

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

I.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Alameda, CA, Employer**

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**Docket No. 11-1796
Issued: March 23, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 1, 2011 appellant filed a timely appeal from the June 29, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) determining his wage-earning capacity. 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 OWCP properly reduced appellant's compensation effective July 3, 2011 based on his capacity to earn wages as a truck terminal manager.

On appeal, appellant contends that there were errors in the way OWCP arrived at his wage-earning capacity, including illegal and improper surveillance, and that he should have been permitted to pursue self-employment. He also asserts that he was entitled to reimbursement for his last semester at San Francisco State University pursuant to the vocational rehabilitation plan.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a March 21, 2008 decision, the Board set aside OWCP's September 10, 2007 nonmerit decision denying appellant's request for reconsideration as untimely and failing to show clear evidence of error, and remanded the case for a determination as to whether the evidence established that a modification of a February 1, 2000 wage-earning capacity determination was warranted.² In a decision dated June 23, 2010, the Board reversed OWCP's February 10, 2009 decision reducing appellant's compensation based on his capacity to earn wages as a truck terminal manager. The Board found that OWCP's February 1, 2000 loss of wage-earning capacity (LWEC) determination was erroneous because it was based on a stale medical report.³ The facts and the law contained in those Board decisions are incorporated herein by reference. Relevant facts are included below.

OWCP accepted appellant's July 20, 1993 traumatic injury claim for neck contusion, cervical sprain and disc dislocation/bulge at C5-6 and placed him on the periodic rolls. Appellant was referred for vocational rehabilitation services and received funds to complete his bachelor's degree at San Francisco State University. As he had previously accumulated college credits and had also obtained an associate degree, his undergraduate degree requirements were projected to be satisfied within three semesters; however, he did not complete the degree program during the period of vocational rehabilitation. OWCP directed the rehabilitation counselor to initiate placement services in June 1998. The rehabilitation specialist identified the position of assistant manager, truck terminal. Although appellant received more than 90 days of placement assistance, he failed to secure employment.

The rehabilitation specialist identified the position of assistant manager, truck terminal (Department of Labor's *Dictionary of Occupational Titles* No. 184.1670110) as vocationally suitable and reasonably available in appellant's commuting area, based upon a local labor market survey. The specialist found the job vocationally suitable in light of appellant's educational background and more than 10 years of trucking industry experience, and medically suitable, based upon a May 1994 report from appellant's treating physician, Dr. Eugene Mar.

In a decision dated February 1, 2000, OWCP reduced appellant's compensation to reflect his wage-earning capacity as an assistant manager, truck terminal, finding that the constructed position fairly and reasonably represented his wage-earning capacity based on Dr. Mar's May 1994 restrictions. In a decision dated September 10, 2007, it denied appellant's May 3, 2007 request for reconsideration as untimely and failing to show clear evidence of error. On March 21, 2008 the Board set aside the September 10, 2007 decision and remanded the case for a determination as to whether the evidence established that a modification of the February 1, 2000 wage-earning capacity determination was warranted.

In a decision dated June 5, 2008, OWCP denied modification of the February 1, 2000 wage-earning capacity determination. On February 10, 2009 an OWCP hearing representative affirmed the June 5, 2008 decision finding that a modification of the February 1, 2000 wage-

² Docket No. 08-73 (issued March 21, 2008).

³ Docket No. 09-1887 (issued June 23, 2010).

earning capacity was not warranted. As noted, on June 23, 2010 the Board reversed OWCP's February 10, 2009 decision on the grounds that the February 1, 2000 loss of wage-earning capacity determination was erroneous because it was based on a stale medical report.

On June 30, 2010 OWCP referred appellant to Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Fong was asked to provide an opinion as to whether appellant was capable of returning to work in his date-of-injury job or of performing the duties of sales/marketing manager or assistant manager truck terminal. He was also asked whether appellant had residuals from his accepted injury.

In an August 11, 2010 report, Dr. Fong provided a history of injury and treatment and noted that appellant was running his own business as a contractor. He related appellant's complaints of constant neck and right shoulder pain. Cervical examination revealed: extension -- 20 degrees; flexion -- 50 degrees, lateral rotation -- 60 degrees to the right, 70 degrees to the left; lateral tilt -- 20 degrees bilaterally. Motion was slow and guarded. There was chronic muscle tightness of the paracervical muscles but no trapezial tightness. Palpation of the neck somewhat replicated his pain. Shoulder examination revealed a positive arc and impingement sign with an equivocal drop test; crepitus on palpation; and pain on palpation of the supraspinatus fossa and subacromial space. A 2003 magnetic resonance imaging (MRI) scan of the right shoulder showed advanced degenerative joint disease (DJD) of the glenohumeral joint along with supraspinatus tendinosis and a downsloping acromion that might predispose to impingement. A 2003 MRI scan of the cervical spine showed multilevel spondylosis with multiple small disc bulges but primarily neuroforaminal encroachment at various levels as previously discussed. Dr. Fong diagnosed cervical spondylosis with a history of radiculitis and right shoulder internal derangement with DJD and possible impingement.

