification of the June 17, 2005 wage-earning capacity determination.

Appellant has also not alleged or otherwise shown that the original wage-earning capacity determination was in fact erroneous. The employing establishment was unable to accommodate appellant's physical restrictions and he retired from federal service on October 28, 1997. Appellant obtained employment in the private sector and worked as a delivery driver for more than 60 days. There is no evidence that the position was seasonal, temporary or makeshift work designed for appellant's particular needs and no evidence to show that he was not working eight hours a day.¹⁶ Appellant has not shown that the June 17, 2005 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to modify the June 17, 2005 wage-earning capacity determination.

¹⁶ *J.C.*, 58 ECAB 700 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 29 and February 25, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 21, 2012
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