

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

J.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 10-1605
Issued: August 19, 2011**

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 1, 2010 appellant filed a timely appeal from a March 12, 2010 decision of the Office of Workers' Compensation Programs (OWCP) regarding a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 OWCP properly denied modification of the January 22, 2009 wage-earning capacity determination.

On appeal, appellant's representative contends that OWCP improperly denied modification of the wage-earning capacity determination because he established a material worsening of the accepted bilateral shoulder conditions. Counsel also asserted that OWCP improperly failed to consider a preexisting bilateral hand condition when determining that the clerk position was suitable work.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 16, 2005 appellant, then a 65-year-old mail processor filed an occupational disease claim for his left shoulder that he attributed to repetitive sorting of mail with his left arm. The record reflects that he sustained a prior right rotator cuff tear on February 3, 2003 under a different claim number, for which he underwent surgery on May 5, 2004. Dr. Ben Medina, an attending physician, reported that appellant was returned to work after the right shoulder surgery and instructed to use his left arm for sorting mail. Based on appellant's complaint of left upper extremity symptoms, a magnetic imaging resonance (MRI) scan was obtained on January 3, 2006 that showed a possible partial tear of the supraspinatus tendon with mild tendinopathy.

On May 10, 2006 Dr. Thomas W. Harris, an attending Board-certified orthopedic surgeon, reported that appellant was initially seen by Dr. Medina and diagnostic studies obtained of the left shoulder. Appellant did not stop work and continued at full-time duty casing and sorting mail with a maximum lifting of 10 pounds. Dr. Harris provided findings on examination of the left shoulder and diagnosed a torn rotator cuff and adhesive capsulitis. He restricted appellant from any overhead work, no repetitive forceful gripping or grasping and limited weight from 5 to 10 pounds.

Appellant received conservative treatment with physical therapy and remained at limited duty. On June 26, 2006 Dr. Christopher S. Pallia, an attending orthopedic surgeon and associate of Dr. Harris, reviewed appellant's prior right shoulder history and surgical treatment. He advised that appellant was a candidate for a left shoulder arthroscopy, subacromial decompression, debridement of the partial thickness cuff tear and a distal clavicle excision. The record reflects that surgery was performed by Dr. Pallia on September 17, 2006. Following additional therapy, appellant was released by Dr. Harris to return to light duty with no repetitive work overhead or above shoulder level as of November 20, 2006.

In a February 14, 2007 report, Dr. Harris opined that appellant's left shoulder had reached maximum medical improvement, with residual pain, weakness and restricted motion. He found appellant was able to work full time, with permanent restrictions against overhead work, repetitive lifting above shoulder level or heavy lifting. Dr. Harris submitted periodic reports through September 2008 noting continued shoulder symptoms and weakness in the left hand.

On March 2, 2007 the employing establishment withdrew appellant's light-duty assignment and advised OWCP that there was no work available within his restrictions. Appellant did not return to work. OWCP placed appellant on the periodic rolls effective June 10, 2007.²

On June 20, 2007 OWCP referred appellant for vocational rehabilitation. Following a transferable skills analysis, the vocational rehabilitation counselor selected general clerk and accounting clerk as employment goals. OWCP approved a 32-week community college course in computerized accounting, which appellant completed on May 20, 2008.

² Appellant separated from the employing establishment on August 31, 2008.

On May 20, 2008 OWCP authorized a 90-day direct placement plan for employment as a general clerk. During the placement period, the rehabilitation counselor forwarded appellant 24 job contacts. Appellant pursued job leads but did not obtain employment after 120 days of assistance. Labor market surveys of October 2008 showed that general clerk positions were available in appellant's commuting area with median wages of \$534.50 a week.

On November 14, 2008 OWCP proposed reducing appellant's wage-loss compensation based on his ability to earn \$534.50 a week in the selected position of general clerk, DOT (U.S. Department of Labor, *Dictionary of Occupational Titles*) #209.562-010. The position was classified as light, with lifting up to 20 pounds and frequent reaching, handling and fingering. Duties included: filing, typing, computer data entry, photocopying and writing. OWCP found the position to be suitable to appellant's physical work restrictions. It afforded him 30 days to submit additional evidence or argument.

