United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 11-2123**
	)	**Issued: September 26, 2012**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Norfolk, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2011 appellant filed a timely appeal of a May 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.[2]

ISSUE

The issue is whether OWCP properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

On appeal, appellant contends that OWCP erred in its decision as it did not properly reduce his compensation.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the May 16, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On February 25, 2003 appellant, then a 49-year-old boatswain mate (supervisory able seaman), filed a traumatic injury claim (Form CA-1) alleging a crushing injury of his left hand while carrying a load of pipes in the performance of duty on February 24, 2003. He reported the injury to his supervisor onboard the ship on March 8, 2003 but did not have any work stoppage. Appellant continued to work until June 11, 2003 where he was seen at the Naval Hospital at Sigonella, Sicily. At that time, an old fracture of the fifth digit of the left hand was diagnosed.

Appellant continued to work until March 1, 2004 when he was rotated off the ship. He was placed on sick leave from March 5 through April 5, 2004. OWCP received the signed Form CA-1 claim on May 3, 2004 and accepted appellant's claim on June 2, 2004 for left hand small finger contusion. Appellant stopped work on April 16, 2004 and filed continuous claim CA-7 forms. He was paid compensation benefits for total disability and placed on the periodic rolls effective October 31, 2004. The additional conditions of bilateral wrist repetitive stress injury or chronic strain were accepted by OWCP on December 1, 2004.

Dr. Michael Kulick, a Board-certified plastic surgeon, performed left little finger surgery on June 25, 2004.

Appellant was placed in the nurse intervention program on August 5, 2004. On October 25, 2004 Dr. Kulick released him to work full time with the following restrictions no climbing or pulling over 10 pounds.

On November 3, 2004 OWCP initially was referred appellant for vocational rehabilitation services. Appellant was reassigned to a new rehabilitation counselor on February 3, 2005. By letter dated March 7, 2005, the employing establishment advised the rehabilitation counselor that it did not have any light- or restricted-duty assignments as all duties were performed while living and working onboard vessels which deploy overseas from four to six months.

Due to a nonemployment-related motor vehicle accident in June 2005 and an August 19, 2005 OWCP-authorized left wrist tenosynovectomy and left radiocarpal capsulorrhaphy and synovectomy due to an earlier work-related injury,[3] the rehabilitation counselor process was interrupted.

Following his clearance to return to work, OWCP referred appellant to Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Nijjar's December 21, 2005 report, it accepted bilateral ulnar neuritis; bilateral tenosynovitis of the wrists; crush injury of the left little finger; status post joint replacement arthroplasty of the proximal interphalangeal joint and mallet finger deformity. Dr. Nijjar precluded appellant from repetitive use of the hands and repetitive power gripping.

On February 10, 2006 Dr. Kulick performed right elbow surgery.

[3] The surgery was approved under case File No. xxxxxx442. This case has been combined with case File No. xxxxxx802 as the master file.

In a September 18, 2008 report, Dr. Kulick stated that he reexamined appellant and found evidence of cubital tunnel syndrome in the left upper extremity, carpal tunnel syndrome, left lateral epicondylitis and desmitis of the basal joint of his left thumb. Appellant still had a problem with a mallet deformity of his left little finger and had decreased motion of the proximal interphalangeal (PIP) joint following the arthroplasty performed in 2004. Dr. Kulick opined that appellant had permanent loss of motion of the PIP joint which was related to his employment. On December 18, 2008 he reiterated his opinion that appellant's condition was employment related.

By letter dated December 22, 2008, OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. In his January 21, 2009 report, Dr. Swartz diagnosed left wrist sprain, left carpal tunnel syndrome, left ulnar collateral ligament of the left thumb sprain and de Quervain's tenosynovitis of the left wrist. He opined that appellant continued to have residuals with respect to the left wrist and the left little finger. Dr. Swartz found no basis for further medical treatment except for left carpal tunnel release; but, if appellant developed a recurrence of the giant cell tumor, then treatment would be done on a nonemployment-related basis. The date of maximum medical improvement was determined to be January 21, 2009. Dr. Swartz opined that appellant was able to work full time with the following restrictions no pushing, pulling or lifting over 20 pounds.

