

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

W.F., Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

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**Docket No. 13-174
Issued: April 5, 2013**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant, through his attorney, filed a timely appeal from an October 15, 2012 merit decision 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 has established that OWCP's November 15, 2010 loss of wage-earning capacity determination should be modified.

On appeal, counsel contends that OWCP's October 15, 2012 decision is "contrary to fact and law."

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the fourth appeal before the Board in this case. By decision and order issued March 9, 2012,² the Board affirmed OWCP's November 15, 2010 decision finding that the selected position of cashier properly represented appellant's wage-earning capacity as of November 21, 2010. The Board also affirmed OWCP's December 22, 2010 decision denying a request for reconsideration, and set aside OWCP's January 11, 2011 decision suspending appellant's compensation as he failed to return an affidavit of earnings and employment. The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.

In 2010 and 2011, appellant continued to receive total wage-loss compensation on the periodic rolls based on his ability to earn wages in the selected position of cashier.

In a January 10, 2012 letter, counsel requested modification of the November 15, 2010 wage-earning capacity determination. He enclosed an October 14, 2011 vocational evaluation noting "borderline intellectual functioning" and a possible mental illness "secondary to medical problem." The examiner noted that appellant may not have been cooperative with testing as his skill levels were less than those required for his preinjury positions as a warehouse materials handler and truck driver. Counsel asserted that these test results demonstrated that appellant could not perform the selected cashier position due to intellectual impairment.

In July 11, 12 and 26, 2012 letters, counsel and appellant contended that intellectual limitations and hearing loss prevented appellant from working in the selected position of cashier. He submitted a July 8, 2008 report from Dr. Paul Whitt, an attending Board-certified otolaryngologist, finding a 49.4 percent binaural hearing impairment as of April 11, 2007 due to occupational noise exposure. Counsel contended that as no statement of accepted facts addressed an accepted 25 percent binaural hearing loss³ or newly asserted intellectual disability, the medical opinion finding that the selected cashier position was suitable work was fundamentally flawed. Appellant submitted additional evidence.

In reports dated from November 21, 2010 to August 4, 2011, Dr. Roshan Sharma, an attending Board-certified physiatrist, found appellant totally disabled for work due to an accepted ruptured right biceps tendon. On November 30, 2010 she opined that he could sit six hours a day, bend for four hours a day, squat or stand for two hours a day, lift, kneel and test for one hour a day and lift up to 10 pounds. Dr. Sharma proscribed reaching above the shoulder, pulling and pushing. She noted that appellant had no limitations due to hearing loss.

In an August 15, 2011 report, Dr. John David Googe, an attending orthopedic surgeon, found normal musculature and good range of motion throughout the shoulder girdle musculature

² Docket No. 11-877 (issued March 9, 2012).

³ Under File No. xxxxxx123, OWCP accepted a 25 percent binaural hearing loss and authorized hearing aids. This claim is not before the Board on the present appeal.

bilaterally. He diagnosed right rotator cuff tendinopathy, a right biceps tendon tear and mild-to-moderate extensor tendinitis in both shoulders.⁴

In August 22 and 29, 2012 reports, Dr. Sharma noted continued chronic musculoskeletal pain throughout appellant's back, legs and right arm.⁵

By decision dated October 15, 2012, OWCP denied modification of the November 15, 2012 wage-earning capacity determination. It found that the additional medical evidence submitted did not establish that appellant's condition had materially changed. OWCP noted that the October 14, 2011 vocational test results were not persuasive as they did not correlate with his previous level of functioning.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's loss of wage-earning capacity.⁷

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

Appellant asserts that the November 15, 2010 wage-earning capacity determination was in error as it did not consider his accepted hearing loss. Under File No. xxxxxx123, OWCP accepted a 25 percent binaural hearing loss and authorized hearing aids. Appellant submitted an April 11, 2007 report from Dr. Whitt, finding a 49.4 percent hearing loss. The Board finds,

⁴ On November 28, 2011 appellant claimed an augmented schedule award. OWCP previously issued a schedule award for a 15 percent impairment of the right arm on June 26, 2001. In a December 14, 2011 decision, it denied the claim for an additional schedule award. There is no final decision of record regarding the schedule award claim issued within 180 days of the date appellant filed his appeal. Therefore, the schedule award issue is not before the Board on the present appeal.

⁵ Appellant also submitted March 15, May 16, July 12 and October 9, 2012 appointment slips from Dr. Sharma.

⁶ *W.B.*, Docket No. 09-934 (issued January 11, 2010).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁸ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁹ *Id.*

however, that OWCP did consider his hearing loss. When OWCP referred appellant for vocational rehabilitation on May 27, 2009, it advised the vocational rehabilitation specialist that appellant had bilateral hearing loss. There is no evidence that the vocational specialist failed to consider appellant's hearing loss when she selected the cashier position as commensurate with appellant's work abilities. Therefore, appellant's contention is without merit.

Appellant also contends that after the November 15, 2010 wage-earning capacity determination, he was found to be intellectually disabled by a vocational evaluator on October 14, 2011. However, in determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from subsequently acquired conditions.¹⁰ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Nevertheless, the Board notes that this evaluation was not signed or reviewed by a qualified physician. Therefore, it does not constitute medical evidence. It is therefore insufficient to establish that appellant has an intellectual disability that would prevent him from performing the selected cashier position.¹¹

Appellant also argues that his accepted right biceps tendon tear had worsened such that he was unable to perform the selected cashier position. He submitted reports from Dr. Sharma, an attending Board-certified physiatrist, finding appellant totally disabled for work from November 2010 to August 2012 due to an accepted ruptured right biceps tendon. However, Dr. Sharma also opined on November 30, 2010 that appellant could perform sedentary activities for six hours a day, demonstrating that he was not totally disabled for work. Appellant also submitted an August 15, 2011 report from Dr. Googe, an attending orthopedic surgeon, finding normal musculature and good range of motion throughout the shoulder girdle bilaterally. Dr. Googe did not comment on appellant's work capacity. Therefore, his opinion does not support appellant's contention that the accepted right shoulder condition worsened such that he was not able to perform the selected cashier position.

The Board finds that appellant did not meet his burden of proof to establish that the November 15, 2010 wage-earning capacity determination should be modified. Appellant did not establish that the original determination was in error, that the accepted condition had materially worsened or that he had been vocationally rehabilitated. Thus, OWCP's October 15, 2012 decision denying modification is proper under the law and facts of this case.

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

¹⁰ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹¹ *James A. Long*, 40 ECAB 538 (1989).

CONCLUSION

The Board finds that OWCP properly found that appellant has not established that OWCP's November 15, 2010 loss of wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 15, 2012 is affirmed.

Issued: April 5, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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