

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

E.G., Appellant)

and)

**DEPARTMENT OF THE AIR FORCE, AIR
FORCE LOGISTICS CENTER,
HILL AIR FORCE BASE, UT, Employer**)

**Docket No. 11-1363
Issued: January 12, 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
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 16, 2011 appellant filed a timely appeal from the May 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for modification of an OWCP wage-earning capacity determination. 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 met his burden of proof to establish that modification of OWCP's wage-earning capacity determination was warranted.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In an April 9, 2010 decision,² the Board affirmed OWCP's June 18, 2009 decision on the grounds that OWCP properly reduced appellant's compensation effective June 18, 2009 based on his capacity to earn wages in the constructed position of escort vehicle driver.³ The Board found that OWCP properly relied on the opinion of appellant's rehabilitation counselor that he was vocationally capable of performing the position of escort vehicle driver. The Board further determined that a review of the medical evidence revealed that appellant was physically capable of performing the position.⁴ The Board noted that, in a September 30, 2008 report, Dr. Bermudez reviewed the descriptions of several driving positions provided by appellant's vocational rehabilitation counselor and opined that appellant was able to perform work as a chauffeur or tractor-trailer driver with restrictions of no lifting over 20 pounds. The Board found that the requirements of the positions of chauffeur and tractor-trailer driver were similar to those of the position of escort vehicle driver and that Dr. Bermudez' approval of these positions showed that appellant was physically capable of working as an escort vehicle driver.⁵ The Board also determined that OWCP properly calculated the amount of appellant's wage-earning capacity based on the average weekly salary of an escort vehicle driver.⁶ The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

In several letters dated between September 2010 and March 2011, appellant requested modification of OWCP's June 18, 2009 wage-earning capacity determination. He claimed that, in calculating his wage-earning capacity, OWCP improperly used earnings figures for an escort vehicle driver. Appellant stated that the December 16, 2008 labor market survey indicated that

² Docket No. 09-2033 (issued April 9, 2010).

³ OWCP accepted in February 2001 that appellant, then a 34-year-old painter, sustained work-related de Quervain's disease of his right arm, bilateral ulnar nerve entrapment and tenosynovitis of his left hand/wrist and authorized the performance of surgical procedures in July 2001 and April 2002. In a March 11, 2008 work restrictions report, Dr. Rita Bermudez, an attending Board-certified physical medicine and rehabilitation physician, opined that appellant could work on a full-time basis with restrictions of sitting up to 7 hours, operating a motor vehicle at work for up to 5 hours, performing repetitive wrist and elbow movements for up to 4 hours per day and occasionally pushing, pulling or lifting up to 20 pounds. In a September 30, 2008 report, Dr. Bermudez reviewed the descriptions of several driving positions provided by appellant's vocational rehabilitation counselor and opined that appellant was able to perform work as a chauffeur or tractor-trailer driver with restrictions of no lifting over 20 pounds. The positions of chauffeur and tractor-trailer driver were sedentary in nature and required driving for almost an entire eight-hour day. In a June 18, 2009 decision, OWCP adjusted appellant's compensation effective June 18, 2009 based on his capacity to earn wages as an escort vehicle driver.

⁴ The position required sitting and driving for most of the eight-hour workday and required occasional lifting of up to 10 pounds.

⁵ The Board noted that Dr. Bermudez indicated in March 2008 that appellant could only sit for seven hours per day and drive at work for five hours per day, but her September 2008 opinion superseded these restrictions. In an April 6, 2009 report, Dr. Bermudez again indicated that appellant was capable of working as a tractor-trailer driver.

⁶ The Board stated that a December 16, 2008 labor market survey showed that the entry-level pay for the escort vehicle driver position varied from \$8.00 per hour to \$10.73 per hour (the listed pay figures were \$10.00, \$8.00, \$9.00 and \$10.73 per hour). Therefore, an average of these several entry-level rates was calculated at \$9.43 per hour or \$377.20 a week.

the wages for an escort vehicle driver varied from \$8.00 to \$18.00 per hour, but that OWCP improperly used the figure of \$9.43 per hour.

