

FACTUAL HISTORY

Appellant, a 61-year-old former welder, injured his left thumb and wrist in the performance of duty on April 12, 1994.³ OWCP initially accepted his traumatic injury claim for left thumb ulnar collateral ligament tear. On April 15, 1994 appellant underwent OWCP-approved surgery to repair the left thumb ligament damage.⁴ The employing establishment provided light-duty work for a period of time, but ultimately terminated him effective October 28, 1994. Thereafter, OWCP paid wage-loss compensation and placed appellant on the periodic rolls.

Although unable to resume his regular duties as a welder, appellant was not totally disabled from all gainful employment. In August 1997, he secured private-sector employment as a container maintenance mechanic with the International Longshoremen's Association (ILA).⁵ The work was sporadic at first, but after successfully completing a 90-day probationary period appellant began working full time for ILA in early December 1997.

By decision dated March 13, 1998, OWCP determined that appellant's full-time reemployment with ILA fairly and reasonably represented his wage-earning capacity. Effective December 7, 1997, appellant earned \$520.00 per week as a container maintenance mechanic which was less than what he had previously earned as a welder.⁶ Accordingly, OWCP compensated appellant based on his loss in wage-earning capacity (LWEC).

In August 1998, OWCP granted a schedule award for 55 percent impairment of the left thumb. The award covered a period of 41.25 weeks from July 19, 1998 through May 3, 1999. OWCP suspended payment of wage-loss compensation during the period of the schedule award. When the schedule award expired, OWCP resumed payment of wage-loss compensation in accordance with the March 13, 1998 LWEC determination. Appellant continued to work as a container maintenance mechanic through October 2005.⁷

On August 4, 2009 OWCP expanded appellant's claim to include left wrist post-traumatic degenerative arthritis as an accepted condition. The decision to include appellant's left wrist condition was supported by the June 25, 2009 report of Dr. Bright McConnell, III, a Board-certified orthopedic surgeon and OWCP referral physician, who examined appellant on June 5, 2009 and obtained a June 17, 2009 left wrist computerized tomography (CT) scan. In addition to the accepted left thumb injury, Dr. McConnell diagnosed probable post-traumatic degenerative arthritis, left wrist. He surmised that appellant had also sustained injury to his left wrist on

³ Appellant was letting down welding leads when the leads slipped. The injury occurred when his left hand became entangled between the leads and a handrail.

⁴ OWCP also approved an April 26, 1994 follow-up surgical procedure.

⁵ The position was described as a light-duty version of a welder which appellant's treating physician approved.

⁶ OWCP determined that appellant's earnings as a container maintenance mechanic represented 87 percent of the current wages of his date-of-injury position as a welder.

⁷ Appellant has reportedly not worked since October 2005. He continued to receive wage-loss compensation from OWCP based on the March 13, 1998 LWEC determination.

April 12, 1994.⁸ In a July 22, 2009 report, appellant's treating physician, Dr. Howard L. Brilliant, reviewed Dr. McConnell's report and concurred with his finding that appellant probably also injured his left wrist and developed secondary osteoarthritis.⁹

In June 2012, appellant's then-representative filed a request for modification of the March 13, 1998 LWEC determination. He argued that an increase in compensation was warranted due to a material change in the nature and extent of appellant's injury-related condition. The evidence that purportedly supported modification was a May 19, 2011 report from Dr. Dowse D. Rustin, a Board-certified orthopedic surgeon and OWCP referral physician.

Dr. Rustin examined appellant at OWCP's request to determine if any of the accepted conditions had resolved and whether appellant was capable of resuming his date-of-injury position as a welder.¹⁰ In his May 19, 2011 report, he described appellant's condition as gamekeeper's thumb with disruption of the ulnar collateral ligament. Dr. Rustin further indicated that it appeared appellant had also injured his left wrist with remote fractures and injury to the scapholunate ligament. He stated that appellant could not return to active employment as a welder. Dr. Rustin explained that appellant would have some difficulty with use of his left hand even doing light supportive work for his dominant right hand.

