

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

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C.H., Appellant )

and )

DEPARTMENT OF JUSTICE, BUREAU OF )  
PRISONS, FEDERAL CORRECTIONAL )  
COMPLEX, Coleman, FL, Employer )

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**Docket No. 13-2179  
Issued: April 23, 2014**

*Appearances:*

*Lenin V. Perez*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 30, 2013 appellant, through his representative, filed a timely appeal from a September 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of his loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 established that OWCP's September 10, 2010 loss of wage-earning capacity determination should be modified.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 21, 2008 appellant, then a 39-year-old correctional officer, sustained a traumatic injury in the performance of duty during a cell move. He was pushed to the floor. An inmate landed on appellant and began choking him. OWCP accepted appellant's claim for cervical sprain, brachial neuritis and right arm/shoulder disorder (bursae and tendons). It also accepted a major depressive disorder, single episode severe-type and post-traumatic stress disorder. Appellant received compensation for temporary total disability on the periodic rolls.

On September 10, 2010 OWCP found that appellant's actual wages as a security clerk for Valencia Community College, a position he held since July 10, 2010, fairly and reasonably represented his wage-earning capacity. It reduced his compensation for wage loss caused by the accepted medical conditions.

On July 17, 2012 Dr. Walter E. Afield, an attending Board-certified psychiatrist, noted that appellant had voiced concern with his blood pressure, as well as feeling that his part-time job was too stressful. Appellant wanted to get another job with less stress. Dr. Afield advised that appellant should not be working over 21 hours a week.

Therefore, appellant advised that he wanted to get out of the Valencia Community College. "He just cannot deal with the people." Dr. Afield noted that appellant was now working 20 hours a week.

On August 29, 2012 appellant telephoned OWCP to advise that his psychiatrist wanted him to work only 20 hours a week "due to stress at work." He stated that he saw 300 to 400 students in a workday and he argued with them over one thing or another, so it was very stressful.

On September 12, 2012 Dr. Afield noted that appellant was getting more and more confused. Appellant was working 20 hours a week "but he can barely hold onto it." Dr. Afield stated: "There has been a major deterioration with [appellant] and he is just holding on slowly."

On September 12, 2012 Dr. Afield also reviewed his treatment of appellant since January 2010 of that year. By March 2012, appellant seemed to be doing fairly well. He was very eager to work and was working part time at Valencia Community College. "[Appellant] was still holding onto the job, but it made him quite anxious." Dr. Afield noted that he approved 20 hours, but they "pushed him to do more and more." Appellant essentially fell apart and could not do it. "We had to write to them and tell them that we could try 20 hours, but not beyond that."

Dr. Afield also noted that appellant had developed some stress-induced hypertension by April 2012. Appellant was having a lot of pressure in the work situation and could not seem to do it. In July 2012, he was still having horrendous problems. "We thought it was not a particularly nice picture.... We did not think he could do the 28 hours and Valencia [Community College] was pushing it."

Dr. Afield advised that appellant could not work full time or go back to the kind of work he did. He was not sure whether appellant could do what he was currently doing.

In a November 1, 2012 report, Dr. Afield noted that appellant's daughter had dropped out of school. Appellant had previously reported that she had no money and that he felt guilty that he could not help her. His youngest two children were in the military. "[Appellant] gets very upset that he is getting older. The children demand things.... [Appellant] and his wife are having their difficulties." Dr. Afield added that appellant was overwhelmed with pain. Appellant's shoulder was very bad. There was an issue with cervical discs bulging. Dr. Afield observed that appellant was "really getting worse from a physical standpoint."

In a January 25, 2013 decision, OWCP denied modification of its September 10, 2010 loss of wage-earning capacity determination. It noted that both appellant and Dr. Afield described a worsening of conditions in relation to intervening factors at the Valencia Community College.

On January 3, 2013 Dr. Afield noted that appellant was very stressed out over his children: "[Appellant] and his son used to do all kinds of things. Now he wants to do his own thing. [Appellant's daughter] wants to join the military; and then she does not. [Appellant] really does not have the time to deal with the stress of all that because he is so depressed on his own; and so fragile." Dr. Afield referred appellant to Dr. Samy F. Bishai, an orthopedic surgeon, "to see where we stand about surgery."

Dr. Bishai examined appellant on January 30, 2013. He noted that appellant had sustained multiple injuries in a violent struggle that occurred while working as a prison guard or correctional officer. Dr. Bishai found that appellant continued to have problems with severe pain in his right shoulder and to a lesser extent his left. Appellant had pain in his neck with radiculopathy, as well as pain in the lower back with radiculopathy. He also had pain in his hip joints and numbness and tingling in his right hand.