In a November 24, 2008 report, Dr. Harris noted that appellant had residual impingement and reduced motion in the right shoulder due to the May, 5, 2004 arthroscopic surgery. He diagnosed a possible right rotator cuff re-tear but opined that appellant's condition remained permanent and stationary. Dr. Harris provided range of motion findings pertaining to both upper extremities and advised that there were residuals of impingement syndrome. He recommended additional diagnostic testing. In a December 10, 2008 report, Dr. Harris noted that appellant had residual pain and restricted motion in the left shoulder with numbness and tingling into his left arm, the etiology of which was unclear. Examination of the left elbow revealed a negative Tinel's while the left hand had a negative response to Tinel's and Phalen's tests.

A December 17, 2008 magnetic resonance imaging (MRI) scan of appellant's right shoulder showed degenerative changes, moderate impingement, chronic tendinitis and subchondral cysts.

By decision dated January 22, 2009, OWCP reduced appellant's compensation effective January 17, 2009 under sections 8106 and 8115 of FECA, based on his ability to earn \$534.50 a week in the light-duty position of general clerk. It found that the medical evidence from Dr. Harris established that appellant's condition was considered permanent and stationary with the physical capacity to perform the duties of a general clerk. OWCP noted that appellant remained entitled to medical benefits for treatment of his accepted conditions.

In a January 28, 2009 letter, counsel requested a hearing, held on April 15, 2009. Appellant stated that in 2004, he experienced pain, weakness and clumsiness in both hands. During an internship in May 2008, his upper extremity symptoms made it difficult for him to type or file such that a prospective employer would not hire him. Appellant contended that he did not inform Dr. Harris of his hands symptoms or the requirements of the general clerk position.

In a December 29, 2008 report, received on January 29, 2009, Dr. John B. Dorsey, an attending Board-certified orthopedic surgeon, noted a history of bilateral shoulder impingement and surgery. He listed appellant's complaint of numbness, tingling, weakness, and clumsiness in both hands, neck pain and bilateral shoulder pain. On examination, Dr. Dorsey found restricted cervical and bilateral shoulder motion, positive impingement signs in both shoulders and 4/5

weakness in all muscle groups of both shoulders. He diagnosed advanced cervical degenerative disc disease and spondylosis, postoperative arthritis of the right glenohumeral joint and impingement syndrome of the left shoulder. Dr. Dorsey stated that appellant had residuals in the form of pain, weakness and loss of motion that would prevent him from gainful employment. He noted that appellant was 68 years of age and, in his opinion, disabled from any type of work.

In an April 28, 2009 note, submitted after the hearing, Dr. Dorsey reiterated that appellant was disabled. He addressed his examination of appellant noting he was 69 years of age and was having problems with his neck and both shoulders. Appellant was also having problems with his hands, but this was not mentioned in view of the fact that it was not related to his work but was secondary to osteoarthritis. Dr. Dorsey reiterated that appellant could not engage in useful employment, noting his understanding that he had been sent home by the employing establishment.

In a January 21, 2009 report, Dr. Harris stated that appellant's left shoulder remained permanent and stationary, with reduced range of motion and chronic pain.

By decision dated and finalized May 26, 2009, OWCP's hearing representative affirmed the January 22, 2009 wage-earning capacity determination. He found that the weight of medical opinion was represented by Dr. Harris who had treated appellant for several years for both upper extremities. It was noted that Dr. Dorsey did not provide sufficient explanation of how appellant's accepted conditions had materially worsened or why he disagreed with the restrictions or opinion of Dr. Harris.

In a February 4, 2010 letter, counsel requested reconsideration. He resubmitted a copy of Dr. Dorsey's April 28, 2009 note.

In a June 22, 2009 report, Dr. Harris noted appellant's continuing left shoulder pain with restricted motion. He reiterated that appellant was permanent and stationary.

By decision dated March 12, 2010, OWCP denied modification of the wage-earning capacity determination. It found that appellant did not show that the original wage-earning capacity determination was in error, a material change in his medical condition or that he had been vocationally rehabilitated.

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.³ Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.⁴ In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held,

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁴ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

OWCP must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

OWCP's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.⁹

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.

ANALYSIS

The Board finds that appellant has not established that modification of the January 22, 2009 wage-earning capacity determination is warranted.

