

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

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**J.M., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
KEESLER AIR FORCE BASE, MS, Employer**

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**Docket No. 11-1186  
Issued: December 22, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 19, 2011 appellant filed a timely appeal of the December 14, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 a modification of OWCP's June 15, 1999 wage-earning capacity determination.

On appeal, appellant contends that OWCP erred in determining his wage-earning capacity as the physical demands of his assigned light-duty position were not within his restrictions.

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

## **FACTUAL HISTORY**

OWCP accepted that on November 4, 1997 appellant, then a 49-year-old heating, ventilating and air conditioning mechanic, sustained a lumbar strain and disc herniation at L4-5 as a result of slipping on a ladder at work.<sup>2</sup> It authorized lumbar surgery which he underwent on June 1, 1998.

In a February 10, 1999 medical report, Dr. Charles J. Winters, a Board-certified orthopedic surgeon, advised that appellant had lumbar intervertebral disc disorder with myelopathy due to the accepted employment injuries. He reached maximum medical improvement on November 18, 1998. Dr. Winters advised that appellant could perform light-duty work with permanent restrictions which included no lifting more than 5 to 10 pounds and no frequent bending or stooping.

On February 17, 1999 appellant accepted the employing establishment's job offer of the same date for a full-time light-duty facility maintenance controller position. The light-duty position had a compressed work schedule, eight days from 7:00 a.m. to 4:45 p.m. and on the ninth day, 7:00 a.m. to 3:45 p.m. It involved processing written and call-in work requests *via* a work information management system (WIMS). The computer data base assisted in prioritizing work requests/job orders and creating daily/weekly/monthly reports in this regard. It accomplished all daily labor recordings, summarizing and verifying craft efforts assigned to sections which included, but were not limited to, man hours expended on work and job orders, service calls, equipment maintenance operations, indirect activities, leave and supervision. The physical requirements of the light-duty position involved occasional job site visits, extended hours of research and development of computer products and other administrative actions and ability to work under extreme pressure and display the highest degree of tact and courtesy necessary for daily contact with all levels of personnel base-wide. On February 22, 1999 appellant returned to work in the accepted light-duty position.

On June 15, 1999 OWCP issued a decision finding that appellant's actual earnings as a facilities maintenance controller fairly and reasonably represented his wage-earning capacity. It indicated that he worked more than 60 days in the light-duty position. OWCP reduced appellant's compensation to zero as his actual earnings equaled those of his date-of-injury position.

On May 21, 2009 appellant complained to OWCP that the monitor at his desk was too low and he had to sit five hours straight because his office was busy in his new job at the visitor's desk.

On January 25, 2010 appellant filed a claim for total wage-loss compensation (Form CA-7) from December 1, 2009 to March 5, 2010. He stopped work on November 3, 2009.

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<sup>2</sup> In a prior appeal, the Board issued a decision on October 22, 1997 affirming an OWCP hearing representative's May 5, 1995 decision which found that appellant did not sustain a medical condition causally related to his exposure to chemicals in the performance of duty. Docket No. 95-2684 (issued October 22, 1997).

In a November 4, 2009 report, Dr. Valerie R. Lenox, an internist, stated that she had treated appellant for several years. She advised that he would not recover from his condition which would likely continue to worsen.

In a November 6, 2009 report, Dr. William J. Evans, a Board-certified neurologist, stated that he had followed appellant since May 5, 2009. Appellant had a history of multilevel degenerative disc disease which caused cervical pain with radiation into the right side of his head, shoulder and upper back. He also had occipital neuralgia with sharp shooting pains radiating into the right posterior region of his head. Due to the above, Dr. Evans advised that appellant was unable to work for any extended period of time without exacerbation. Appellant was required to take pain medications that would result in cognitive side effects limiting his ability to perform his work duties.

By letters dated February 12 and March 10, 2010, OWCP acknowledged receipt of appellant's CA-7 form. It advised him that the medical evidence of record was insufficient to establish that he sustained a recurrence of disability. OWCP requested factual and medical evidence.

In reports dated February 25 and April 14, 2010, James Meeks, a nurse practitioner, advised that appellant had low back and neck pain and insomnia.

In a Form CA-7 dated November 17, 1999 and received by OWCP on March 11, 2010, appellant requested leave buy back for time lost from work from November 3 to December 4, 2009. A time analysis form (CA-7a) dated November 17, 2009 indicated that he lost time from work from November 3 to 11, 2009 due to back pain.

In an April 7, 2010 report, Dr. Lenox advised that appellant had chronic back pain since his November 4, 1997 employment injuries. She reviewed Dr. Evans' assessment and findings and concluded that they were related to the accepted injuries. Dr. Lenox reiterated her prior opinion that appellant would not recover from his accepted back condition which would likely continue to worsen.

By decision dated May 5, 2010, OWCP denied appellant's recurrence of disability claim for the period December 1, 2009 to March 5, 2010. It found that the medical evidence was insufficient to establish that his claimed disability was causally related to his accepted November 4, 1997 employment-related injuries.