By February 4, 2009 appellant was again referred to vocational rehabilitation but, due to surgical procedures, it was terminated.

On July 17, 2009 Dr. Kulick performed revision arthroplasty, PIP joint and isolated site, excision of tumor most likely "giant cell tumor."

October 21, 2009 appellant was again returned to vocational rehabilitation.

On November 18, 2009 the rehabilitation counselor submitted a proposed vocational rehabilitation plan which identified two positions -- an inventory control clerk or a shipping/receiving clerk -- for which appellant qualified and which were available in the labor market. This plan was approved and appellant was provided a period of time to obtain employment. Appellant also had been working with his union to obtain a job placement. The rehabilitation counselor learned that appellant had been tentatively offered a position as an electronics technician with his previous employer. On September 18, 2010 appellant was shipped out to sea apparently working with the Central Gulf Lines/LMS ship. His salary was confirmed by the union as $2,331.00 a month.

The rehabilitation counselor verified that appellant had been working on the vessel and that he would be out to sea for at least 60 days or longer depending upon the weather. Appellant verified by letter of September 30, 2010 that he was at that time working on a vessel and earning $2,331.00 a month. He did not know when he would be back in the United States but that the job assignment was for "three to four month trips, then back to the U.S.A."

In a May 20, 2010 report, Dr. Kulick reiterated that appellant was fit to return to work with the following permanent restrictions not able to use forced grip with injured hand (left little finger) and artificial joint not able to withstand repetitive grip of more than five pounds.

By decision dated October 13, 2010, OWCP advised appellant that effective September 18, 2010 his compensation benefits would be reduced based on his actual wages as an electronics technician with the Central Gulf Lines of $27,972.00 a year or $537.92 a week.

On November 18, 2010 the rehabilitation counselor confirmed that appellant had been employed for 60 days.[4]

On November 29, 2010 OWCP determined that appellant's employment with the Central Gulf Lines fairly and reasonably represented his wage-earning capacity as he had demonstrated the ability to perform the duties of this job for 60 days or more and that it was suitable for his partially disabled condition. It found that he was capable of earning $537.92 a week and that his current pay rate for the date-of-injury position was $884.93 resulting in a 61 percent wage-earning capacity.

On December 18, 2010 appellant requested a review of the written record by an OWCP hearing representative. In a December 28, 2010 statement, he noted that he did not obtain a position as an electronics technician; rather he held a temporary assignment as an able seaman with the Waterman Steamship Corporation for a total of 63 days. Appellant contended that he took the position under pressure from the rehabilitation counselor and argued that it was not suitable for his partially disabled condition. He also submitted a December 22, 2010 letter from the Seafarers International Union indicating that appellant was an able seaman and had not sailed as an electronics technician.

By decision dated May 16, 2011, OWCP's hearing representative found the actual wages appellant received while working on the vessel as an electronics technician fairly and reasonably represented his wage-earning capacity and affirmed the November 29, 2010 decision.

LEGAL PRECEDENT

Section 8115(a) of FECA[5] provides that, in determining compensation for partial disability, 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.[6] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[7] If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical

[4] By decision dated November 29, 2010, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of $538.80. It further finalized its finding that he was not at fault in the creation of the overpayment. As appellant did not contest the finding, OWCP determined that it would deduct the amount of $50.00 from future compensation payments to repay the overpayment.

[5] 5 U.S.C. §§ 8101-8193, 8115.

[6] *Loni J. Cleveland*, 52 ECAB 171 (2000).

[7] *Lottie M. Williams*, 56 ECAB 302 (2005).

impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[8]

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 for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open 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 *Albert C. Shadrick*[9] will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.[10]

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.[11] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[12] Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.[13]

OWCP procedures offer further instruction:

> "Determining WEC Based on Actual Earnings. When an employee cannot return to the date[-]of[-]injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's WEC [wage-earning capacity]. Following is an outline of actions to be taken by the CE when a partially disabled claimant returns to alternative work:
>
> > a. *Factors Considered.* To determine whether the claimant's work fairly and reasonably represents his or her WEC, the CE should consider whether the kind of appointment and tour of duty are at least equivalent to

[8] *See N.J.*, 59 ECAB 171, 175 (2007).