Dr. Fong opined that appellant continued to experience residuals of the accepted injury and was not capable of returning to work as a motor vehicle operator. He opined, however, that appellant was capable of working as a sales/marketing manager providing walking and standing were minimal and reaching, pushing and pulling of objects was avoided. Dr. Fong opined that appellant was capable of working as an assistant manager, truck terminal provided that he should not be exposed to noise and vibration, in addition to the aforementioned restrictions. In an accompanying work capacity evaluation, he restricted appellant from driving, reaching or twisting, or lifting, pushing or pulling more than 15 pounds. Appellant was to perform minimal walking and standing, and squatting, kneeling and climbing were prohibited.

In a letter dated August 25, 2010, Dr. James H. Rhee, a Board-certified physiatrist, opined that Dr. Fong's restrictions pertained to appellant's shoulder condition, rather than to his cervical condition, and that walking, standing, squatting, kneeling and climbing would not impact his cervical condition. In an October 18, 2010 work capacity evaluation, Dr. Rhee indicated that he was uncertain whether appellant could perform the duties of his date-of-injury job.

OWCP found a conflict in medical opinion between Dr. Rhee and Dr. Fong regarding appellant's work capacity and referred appellant to Dr. Arthur Auerbach, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Auerbach was asked whether appellant had

residuals of the accepted condition and whether he was capable of performing the duties of his date-of-injury job as a motor vehicle operator.

In a December 28, 2010 report, Dr. Auerbach provided a history of injury and treatment and examination findings. Although appellant alleged that he sustained a shoulder injury at the time of the accepted incident, the claim was accepted only for a cervical condition. He informed Dr. Auerbach that he had never had a shoulder condition prior to the 1993 employment incident and that his right shoulder pain had increased in intensity over the years since the incident. Appellant also had a preexisting right knee condition secondary to a 1997 nonindustrial injury, and intermittent low back pain resulting from a fall from a ladder in 2000.

Cervical range of motion testing revealed flexion -- 30 degrees; extension -- 5 degrees right and left; rotation -- 5 degrees right, 0 degrees left; side bending -- 5 degrees right, 0 degrees left. Range of motion testing of the shoulders, right versus left, revealed: forward flexion -- 90 degrees right, 150 degrees left; abduction -- 90 degrees, right, 180 degrees left; extension -- 40 degrees right, 50 degrees left; internal rotation -- 30 degrees right, 50 degrees left; external rotation -- 60 degrees right, 90 degrees left. Grasping the right Jamar Dynamometer caused right shoulder pain. An April 5, 2010 MRI scan of the right knee revealed severe narrowing of the lateral compartment, mild joint effusion and disrupted anterior cruciate ligament. Dr. Auerbach stated that appellant had constant right knee pain and intermittent swelling and noted that he was unable to squat or walk on uneven ground. He opined that appellant had “a right knee degree of nonindustrial impairment adding to his total impairment.”

Dr. Auerbach diagnosed preexisting mild cervical spondylosis and degenerative disease, aggravated by the accepted 2003 injury and mild C6-7 radiculopathy; multilevel disc degeneration with C5-6 right foraminal stenosis and left foraminal stenosis at C4-5; right shoulder impingement syndrome and possible rotator cuff tear; chronic low back pain due to possible L3-4 inferior foramina and lateral disc protrusion and right knee effusion. Restrictions precluded using the right shoulder at and above shoulder level, or pushing, pulling or lifting greater than five pounds with the right shoulder above shoulder level. Dr. Auerbach stated that these restrictions were “possibly the responsibility of the nonindustrial right shoulder and partly the responsibility of the industrial neck.” Appellant was also restricted from kneeling, squatting, climbing and walking over uneven ground due to his right knee condition. Restrictions relating solely to his cervical condition included no repetitive motions of the neck, no power grasping, no repetitive simple grasping with the right wrist and hand and no lifting, pulling or pushing more than 25 pounds with the right upper extremity.

Dr. Auerbach opined that appellant continued to suffer from the residuals of the original neck injury of July 16, 1993 and was unable to perform the duties of motor vehicle operator. In an attached work capacity evaluation, he indicated that appellant was permanently restricted from repetitive neck motion and from lifting or carrying more than 10 pounds.

At OWCP’s request, the rehabilitation counselor conducted a labor market survey in for the position of manager, truck terminal (DOT No. 184.167-110). The position was classified as sedentary, which provides a 10-pound lifting limit. A manager, truck terminal is responsible for directing and coordinating activities of the terminal as intermediate freight distributor and may

provide garage services for trucks. Duties include checking incoming and outgoing shipments against bills of lading. The vocational counselor determined that appellant had the physical capacity to perform the duties of the manager, truck terminal position and that the job was being performed in sufficient numbers as to make it reasonably available to appellant within his commuting area.

On May 10, 2011 OWCP notified appellant that it proposed to reduce his compensation for wage loss on the grounds that the medical and factual evidence established that he was no longer totally disabled for work, but rather was capable of earning wages as a manager, truck terminal. It allowed him 30 days to submit additional evidence or argument regarding his capacity to earn wages in the described position.