Also, on May 5, 2010 OWCP advised appellant that the medical evidence of record was insufficient to establish his claim for the period commencing November 3, 2009. It requested factual and medical evidence.

In reports dated May 13 and June 10, 2010, Mr. Meeks reiterated his prior diagnoses of low back and neck pain and insomnia. In a prescription with an illegible date, he ordered physical therapy to treat appellant's low back pain.

On June 9, 2010 OWCP issued a decision denying appellant's recurrence claim for the period November 3, 2009 to March 5, 2010. It found that the medical evidence failed to establish that his claimed disability was causally related to the accepted injuries.

Appellant requested an oral hearing.

A June 16, 2010 report from appellant's physical therapist addressed the treatment of his low back pain.

In a November 3, 2009 report, Dr. Evans noted that appellant continued to suffer from pain in his upper back at his injury site from cervical surgery. Appellant also had a lot of neck pain and stiffness. He experienced a sharp shooting pain mostly up the right side of his head and down his right leg. Dr. Evans listed his findings on physical and neurological examination. He diagnosed occipital neuralgia. Dr. Evans noted appellant's back, neck and right-sided headache symptoms and stated that prior cervical magnetic resonance imaging (MRI) scan reports showed multilevel degenerative changes. He also diagnosed disturbance of skin sensation. Dr. Evans noted that appellant complained of pain radiating down his right leg since his heart cauterization in January 2009. He also reported a hematoma from the cauterization. Based upon the distribution, Dr. Evans advised that appellant likely suffered from femoral neuropathy. A brain MRI scan report showed some chronic ischemic changes. Appellant took aspirin and had risk factors for diabetes and hypertension. In an August 3, 2010 report, Dr. Evans stated that appellant's headaches were improving. Appellant had continuing back pain. Dr. Evans listed his findings on physical examination and diagnosed back pain.

At the September 23, 2010 hearing, appellant testified that his facility maintenance controller position was supposed to allow him to move about with only intermittent sitting, but he sat all day taking telephone calls. The prolonged sitting caused a worsening of his low and upper back pain and occipital neuralgia. Appellant contended that, although OWCP had only accepted his claim for a low back condition, his upper back and headaches had existed since his November 4, 1997 employment injuries. He testified that in January 2009 he was reassigned to a new position due to downsizing. The position involved sitting at a desk all day, stooped over processing identification badges and passes. This activity worsened appellant's low back and neck pain and required him to take additional pain medications which interfered with his ability to concentrate at work.

In a December 14, 2010 decision, an OWCP hearing representative affirmed the June 9, 2010 decision. He found that appellant failed to establish that modification of the June 15, 1999 wage-earning capacity determination was warranted. Appellant had not shown that the June 15, 1999 determination was made in error or that a material change in the nature and extent of his injury-related conditions.

### **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.<sup>3</sup> OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the

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<sup>3</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

[claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”<sup>4</sup>

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.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

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’s 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. If it is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>7</sup>

Section 8115(a) of FECA provides that 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.<sup>8</sup> The Board has stated, generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.<sup>9</sup> However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee’s particular needs or a position that is seasonal in an area where year-round employment is available.<sup>10</sup> Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>5</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> *See* Federal (FECA) Procedure Manual, *supra* note 4, at Chapter 2.814.11 (June 1996).

<sup>8</sup> 5 U.S.C. § 8115(a).

<sup>9</sup> *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee’s wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee’s compensation.

<sup>10</sup> *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.7a(1) (July 1997).

temporary or part-time position.<sup>11</sup> OWCP's procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.<sup>12</sup>

### ANALYSIS

On November 4, 1997 appellant sustained lumbar strain and disc herniation at L4-5 as a result of slipping on a ladder at work. After a period off work, he began working on a full-time basis on February 22, 1999 in a light-duty facility maintenance controller position. The position required processing written and call-in work requests using WIMS which assisted in prioritizing work requests/job orders and creating daily/weekly/monthly reports in this regard and accomplished all daily labor recordings, summarizing and verifying craft efforts assigned to sections which included, but were not limited to man hours expended on work and job orders, service calls, equipment maintenance operations, indirect activities, leave and supervision. The physical requirements of the light-duty position involved occasional job site visits, extended hours of research and development of computer products and other administrative actions and ability to work under extreme pressure and display the highest degree of tact and courtesy necessary for daily contact with all levels of personnel base-wide. Based on this position, OWCP reduced appellant's compensation to zero after finding that his actual earnings as a facility maintenance controller fairly and reasonably represented his wage-earning capacity. Appellant later filed claims for compensation from November 3, 2009 to March 5, 2010 due to back pain.

