

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

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**J.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Jacksonville, FL, Employer**

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**Docket No. 12-962  
Issued: December 6, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 19, 2012 appellant filed a timely appeal from the September 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its wage-earning capacity determination.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on September 21, 2011, the 180-day computation begins September 22, 2011. One hundred eighty days from September 21, 2011 was March 19, 2012. Since using March 26, 2012, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 19, 2012, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant met his burden to establish that modification of OWCP's June 4, 2009 wage-earning capacity determination is warranted.

## FACTUAL HISTORY

On December 21, 1998 appellant, a 36-year-old mail handler, sustained a traumatic injury in the performance of duty when a shelf fell onto his right middle finger. OWCP accepted his claim for a fracture. It also accepted reflex sympathetic dystrophy.

Appellant received a schedule award for a 48 percent impairment of his right middle finger. He also received compensation for temporary total disability on the periodic rolls.

Appellant underwent vocational training and completed the requirements for an Associate's degree as a paralegal. An OWCP rehabilitation specialist, who is an expert in such matters, found that appellant was qualified for employment as a paralegal.<sup>3</sup>

Appellant's attending physician, Dr. Christopher Roberts, Board-certified in anesthesiology and pain management, confirmed that appellant was physically capable of performing the functions of a paralegal, as set forth in a position description provided by OWCP.

On June 4, 2009 OWCP issued a loss of wage-earning capacity determination. It found that the constructed position of paralegal was medically and vocationally suitable and reduced appellant's wage loss based on a 61 percent earnings capacity.

In a November 30, 2009 decision, an OWCP hearing representative found that, although the loss of wage-earning capacity determination was appropriate when issued, a conflict in medical opinion subsequently arose. Dr. Roberts advised that appellant could not keep up with the demands of the paralegal position, primarily because of the repetitive keying motion that aggravated his symptoms. This report conflicted with that of Dr. Steven J. Lancaster, a Board-certified orthopedic surgeon and second opinion physician, whose prior work capacity evaluation was essentially the same as Dr. Roberts' earlier evaluation of the extent of appellant's physical limitations, including the ability to perform repetitive movements. The hearing representative directed OWCP to refer appellant to an impartial medical specialist and obtain a functional capacity evaluation.

On April 13, 2012 OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Raul B. Zelaya, a Board-certified orthopedic surgeon, for an opinion on whether appellant could perform the functions of the paralegal position, as outlined.

On May 20, 2010 Dr. Zelaya related appellant's history and described his findings on physical examination. Currently, he noted that appellant firmly believed that he was perfectly

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<sup>3</sup> *E.g.*, *W.D.*, Docket No. 09-188 (issued August 21, 2009) (a vocational rehabilitation specialist is an expert in the field of vocational rehabilitation and OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable).

capable of performing all the functions of a paralegal so long as he did not have to type more than 25 words per minute, which caused paresthesia, numbness and radiating pain in his right hand and fingers. In response to the question posed, Dr. Zelaya stated: “Yes, [appellant] is capable of performing the functions of a paralegal except that he is not able to type with the right hand for more than twenty-five (25) words per minute. This is a permanent restriction.” He requested that OWCP direct appellant to undergo a functional capacity evaluation, for which he provided a prescription.

Following the June 14, 2010 functional capacity evaluation, OWCP asked Dr. Zelaya for a supplemental report. Noting that the evaluation indicated that appellant was capable of typing constantly at 67 to 100 percent or up to five hours per eight-hour workday, OWCP asked the impartial medical specialist whether the previously imposed restriction of typing no more than 25 words per minute still applied.

Dr. Zelaya responded that appellant could type no more than 25 words per minute. He highlighted that during the functional capacity evaluation appellant performed continuous typing for 30 minutes at the rate of 9.77 words per minute.

On July 14, 2010 OWCP denied modification of the loss of wage-earning capacity determination. It noted that the occupational requirements for the position of paralegal contained no reference to typing a specific number of words per minute; therefore the fact that appellant could type no more than 25 words per minute did not establish that he could not perform the duties of the constructed position.

On June 17, 2011 Dr. Bao T. Pham, an attending Board-certified physiatrist, found that appellant’s accepted reflex sympathetic dystrophy totally and permanently disabled him from his current job. He noted that appellant might be a candidate for vocational rehabilitation training in the future.

In a September 21, 2011 decision, OWCP reviewed the merits of appellant’s case and denied modification of its July 14, 2010 decision.