In a July 25, 2012 development letter, OWCP explained the legal criteria for modification of an LWEC determination. It advised appellant that, if he believed his medical condition had worsened, he must submit medical documentation to substantiate disability.¹¹ Appellant was initially afforded 30 days to submit the requested information. His representative later requested a 30-day extension which OWCP granted. However, appellant's representative did not subsequently submit any additional evidence or argument in support of modification.¹²

Appellant resubmitted a March 2009 report and an undated Form OWCP-5c from his treating physician, Dr. Brilliant. In a report dated March 30, 2009, Dr. Brilliant noted that he had not seen appellant in almost two years and that his condition had essentially remained the same. He commented that appellant could not use his left hand for much of anything. Dr. Brilliant further indicated that it was not likely appellant could do much of anything in the way of work because of his limited education and his hand problem. The undated work capacity evaluation

⁸ Dr. McConnell also submitted a June 25, 2009 work capacity evaluation (Form OWCP-5c) that limited left-hand reaching and reaching above shoulder to one to two hour(s). He also limited left-hand lifting to one to two hour(s) with a five-pound weight restriction. Lastly, Dr. McConnell imposed a one-to-two hour limitation on repetitive wrist movement. However, he did not indicate whether this restriction was specific to the left upper extremity only.

⁹ Dr. Brilliant is a Board-certified orthopedic surgeon. He initially examined appellant on June 1, 1995 at OWCP's behest. Pursuant to appellant's request, OWCP subsequently authorized continued treatment with Dr. Brilliant.

¹⁰ The referral was accompanied by an April 21, 2011 statement of accepted facts (SOAF).

¹¹ In a June 18, 2012 letter to both appellant and his representative, OWCP noted, *inter alia*, that, although Dr. Rustin stated that appellant was unable to return to work as a welder, he had not stated that appellant was unable to work in any capacity.

¹² He later withdrew as appellant's representative before OWCP.

(OWCP-5c) was initially received on July 31, 2009. At the time, Dr. Brilliant imposed permanent work restrictions of “no use of left hand.”

Appellant also resubmitted a copy of Dr. McConnell’s June 25, 2009 narrative report and OWCP-5c, as well as the results of the June 17, 2009 left wrist CT scan.

By decision dated October 1, 2012, OWCP denied appellant’s claim for additional wage-loss compensation.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on LWEC.¹³ An employee’s actual earnings generally best reflect his wage-earning capacity.¹⁴ Absent evidence that actual earnings do not fairly and reasonably represent the employee’s wage-earning capacity, such earnings must be accepted as representative of the individual’s wage-earning capacity.¹⁵ Compensation payments are based on the wage-earning capacity determination, and OWCP’s finding remains undisturbed until properly modified.¹⁶

Factors to be considered in determining if a position fairly and reasonably represents the injured employee’s wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant’s previous job was permanent.¹⁷

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent the employee’s wage-earning capacity after he has successfully performed the required duties for at least 60 days.¹⁸

Modification of an LWEC determination is unwarranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or

¹³ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹⁴ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹⁵ *Id.*

¹⁶ *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (October 2009).

¹⁸ *Id.* at Chapter 2.814.7c(1).

otherwise vocationally rehabilitated or the original determination was erroneous.¹⁹ The burden of proof is on the party seeking modification of the wage-earning capacity determination.²⁰

ANALYSIS

In a March 13, 1998 decision, OWCP determined that appellant's full-time reemployment as a container maintenance (mechanic) worker fairly and reasonably represented his wage-earning capacity. Effective December 7, 1997, appellant earned \$520.00 per week from his private-sector employer, ILA. Because his actual earnings with ILA were less than the then-current pay rate of his date-of-injury position as a welder, OWCP paid appellant wage-loss compensation based on his LWEC. Appellant continued to work as a container maintenance mechanic through October 2005, and has not worked since. It is unclear why he stopped work entirely in October 2005. OWCP has continued to pay appellant wage-loss compensation based on the March 13, 1998 LWEC determination.