The determination of appellant's wage-earning capacity was based on the constructed position of general clerk and the light-duty work restrictions recommended by Dr. Harris, an attending Board-certified orthopedic surgeon. The record reflects that Dr. Harris treated appellant for both upper extremities and provided detailed reports on examination. He noted that following surgery of the left shoulder in 2003 and of the right shoulder in 2004, appellant had the capacity for full-time duty performing maximum lifting to 10 pounds, no overhead work, with no repetitive gripping or grasping. Additional surgery was performed in 2006 by Dr. Pallia, an associate of Dr. Harris, on September 17, 2006; following which Dr. Harris again released appellant to light duty as of November 20, 2006. The subsequent treatment notes advised that

⁵ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Tamra McCauley*, 51 ECAB 375, 377 (2000); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

⁸ *A.J.*, Docket No. 10-619 (issued June 29, 2010).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

appellant was considered permanent and stationary with restrictions. As of March 2, 2007, the employer withdrew appellant's light duty as no work was available. Following a period of vocational rehabilitation, Dr. Harris submitted reports of November and December, 2008 detailing the results of examination of both upper extremities. He reiterated that appellant was considered permanent and stationary, with residuals of restriction in range of motion and pain tingling into the left arm, of undetermined etiology. Dr. Harris noted findings relative to appellant's elbow and hands, but did not state that this rendered appellant disabled. He advised that appellant was able to work full time, subject to limitations on overhead work, repetitive and lifting. As found by OWCP, the medical reports established appellant's capacity to perform the light-duty general clerk position.

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.¹⁰ Counsel does not assert that the original determination was in error or that appellant was vocationally rehabilitated. Rather, he contends that modification of the January 22, 2009 LWEC determination was warranted due to a material change in the nature and extent of appellant's injury-related shoulder conditions as established by Dr. Dorsey.

Pursuant to an April 15, 2009 hearing, appellant submitted medical evidence from Dr. Dorsey, an attending Board-certified orthopedic surgeon. In a December 29, 2008 report, Dr. Dorsey noted a history of bilateral shoulder impingement with surgery and presented findings on examination of the cervical spine and both shoulders. He diagnosed advanced cervical degenerative disc disease and spondylosis with postoperative arthritis of the right shoulder glenohumeral joint and impingement syndrome of the left shoulder. Dr. Dorsey stated generally that appellant was 68 years of age and disabled from gainful employment. In an April 28, 2009 note submitted after the hearing, he briefly reviewed the December 29, 2008 evaluation, noting that appellant also complained of problems with his hands that were not mentioned as this was secondary to osteoarthritis. Dr. Dorsey again stated that appellant was disabled, based on his age and inability to type, file, carry, lift, push or pull or perform other such activities with his upper extremities.

The Board finds that the medical evidence submitted from Dr. Dorsey is not sufficient to establish that appellant experienced a material change in his accepted shoulder conditions such that the 2009 wage-earning capacity determination required modification. In this regard, Dr. Dorsey did not provide any extensive discussion of appellant's capacity for work as it pertained to the selected position of a light-duty general clerk. Rather, his opinion on disability for work appeared largely based on appellant's age and stated inability to work. Dr. Dorsey did not address with any specificity how residuals affecting appellant's accepted shoulder conditions had materially changed since treatment by Dr. Harris such that appellant could no longer perform light-duty work subject to specified physical limitations. As noted in OWCP's hearing representative's May 26, 2009 decision, this is the primary defect in the conclusion stated by Dr. Dorsey. Appellant thereafter sought modification of the wage-earning capacity on

¹⁰ *Supra* note 11.

February 4, 2010, but resubmitted the April 28, 2009 note from Dr. Dorsey. No new medical evidence was submitted that cured the deficiencies found in the physician's reports of record. Appellant has not met his burden to establish a material change in his accepted shoulder condition which warranted modification of the wage-earning capacity determination.

On appeal, counsel asserts that OWCP improperly failed to consider a preexisting bilateral hand condition when determining that the selected general clerk position was suitable work. The Board notes that the reports of Dr. Harris commented on examination of appellant's hands but did not find residuals that disabled him from limited-duty work with restrictions, as recommended. Appellant did not submit any medical evidence from another physician that establishes that he was rendered totally disabled due to a condition involving his wrists or hands.

CONCLUSION

The Board finds that appellant did not establish that the January 22, 2009 wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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