On appeal, appellant argued that there was no conflict between Dr. Lancaster and Dr. Roberts about the paralegal job description. He argues that the claims examiner mishandled his case. Appellant expresses disagreement with how the employing establishment terminated him and never reimbursed him for his annual leave.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>4</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>5</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 20 C.F.R. § 10.5(f).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<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>

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>8</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

### ANALYSIS

The Board finds that a conflict in medical opinion arose between Dr. Roberts, the attending anesthesiologist and pain management specialist, and Dr. Lancaster, the second opinion orthopedic surgeon, on whether appellant could meet the physical demands of a paralegal position. Appellant argued that Dr. Lancaster did not directly address the paralegal position; but Dr. Lancaster completed a work capacity evaluation addressing appellant's capabilities and physical limitations. OWCP may reasonably compare those capabilities and limitations to the physical requirements of the paralegal position. Dr. Lancaster's evaluation was essentially the same as the work capacity evaluation completed previously by Dr. Roberts. Both were consistent with the paralegal position. Neither physician imposed a limitation on repetitive motion or typing. Dr. Roberts found that appellant could perform the duties of the paralegal position.

Initially, there was agreement between the two physicians on whether the constructed position was medically suitable. For that reason, an OWCP hearing representative found that the June 4, 2009 loss of wage-earning capacity determination was appropriate when issued.

It was only after the loss of wage-earning capacity determination was issued that OWCP received a report from Dr. Roberts advising that appellant could not keep up with the demands of the paralegal position, primarily because of the repetitive keying motion. This change of medical opinion created a conflict with Dr. Lancaster, who had imposed no limitation on repetitive motion or typing. For this reason, the Board finds that OWCP properly referred appellant to Dr. Zelaya, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict.

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<sup>6</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

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

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP provided Dr. Zelaya with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual history. Dr. Zelaya examined appellant, reviewed the position description and physical demands of the paralegal position and concluded that appellant was capable of performing the functions of a paralegal with one caveat: he was not able to type with the right hand more than 25 words per minute. Appellant noted that he was capable of performing at the functions of a paralegal if he did not have to type more than 25 words per minute. Dr. Zelaya supported appellant's capacity for such work.

Following a functional capacity evaluation, Dr. Zelaya made clear that appellant had only the one typing restriction when it came to performing the duties of the paralegal position. But it remained his opinion that appellant was capable of performing the duties described.

As noted, once a loss of wage-earning capacity is determined, as it was here, a modification 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. In this case, as appellant is the party attempting to show modification of the award, the burden rests with him.

Dr. Zelaya's opinion does not support modification. He based his opinion on a proper factual and medical history and the Board finds that it was sufficiently rationalized that it must be accorded special weight in establishing that appellant was capable of performing the duties of the paralegal position. Dr. Zelaya imposed only one restriction. As OWCP correctly observed, this restriction did not preclude appellant from meeting the physical demands of the constructed position. The position description states that a paralegal prepares documents, but it says nothing about typing at a particular speed.

Dr. Pham, the physiatrist, found that appellant's accepted reflex sympathetic dystrophy totally and permanently disabled him from his current job. But the issue is whether appellant was physically capable of performing the duties of the paralegal position, which Dr. Pham's did not address. Dr. Pham's June 17, 2011 report is not relevant to OWCP's determination of wage-earning capacity.

Accordingly, the Board finds that appellant has not met his burden to show that modification of OWCP's June 4, 2009 loss of wage-earning capacity determination is warranted. The evidence does not establish a material change in the nature and extent of the injury-related condition and it does not establish that the June 4, 2009 determination was, in fact, erroneous.<sup>10</sup> The Board will therefore affirm OWCP's September 21, 2011 decision.

The record does not support appellant's contentions concerning the claims examiner. Issues surrounding appellant's termination, including reimbursement for annual leave, are outside the jurisdiction of the Board. As to why there was no settlement of his workers' compensation claim, FECA does not authorize such a practice. In reaching any decision with respect to FECA coverage or entitlement, OWCP considers the claim presented by the claimant,

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<sup>10</sup> The second standard -- the employee has been retrained or otherwise vocationally rehabilitated -- is a standard OWCP would typically bear the burden of establishing to modify an existing loss of wage-earning capacity determination.

the reports of the employing establishment and the results of such investigation as OWCP may deem necessary. It will apply the law, the regulations and its procedure to the facts as reported or obtained upon investigation. OWCP will also apply decisions of this Board and administrative decisions as set forth in FECA Program Memoranda.<sup>11</sup> Its decision shall contain findings of fact and a statement of reasons and it is accompanied by information about the claimant's appeal rights.<sup>12</sup> There is no provision for settling cases, as frequently occurs under workers' compensation cases at the state level.

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 met his burden to show that modification of OWCP's June 4, 2009 loss of wage-earning capacity determination is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 21, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> 20 C.F.R. § 10.125.

<sup>12</sup> *Id.* § 10.126.