In an April 21, 2011 report, Dr. David P. Teicheira, an attending Board-certified internist, stated that appellant's pain drawing showed pain in both arms, fairly equally. Appellant reported that pain limited his ability to drive and that he was capable of lifting medium weights. Dr. Teicheira indicated that the findings of physical examination revealed that the bulk and tone of appellant's upper extremities seemed to be grossly normal and that no focal neurologic deficits or radicular symptoms were noted. Appellant reported pain on palpation of his wrist and on active movements of his upper extremities. Dr. Teicheira diagnosed status post bilateral ulna fractures with residual pain and probable bilateral peripheral neuropathy. He did not provide any opinion on appellant's ability to work.

In a May 2, 2011 decision, OWCP denied appellant's request for modification of its June 18, 2009 wage-earning capacity determination. It indicated that he had not shown that the original determination was in error or that he had a material change in his injury-related condition.

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.⁷ 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 [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁸

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

In addition, Chapter 2.814.11 of the 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

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁹ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹⁰ *Id.*

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. 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.¹¹

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.¹²

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹³

ANALYSIS

In a June 18, 2009 decision, OWCP adjusted appellant's compensation effective June 18, 2009 based on his capacity to earn wages in the constructed position of escort vehicle driver. Appellant later requested modification of OWCP's June 18, 2009 wage-earning capacity determination.

The Board finds that appellant did not establish that OWCP's original wage-earning capacity determination was in error.

OWCP received information in early 2008 from Dr. Bermudez, an attending Board-certified physical medicine and rehabilitation physician, who found that appellant was not totally

¹¹ See Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.11 (June 1996).

¹² See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a). Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

¹³ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of escort vehicle driver and found that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within his commuting area.

The Board finds that OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the escort vehicle driver position. Moreover, a review of the medical evidence reveals that appellant was physically capable of performing the position. The position required sitting and driving for most of the eight-hour workday and required occasional lifting of up to 10 pounds. Appellant did not submit any evidence or argument showing that he could not physically perform the position of escort vehicle driver. In a September 30, 2008 report, Dr. Bermudez reviewed the descriptions of several driving positions provided by appellant's vocational rehabilitation counselor and opined that appellant was able to perform work as a chauffeur or tractor-trailer driver with restrictions of no lifting over 20 pounds.¹⁴

Before OWCP and on appeal, appellant alleged that OWCP used an improper figure for the average wage of the escort vehicle driver position when it calculated his wage-earning capacity. He stated that the December 16, 2008 labor market survey indicated that the wages for an escort vehicle driver varied from \$8.00 to \$18.00 per hour, but that OWCP improperly used the figure of \$9.43 per hour. The Board finds that OWCP properly took figures for entry-level salaries of an escort vehicle driver and averaged them to equal \$9.43 per hour or \$377.20 per week. Although the December 16, 2008 labor market survey suggested that the salary of an escort vehicle driver could be up to \$18.00 per hour, no specific instances of such a high salary were provided and it was not clear that the \$18.00 per hour figure was for an entry-level position as an escort vehicle driver.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the escort vehicle driver position represented appellant's wage-earning capacity.¹⁵ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the escort vehicle driver position and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, OWCP properly based appellant's wage-earning capacity effective June 18, 2009 on the escort vehicle driver position. For these reasons, appellant has not shown that the OWCP's original determination with regard to his wage-earning capacity was erroneous.

Appellant suggested that there was a material change in the nature and extent of his employment-related condition and submitted a report of an attending physician. However, this

¹⁴ The positions of chauffeur and tractor-trailer driver were sedentary in nature and required driving for almost an entire eight-hour day. The requirements of the positions of chauffeur and tractor-trailer driver are similar to those of the position of escort vehicle driver and therefore the medical evidence shows that appellant was physically capable of working as an escort vehicle driver.

¹⁵ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

evidence does not contain a rationalized medical opinion explaining why an employment-related condition prevented appellant from performing the escort vehicle driver position or otherwise establish that OWCP improperly determined appellant's wage-earning capacity.¹⁶ Appellant submitted an April 21, 2011 report in which Dr. Teicheira, an attending Board-certified internist, discussed his upper extremity condition. However, Dr. Teicheira did not indicate that appellant could not work as an escort vehicle driver and his report does not show a material change in appellant's injury-related condition.¹⁷

Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that the position of escort vehicle driver would not be representative of his wage-earning capacity. For these reasons, OWCP properly found that did not meet his burden of proof to establish that modification of OWCP's wage-earning capacity determination was warranted.

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 did not meet his burden of proof to establish that modification of OWCP's wage-earning capacity determination was warranted.

¹⁶ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

¹⁷ Dr. Teicheira did not provide any opinion on appellant's ability to work.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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