In his June 11, 2012 petition for modification, appellant's then-representative argued that modification was warranted because of a material change in appellant's injury-related condition. He cited Dr. Rustin's May 19, 2011 finding of "left wrist ... remote fractures and injury to scapholunate ligament" as evidence of a material change sufficient to require additional compensation. Dr. Rustin also indicated that appellant could not return to active employment as a welder. In its June 18, 2012 response, OWCP correctly noted that Dr. Rustin had not stated that appellant was unable to work in any capacity. It subsequently afforded appellant the opportunity to submit additional evidence and/or argument in support of modification. Specifically, appellant was advised to submit medical evidence demonstrating injury-related disability.

OWCP subsequently received additional copies of various medical evidence and reports that had previously been submitted. Additionally, appellant argued that OWCP's August 2009 expansion of the claim to include a left wrist condition was proof that the March 13, 1998 LWEC determination was erroneous. He also argued that OWCP's belated acceptance of an employment-related left wrist condition demonstrated a material change in his injury-related condition. Appellant claimed that his condition had materially worsened and he could not work as a welder or work in any light-duty capacity.

Appellant essentially argued that OWCP failed to consider the full extent of his April 12, 1994 employment injury, and therefore, the LWEC determination was erroneous. The fact that appellant subsequently developed degenerative arthritis in his left wrist does not demonstrate that the March 13, 1998 LWEC determination was erroneous. The June 2009 evidence which justified expansion of the claim postdated appellant's employment injury by more than 15 years. This same evidence postdated the March 1998 LWEC decision by at least 11 years. OWCP's March 13, 1998 LWEC determination is not erroneous merely because appellant subsequently developed degenerative arthritis in his left wrist.

¹⁹ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

²⁰ *Id.*

Appellant has not submitted any evidence or argument that might otherwise demonstrate that his work as a container maintenance mechanic was not vocationally and/or medically suitable. Moreover, he has not argued nor does the record support that his position with ILA was inconsistent with any of OWCP's specific criteria for determining if a position fairly and reasonably represents the injured employee's wage-earning capacity.²¹ An employee's actual earnings generally best reflect his or her wage-earning capacity.²² Since returning to work in 1997, appellant was employed for approximately eight years as a container maintenance mechanic. There is no indication from the record that his October 2005 work stoppage was related to the April 12, 1994 employment injury.

Appellant also argued that modification was appropriate because he had been retrained or otherwise vocationally rehabilitated. However, he has not identified what, if any, retraining and/or vocational rehabilitation he purportedly received since his full-time reemployment with ILA in December 1997. As noted, appellant subsequently worked for almost eight years as a container maintenance mechanic and then stopped work without explanation.

Appellant also failed to establish a material change in his injury-related condition such that he was no longer capable of performing his limited-duty position as a container maintenance mechanic. He claimed that his employment-related left upper extremity condition precluded work as a welder or work in any light-duty capacity. While the record supports that appellant is unable to perform his date-of-injury position as a welder, the record does not establish that he is presently incapable of performing the duties of a container maintenance (mechanic) worker for which he was rated in March 1998. Although he has since developed left wrist post-traumatic degenerative arthritis, the medical evidence does not establish a material change in appellant's employment-related left thumb/wrist condition such that he is presently incapable of performing his previous limited-duty position. Dr. Rustin's May 19, 2011 report, which appellant's prior representative cited as evidence of a material change, did not even reference the fact that appellant had been reemployed as a container maintenance mechanic for approximately eight years. Appellant also cited earlier reports from Dr. Brilliant and Dr. McConnell. However, their respective reports and work capacity evaluations (OWCP-5c) do not clearly establish that appellant was incapable of performing his limited-duty assignment as a container maintenance mechanic. At the time, Dr. McConnell noted that appellant was capable of working with certain left hand restrictions. Dr. Brilliant's undated OWCP-5c provided no explanation for the noted permanent work restriction of "no use of left hand."

The Board finds that appellant has failed to satisfy his burden of proof in seeking modification of the March 13, 1998 LWEC determination. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

²¹ See *supra* note 17.

²² *Hayden C. Ross, supra* note 14.

CONCLUSION

Appellant has not established a basis for modifying OWCP's March 13, 1998 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board