The Board finds that OWCP's determination that appellant's actual earnings as a facility maintenance controller beginning February 22, 1999 fairly and reasonably represented his wage-earning capacity was consistent with section 8115(a) of FECA which provides that 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.<sup>13</sup> OWCP properly noted that he had received actual earnings as a facility maintenance controller for more than 60 days in that he had been working in the position since February 22, 1999 when OWCP issued its June 15, 1999 decision and there is no evidence that his earnings in this position did not fairly and reasonably represent his wage-earning capacity. The facility maintenance controller position was not an odd-lot or make-shift position designed for appellant's particular needs and it was not seasonal in nature.<sup>14</sup> Moreover, the position was not a temporary or part-time position.<sup>15</sup>

The evidence does not show that appellant's actual earnings as a facility maintenance controller did not fairly and reasonably represent his wage-earning capacity and OWCP properly

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<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.7a(1), (3) (July 1997).

<sup>12</sup> *Id.* at Chapter 2.814.7c (December 1993).

<sup>13</sup> *See supra* note 9 and accompanying text.

<sup>14</sup> *See supra* note 10 and accompanying text.

<sup>15</sup> *See supra* note 11 and accompanying text.

adjusted his compensation based on this wage-earning capacity determination.<sup>16</sup> For these reasons, appellant has not shown that OWCP's original determination with regard to his wage-earning capacity was erroneous.

Appellant did not allege that he was retrained or otherwise vocationally rehabilitated and, as noted, there is no evidence that the original wage-earning capacity determination was erroneous. Furthermore, the Board finds that the evidence does not establish a material change in his employment-related conditions.

Dr. Lenox's reports found that appellant would not recover from his back condition and the condition would likely continue to worsen. However, she did not explain why his accepted conditions worsened and prevented him from performing the facility maintenance controller position or otherwise establish that OWCP improperly determined his wage-earning capacity.<sup>17</sup> The Board finds, therefore, that Dr. Lenox's reports are of diminished probative value.

Dr. Evans' reports found that appellant had occipital neuralgia with sharp shooting pains radiating into the right posterior region of his head which prevented him from working for any extended period of time without exacerbation of the conditions. He stated that appellant's pain medication for the diagnosed condition had cognitive side effects that would limit his ability to perform his work duties. Dr. Evans advised that appellant also had disturbance of skin sensation. He stated that appellant complained of pain radiating down his right leg and sustained a hematoma since undergoing cauterization in January 2009. Based on the distribution, Dr. Evans advised that appellant likely had femoral neuropathy. Lastly, he advised that appellant suffered from back pain. While Dr. Evans opined that appellant was totally disabled for work, the Board notes that OWCP has not accepted his claim for occipital neuralgia or disturbance of skin sensation. For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.<sup>18</sup> Dr. Evans provided no rationale explaining how appellant's occipital neuralgia and disturbance of skin sensation conditions were caused or related to the November 4, 1997 injuries. Further, the Board has consistently held that pain is a symptom, not a compensable medical diagnosis<sup>19</sup> and a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.<sup>20</sup> Dr. Evans did not explain how slipping on a ladder would cause or contribute to the claimed back condition. In light of his failure to provide medical rationale in support of his opinions, the Board finds that Dr. Evans' reports are of diminished probative value.<sup>21</sup> Accordingly, the Board finds that the record lacks

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<sup>16</sup> OWCP properly applied the principles enunciated in *Albert C. Shadrack*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

<sup>17</sup> See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

<sup>18</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>19</sup> *Robert Broome*, 55 ECAB 339 (2004); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

<sup>20</sup> *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

<sup>21</sup> *S.S.*, 59 ECAB 315, 322 (2008); *Cecilia M. Corley*, 56 ECAB 662 (2005); *George Randolph Taylor*, 6 ECAB 986, 988 (1954).

medical evidence showing that an injury-related condition prevented appellant from working as a facility maintenance controller.

The reports of Mr. Meeks, a nurse practitioner, and appellant's physical therapist are of no probative value because neither a nurse practitioner<sup>22</sup> nor a physical therapist<sup>23</sup> is a physician as defined under FECA.

Appellant did not submit sufficient medical evidence to establish that the 1999 wage-earning determination was erroneous or that there has been a material change in the accepted conditions. For the stated reasons, he did not meet his burden of proof to establish that OWCP's wage-earning capacity decision should be modified.

On appeal, appellant contended that OWCP erred in determining his wage-earning capacity as the physical demands of the facility maintenance controller position exceeded his restrictions. After his injury, he returned to light-duty work on February 22, 1999. Appellant accepted the position without contending that the light-duty requirements were outside his work restrictions and worked for 10 years before stopping on November 3, 2009. He did not present any evidence that the light-duty position was not suitable or outside his work restrictions and the record contains no probative evidence on this issue. The Board finds that appellant did not meet his burden of proof to establish that OWCP erred in finding that his actual earnings in the facility maintenance controller position represented his wage-earning capacity.

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 failed to establish that modification of OWCP's wage-earning capacity determination was warranted.

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<sup>22</sup> See 5 U.S.C. § 8101(2); *L.D.*, 59 ECAB 648 (2008).

<sup>23</sup> *A.C.*, Docket No. 08-1453 (issued November 18, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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