

OWCP accepted his claim for aggravation of right hand osteoarthritis. It had accepted an aggravation of left wrist osteoarthritis in a previous claim.²

Effective January 30, 2007, appellant began work in a modified mail processing clerk position with permanent work restrictions, including no lifting over five pounds. The employing establishment notified OWCP immediately.

On December 22, 2009 appellant accepted a rehabilitation modified position. In March 2010 the employing establishment withdrew his modified duty under the National Reassessment Process (NRP).

On April 6, 2011 Dr. Michael Righetti, the attending Board-certified orthopedic surgeon, noted that a decrease in lifting requirements was recommended due to the objective physical and radiographic findings. After describing his findings on physical examination, however, he stated that physical restrictions remained the same, with a lifting restriction of five pounds.

OWCP referred appellant, together with medical records and a statement of accepted facts, to Dr. John M. McNulty, a Board-certified orthopedic surgeon, for a second opinion on whether appellant's injury-related condition had worsened and for a description of his physical limitations.

Dr. McNulty evaluated appellant on May 23, 2011. He related appellant's complaints and history. Dr. McNulty reviewed appellant's medical records and described his findings on physical examination. He confirmed that appellant continued to have residuals of his accepted work injuries, with weakness and chronic pain in both wrists and evidence of some weakness in the right shoulder with complaints of pain. Dr. McNulty found that the 2003 injury to appellant's right wrist had worsened over time. He explained that sequential radiographs objectively demonstrated worsening of the degenerative changes between the scaphoid and trapezium. The March 29, 2010 x-ray report of the right wrist noted joint space narrowing and subchondral sclerosis involving the trapezium joint. Dr. McNulty found that these changes resulted from continued repetitive movement of the right upper extremity secondary to appellant's work at the employing establishment.

Dr. McNulty completed a work capacity evaluation limiting appellant to lifting two pounds, among other restrictions.

On July 12, 2011 OWCP issued a retroactive wage-earning capacity determination.³ It found that appellant's employment as a modified mail processing clerk effective January 30,

² OWCP File No. xxxxxx825. Appellant also had an earlier injury accepted for right shoulder biceps tendinitis and rotator cuff impingement syndrome. OWCP File No. xxxxxx378.

³ Where OWCP learns that the claimant has returned to alternative work more than 60 days after the fact, the claims examiner may consider a retroactive loss of wage-earning capacity determination. Such a determination is generally to be considered appropriate where an investigation reveals that a claimant held private employment and had substantial earnings which were not reported to OWCP or were otherwise not used in adjusting compensation entitlement. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.e (October 2010).

2007 was both medically and vocationally suitable. OWCP stated: “You have demonstrated your ability to perform the job by working in the modified mail processing clerk position for more than 60 days. Accordingly, OWCP finds that you are vocationally self-rehabilitated and that the modified mail processing clerk position represents your wage-earning capacity.”

OWCP found that the medical evidence supported that appellant was capable of performing the limited-duty position. It discounted the two-pound lifting restriction imposed by its referral physician, Dr. McNulty. OWCP found that Dr. McNulty provided no rationale for imposing a greater restriction. It gave the weight of the medical evidence to Dr. Righetti, appellant’s attending orthopedic surgeon.

As appellant’s actual earnings in his previous position met or exceeded the current wages of his date-of-injury position, OWCP found that his entitlement to wage-loss compensation ended the date he was reemployed.

On appeal, appellant argued that the limited-duty job was designed for his particular needs and was not a regular position of a type readily available to other postal employees.

LEGAL PRECEDENT

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

The wage-earning capacity of an employee is determined by the employee’s actual earnings if the employee’s actual earnings fairly and reasonably represent his wage-earning capacity.⁶ Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.⁷

ANALYSIS

The medical evidence does not support that appellant’s January 30, 2007 earnings as a modified mail processing clerk fairly and reasonably represent his wage-earning capacity. Prior to issuing its July 12, 2011 wage-earning capacity determination, OWCP referred appellant to Dr. McNulty, an orthopedic surgeon, for a second opinion on whether his injury-related condition had worsened and for a description of his physical limitations. It provided Dr. McNulty with the medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual background. Dr. McNulty confirmed that appellant continued to experience residuals of his accepted work injuries, he found that the accepted injury

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

to appellant's right wrist had worsened over time. He supported this finding with rationale. Dr. McNulty explained that sequential radiographs objectively demonstrated worsening of the degenerative changes between the scaphoid and trapezium. He pointed in particular to the March 29, 2010 x-ray report of joint space narrowing and subchondral sclerosis involving the trapezium joint. This was consistent with the report of attending orthopedic surgeon, Dr. Righetti, a month earlier when he recommended a decrease in lifting requirements due to the objective findings on physical examination and radiographic findings.

It was Dr. McNulty's opinion that these changes resulted from continued repetitive movement of the right upper extremity secondary to appellant's work at the employing establishment. It was the worsening of appellant's right wrist injury that led him to impose a lifting restriction of two pounds. The position appellant began working on January 30, 2007 required lifting five pounds.

OWCP discounted Dr. McNulty's opinion on the grounds that he provided little rationale. The Board finds, however, that Dr. McNulty supported his opinion with sequential radiographs objectively demonstrating the worsening of degenerative changes. The Board finds that Dr. McNulty's opinion establishes that appellant's accepted right wrist injury has worsened such that he can no longer perform the modified mail processing clerk position he began January 30, 2007, and upon which OWCP based its wage-earning capacity determination.

As the medical evidence fails to establish that the position of modified mail processing clerk is suitable, the Board finds that OWCP did not establish that appellant's earnings in that position fairly and reasonably represents his wage-earning capacity. The Board will therefore reverse OWCP's July 12, 2011 decision.

CONCLUSION

The Board finds that OWCP improperly determined appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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