[9] 5 ECAB 376 (1953).

[10] *See Karen L. Lonon-Jones*, 50 ECAB (1999).

[11] 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

[12] *K.R.*, *supra* note 11; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

[13] *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

> those of the job held on [the] date of injury. Unless they are, the CE may not consider the work suitable.
>
> For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
>
> > (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > (2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or
> >
> > (3) *The job is temporary* where the claimant's previous job was permanent.
>
> The CE should not consider the factors set forth in 5 U.S.C. 8115; they should be addressed only when reaching a constructed WEC."[14]

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation.

OWCP accepted appellant's claims (under both case File No. xxxxxx802 and case File No. xxxxxx442) for injuries to his hands. The employing establishment was unable to provide modified duty for him. Appellant underwent several instances of vocational rehabilitation. Prior to the completion of the return to work phase of the most recent vocational rehabilitation plan, he obtained employment on September 28, 2010. OWCP, by its November 29, 2010 decision, reduced appellant's compensation benefits finding that his actual wages in the position of electronics technician fairly and reasonably represented his wage-earning capacity, effective September 18, 2010. It determined that he actually performed work in this position for more than 60 days. The Board finds, however, that the record is devoid of any evidence of the type of position appellant held or whether it was similar in nature to the kind of appointment or tour of duty he held at his date of injury.

It is OWCP's burden of proof to establish that appellant's actual earnings fairly and reasonably represent his wage-earning capacity. That burden cannot be met without some verification from the employer of the position held and the nature of the position. The evidence

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

upon which OWCP relied to make its wage-earning capacity decision consists solely of telephone calls between the rehabilitation counselor and individuals at the union hall or "Mike" at the Central Gulf Lines. There is no written confirmation of employment or the position held.

In a September 21, 2010 report, the rehabilitation counselor verified, "[Appellant] did ship out on September 18, 2010 work for Central Gulf Lines/LMS ship manager. I have verified that he is working at a salary of $2,331[.00] [a] month (contact: Mike – xxx-xxx-xxxx). [Appellant] is working as an electronic technician, no job description is available, but he will operate and maintain electronic equipment. He will be out at sea for a two[-]month period."

In another report dated September 29, 2010, the rehabilitation counselor wrote: "I did not hear from [appellant's wife] so I contacted [the union] and spoke to Nick… He told me he knows that [appellant] did ship out and I could contact Central Gulf Lines directly at [xxx-xxx-xxxx] and get more information about what he is doing. I contacted Central Gulf Lines who owns LMS Shipping and spoke to Mike who told me [appellant] is on the ship, he will be out to sea for at least two months, perhaps longer depending upon weather and other conditions. He said he will be maintaining electronic equipment. Other than that, he could not tell me exactly what he would be doing."

On November 18, 2010 the rehabilitation counselor verified: "I confirmed that [appellant] continues to be employed by Central Gulf Lines/LMS Shipping at a salary of $2,331.00 [a] month. He is still at sea. Continued employment was verified by Diana at Seafarers International Union. He has been successfully employed for 60 days."

Appellant, on the other hand, reported by letter to OWCP dated September 30, 2010 that he was a Seaman Dayman Dispatcher and worked with Waterman Steam Ships Corporation. He stated that the job assignment was for "3 to 4 month trips."

The procedural requirements for establishing a wage-earning capacity based on actual wages provide that OWCP must show that appellant had worked in the position for 60 days and that the position was not part-time or sporadic, seasonal or temporary (unless the date-of-injury position was of that nature).[15] The record lacks the evidence necessary for the Board to affirm such a determination. A phone call to the "union hall" or to "Mike" or "Nick" is not sufficient evidence to verify that the position is permanent, full time and not seasonal. As OWCP simply did not follow its own procedures, the Board finds that it did not discharge its burden of proof to justify the reduction of appellant's compensation based on his actual wages.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation.

[15] *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 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