On March 22, 2013 Dr. Afield noted that appellant's job was more hectic and stressful "and [appellant] just cannot keep [up with it.]"

On April 8, 2013 Dr. Bishai related that appellant continued to complain of pain in his neck with radiation down the arms and pain in both shoulder joints. Appellant also complained of pain in his lower back with radiation down the legs. He had numbness and tingling in his hands, greater on the right. Appellant had pain in both hip joints.

On May 10, 2013 Dr. Bishai commented that appellant had suffered severe injuries to different parts of his body during a force cell move on March 21, 2008. He stated that appellant suffered injuries to his head and neck, as well as to his shoulders, arms and lower back. Dr. Bishai stated that appellant's conditions had been getting worse in the last few months "and there are no intervening factors that could have caused the worsening of the condition to occur."

Diagnostic studies raised suspicion for bilateral L5 root dysfunction. They also confirmed that appellant was suffering from herniated lumbar disc and degenerative disc disease "that has been caused by the injury to his back among other injuries to his head and neck that occurred on March 21, 2008." Dr. Bishai added:

"[Appellant] has never experienced any problems with his lumbosacral spine prior to the injury of March 21, 2008. It is my opinion, within a reasonable degree of

medical certainty, that the severe injuries that [appellant] suffered on March 21, 2008 have caused him to have this severe injury to his discs in the lumbosacral region of the spine. Since [appellant] has never had a problem with his back prior to this injury date, it is quite clear that all his symptoms that occurred following this injury and this accident have to be the result of the injuries that he sustained that day because of the violent nature of the injuries and the way it happened and the mechanism of injury of the discs is quite obvious from the fact that [appellant], who is a big person himself, had a very heavy inmate fall on him and he landed on the floor and hit his back against the floor. That is a very typical mechanism for injuring the lumbar discs.”

On May 15, 2013 Dr. Afield found that all of appellant’s physical problems, a medical psychiatric illness and depression were clearly work related to the original injury in the prison. “None of [appellant’s] depression is due to any activity or interaction any place else.”

On July 26, 2013 Dr. Afield advised that in the summer of 2012 appellant did have some problems. Appellant’s oldest daughter was going back to school. She was a senior. Appellant could not help her and felt guilty. By Labor Day, he was doing very badly. By Thanksgiving, appellant was not doing well.

In a decision dated September 5, 2013, an OWCP hearing representative found that the evidence failed to justify a modification of the September 10, 2010 loss of wage-earning capacity determination.

On appeal, appellant’s representative argued that OWCP needs to expand its acceptance of the claim to include the consequential injuries identified by Dr. Bishai.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup>

Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.<sup>4</sup> The wage-earning capacity of an employee is determined by the employee’s actual earnings if the employee’s actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>5</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

<sup>4</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>5</sup> 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.<sup>6</sup>

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. The burden of proof is on the party attempting to show modification of the award.<sup>7</sup>

Once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as it is clear that the real operative factor is the progression of the compensable injury and so long as the worsening is not shown to have been produced by an independent nonindustrial cause.<sup>8</sup>

### ANALYSIS

OWCP accepted appellant's traumatic injury claim for cervical sprain, brachial neuritis and right arm/shoulder disorder (bursae and tendons). It also accepted major depressive disorder, single episode, severe-type and post-traumatic stress disorder. OWCP paid compensation for the total wage loss caused by the accepted medical conditions.

Therefore, appellant returned to the workforce. He demonstrated his capacity to work 28 hours a week as a security clerk for Valencia Community College. Accordingly, on September 10, 2010 OWCP determined appellant's wage-earning capacity and paid compensation for the partial wage loss due to the accepted medical conditions.

In 2012, however, appellant reduced his hours from 28 to 20. To establish that he is entitled to an increase in his compensation for wage loss, he must show that modification of OWCP's September 10, 2010 loss of wage-earning capacity determination is warranted.

Appellant argued that there was a material change in the nature and extent of his injury-related psychiatric condition. Dr. Afield, the attending psychiatrist, documented appellant's worsening state throughout 2012. In March 2012, appellant seemed to be doing fairly well. He was very eager to work and was working part time at Valencia Community College. It made appellant quite anxious. They "pushed [appellant] to do more and more." By April 2012, appellant had developed some stress-induced hypertension. He experienced pressure in the work situation and could not seem to do it. By July 2012, Dr. Afield described appellant's problems as horrendous. "We did not think [appellant] could do the 28 hours and Valencia [Community College] was pushing it."

Appellant voiced concern about his blood pressure, as well as feeling that his part-time job was too stressful. He wanted to get another job with less stress. In August 2012, appellant

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<sup>6</sup> *Lee R. Sires*, 23 ECAB 12 (1971).