In a decision dated June 29, 2011, OWCP reduced appellant's compensation for wage loss to zero effective July 3, 2011. It found that the position of manager, truck terminal was medically and vocationally suitable and represented his wage-earning capacity.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

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.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 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.⁸ In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.⁹

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

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

⁸ *Id.*

⁹ *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

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 a wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *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.¹⁰

OWCP must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which OWCP relies must provide a detailed description of appellant's condition.¹¹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹²

ANALYSIS

The June 29, 2011 wage-earning capacity determination was premised on appellant's ability to work full time as a truck terminal manager. The Board finds that OWCP failed to establish that the constructed truck terminal manager position fairly and reasonably represented his wage-earning capacity. Therefore, OWCP failed to meet its burden of proof and the June 29, 2011 decision must be reversed.

In its June 25, 2010 decision, the Board found that OWCP's February 1, 2000 LWEC determination that the constructed position of manager, truck terminal was medically suitable was erroneous because it was based on a stale medical report. Following the Board's decision, OWCP sought a second opinion regarding appellant's work capacity from Dr. Fong, who opined that appellant's residuals from the accepted injury would impact his ability to walk, bend, stoop, drive stand, twist, push, pull, lift, carry, reach above shoulder level and drive long distances. Dr. Rhee, appellant's treating physician, disagreed that walking and standing would negatively impact appellant's cervical condition and opined that Dr. Fong's pushing and pulling restrictions probably related to his unaccepted shoulder condition. OWCP properly found a conflict in medical opinion between Dr. Fong and Dr. Rhee regarding appellant's work limitations and referred him to Dr. Auerbach for an impartial medical opinion. The Board finds, however, that

¹⁰ 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).

¹¹ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

¹² See *M.A.*, 59 ECAB 624 (2008). See *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996) (six-month-old medical reports are reasonably current for purposes of wage-earning capacity determination); Cf. *Keith Hanselman*, 42 ECAB 680 (1991) (two-year-old medical report and year-old work restriction evaluation forms were not reasonably current for wage-earning capacity determination); *Anthony Pestana*, 39 ECAB 980 (1988) (three-year-old medical evaluation is not reasonably current for wage-earning capacity determination).

Dr. Auerbach's December 28, 2010 report is insufficient to resolve the conflict or to establish that appellant is physically capable of performing the duties of the constructed position.

Dr. Auerbach's opinion is vague, speculative and internally inconsistent. On the one hand, he provided restrictions precluding the use of the right shoulder at and above shoulder level, or pushing, pulling or lifting greater than five pounds with the right shoulder above shoulder level, stating that these restrictions were "possibly the responsibility of the nonindustrial right shoulder and partly the responsibility of the industrial neck." Later in his report, he indicated that appellant should be restricted from repetitive motions of the neck, no power grasping, no repetitive simple grasping with the right wrist and hand and no lifting, pulling or pushing more than 25 pounds with the right upper extremity. In a separate paragraph, Dr. Auerbach stated that appellant could probably push, pull and lift 10 pounds with the right upper extremity. His failure to provide clear restrictions and definitive diagnoses reduces the probative value of his report and renders it insufficient to resolve the conflict in medical opinion.

In response to OWCP's questions, Dr. Auerbach opined that appellant continued to suffer from the residuals of the original neck injury of July 16, 1993 and was unable to perform the duties of motor vehicle operator. He was not asked, however, to review requirements for the manager, truck terminal position and, therefore did not provide an opinion as to whether appellant was capable of performing the duties of the position. The Board notes that the constructed position has a 10-pound lifting limit and includes duties that would require repetitive movements of the neck, such as checking incoming and outgoing shipments against bills of lading. Absent rationalized medical evidence addressing the relevant issue, the Board is unable to determine whether appellant is capable of performing the duties of the manager, truck terminal position.

On appeal, appellant contends that he was entitled to reimbursement for his last semester at San Francisco State University, which he completed after the conclusion of vocational rehabilitation. As OWCP did not issue a final decision on appellant's request, the issue is not properly before the Board.¹³

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation effective July 3, 2011 based on his capacity to earn wages as a truck terminal manager.¹⁴

¹³ Section 8104(a) of FECA provides for the furnishing of vocational rehabilitation services. 5 U.S.C. § 8104(a). OWCP has discretionary authority with respect to vocational rehabilitation and the Board has held that an OWCP decision involving the exercise of this discretion will not be disturbed unless it is clearly in error. Pursuant to the vocational rehabilitation plan, appellant received funds to complete his bachelor's degree at San Francisco State University. As he had previously accumulated college credits and had also obtained an associate degree, his undergraduate degree requirements were projected to be satisfied within three semesters; however, he did not complete the degree program during the period of vocational rehabilitation. The Board notes that appellant has not alleged that OWCP's denial of his request for reimbursement for tuition was an abuse of discretion.

¹⁴ The Board notes that appellant's arguments on appeal regarding alleged improper surveillance and entitlement to reimbursement for his last semester at San Francisco State University are beyond the scope of this appeal.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 23, 2012
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