<sup>7</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>8</sup> 1 Arthur & Lex Larson, *Larson's Workers' Compensation Law*, § 10.02 (Matthew Bender 2007).

advised Dr. Afield that he wanted to get out of the Valencia Community College job. “[Appellant] just cannot deal with the people.” He was now working 20 hours a week.

Appellant advised OWCP on August 29, 2012 that his psychiatrist wanted him to work only 20 hours a week “due to stress at work.” He explained that he saw 300 to 400 students in a workday and he argued with them over one thing or another, so it was very stressful.

Dr. Afield stated that there had been a major deterioration in appellant, who was now just holding on. In 2012, he and appellant attributed the deterioration or worsening of his condition to the stress he encountered at the Valencia Community College. Before appellant reduced his hours from 28 to 20, both he and Dr. Afield implicated the stress of that job.

Given this evidence, the record does establish a worsening of appellant’s accepted psychiatric condition due to the March 21, 2008 injury. The evidence instead establishes that the worsening was produced by an independent nonindustrial cause.

In the case of *Dana Bruce*,<sup>9</sup> the employee was an army emergency relief officer who filed an occupational disease claim, which OWCP accepted for major depression. She received compensation for temporary total disability until she returned to the workforce and demonstrated that she could earn wages as a cosmetologist. OWCP determined Ms. Bruce’s wage-earning capacity and paid compensation for the partial wage loss still caused by the federal injury.

Therefore, Ms. Bruce claimed compensation for total disability. The Board found, however, that she had not demonstrated a material change in the nature and extent of her accepted employment-related condition. The medical evidence established that Ms. Bruce’s emotional decomposition from partial to total disability was due to factors she encountered in her private employment as a cosmetologist and with her family. These factors that constituted an independent intervening cause.

In this case, the medical evidence noted stress at home, especially involving appellant’s children, during the summer of 2012. This stress appears to have become more severe in the latter part of 2012 and early 2013 and so it is not clear whether it played a role in the reduction of appellant’s hours in August 2012.

After OWCP denied modification of its September 10, 2010 loss of wage-earning capacity determination, explaining that factors at the Valencia Community College had intervened, Dr. Afield offered an opinion on May 15, 2013 that all of appellant’s problems were clearly related to the original injury at the prison and that none of his depression was “due to any activity or interaction any place else.” Appellant did not attempt to reconcile the many reports that implicated stress at Valencia Community College or those that described problems at home. Given the lack of rationale and the abundance of earlier evidence tending to support the contrary, the Board finds that Dr. Afield’s May 15, 2013 report has little probative value.<sup>10</sup>

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<sup>9</sup> 44 ECAB 132 (1992).

<sup>10</sup> Medical opinions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

Appellant also alleged a worsening of his physical condition, but his burden is to show a material change in the nature and extent of an injury-related condition. OWCP accepted his traumatic injury claim for the conditions of cervical sprain, brachial neuritis and right arm/shoulder disorder (bursae and tendons).

Dr. Bishai, the orthopedic surgeon, saw appellant in January 2013. He noted that appellant continued to have severe pain in his right shoulder and to a lesser extent his left. Appellant also had pain in his neck with radiculopathy into both upper extremities, pain in the lower back with radiculopathy into both lower extremities, pain in his hip joints and numbness and tingling in his right hand.

The history Dr. Bishai reported on May 10, 2013 was that appellant had suffered severe injuries to different parts of his body, including his head, neck, shoulders, arms and low back during the March 21, 2008 incident at the prison, conditions that had been getting worse in the past few months.

Dr. Bishai did not acknowledge or directly address the specifically accepted medical conditions. He reported a more extensive history of physical injury than OWCP accepted. Medical conclusions based on inaccurate or incomplete histories are of diminished probative value.<sup>11</sup> Dr. Bishai failed to address whether any of the accepted physical conditions caused appellant to reduce his hours from 28 to 20 in August 2012. He instead reported, in May 2013, that appellant's physical conditions had been getting worse in the past few months.

The Board finds that appellant has not met his burden of proof. The weight of the evidence attributed the worsening of his psychiatric condition in the summer of 2012 to stress in his private employment, an independent nonindustrial cause. Appellant has submitted no probative medical opinion establishing a material change in the nature and extent of an accepted physical condition.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

Appellant's representative argues that OWCP should expand its acceptance of the claim. A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,<sup>12</sup> including that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>13</sup>

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<sup>11</sup> *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

<sup>12</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>13</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

**CONCLUSION**

The Board finds that appellant has not met his burden to establish that OWCP's September 10, 2010 loss of wage-earning capacity determination should be modified.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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