

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

B.C., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 13-603
Issued: June 12, 2013**

Appearances:
Howard Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 16, 2013 appellant, through his attorney, filed a timely appeal from a December 13, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 has established a modification of a July 31, 2009 loss of wage-earning capacity determination was warranted.

FACTUAL HISTORY

On May 10, 2001 appellant, then a 47-year-old welder, filed an occupational claim (Form CA-2) alleging that he sustained carpal tunnel syndrome as a result of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted the claim on August 27, 2001 for bilateral carpal tunnel syndrome.² Appellant returned to a light-duty position, and stopped work on September 22, 2003. He returned to work at four hours a day on October 14, 2005, and then filed a traumatic injury claim for injuries on October 18, 2005 when he fell on stairs. OWCP accepted that claim for neck strain and right shoulder rotator cuff tear. Appellant began receiving compensation for temporary total disability, which OWCP stated was based on four hours a day for the occupational claim and four hours for the traumatic injury claim.

OWCP sent a copy of the job description for motor vehicle dispatcher (Department of Labor's *Dictionary of Occupational Titles*, DOT # 249.167-014) to the attending physician, Dr. Michael McManus, a Board-certified occupational medicine specialist. It requested an opinion as to whether appellant could perform the job duties. In a response dated September 19, 2008, Dr. McManus checked a box "approve this occupation."

The record reflects that appellant also received treatment from Dr. Derek Costa, a family practitioner. In a report dated October 10, 2008, Dr. Costa diagnosed major depression, chronic pain and disturbance of skin sensation.

In a report dated December 30, 2008, Dr. McManus noted that appellant had permanent work restrictions and restrictions were now adjusted to "no driving." Dr. McManus indicated in a duty status report (CA-17) that appellant should not operate a motor vehicle.

In a job classification form (CA-66) dated January 21, 2009, the position of motor vehicle dispatcher was described as a sedentary position with occasional 10-pound lifting, frequent reaching and occasional handling. The rehabilitation counselor opined that appellant had the vocational background for the position and the position was available in appellant's commuting area based on state employment information. The weekly wage was reported as \$470.40.

By letter dated May 14, 2009, OWCP advised appellant that it proposed to reduce his compensation on the grounds the selected position of motor vehicle dispatcher represented his wage-earning capacity. It advised appellant that if he disagreed with this proposal he should respond within 30 days.

By letter dated June 8, 2009, appellant's attorney argued that the proposed reduction was inappropriate. He contended that the medical evidence indicated that appellant could not drive a motor vehicle to work. In a report dated June 25, 2009, Dr. McManus provided results on examination and diagnosed status post bilateral carpal tunnel releases, status post bilateral medial epicondylotomies and ulnar nerve decompression, status post restless right trigger, chronic bilateral lateral epicondylitis, and recurrent episodes of bilateral hand edema of uncertain etiology. He listed appellant's medications.

In a decision dated July 31, 2009, OWCP reduced appellant's compensation on the grounds that he had the capacity to earn wages of \$470.40 a week in the selected position of

² A March 29, 2007 OWCP decision states that the claim was also accepted for bilateral epicondylitis and right trigger finger.

motor vehicle operator. It noted that a transportation company was contacted and bus service was available in appellant's commuting area.

In a report dated October 6, 2009, Dr. McManus provided results on examination and stated that appellant remained permanently disabled from his date-of-injury position. In a duty status report dated October 6, 2009, he advised that appellant was unable to work, noting "severe secondary lymphedema right greater than left wrist/hand."

Appellant continued to receive treatment from Dr. McManus. In reports dated February 9, 2011 and January 10, 2012, Dr. McManus stated that appellant reported no change in symptoms.

On February 22, 2012 appellant filed a claim for recurrence of disability (Form CA-2a). He reported that the date of recurrence was June 25, 2009, the date pay stopped July 31, 2009, and the date he stopped working October 6, 2009. In a February 17, 2012 statement, appellant indicated that his conditions continued to decline. By letter dated March 13, 2012, his attorney argued that worsening of pain could be a basis for compensation and OWCP was misinterpreting the medical evidence.

In a report dated March 5, 2012, Dr. McManus stated that appellant's condition had worsened, as appellant had "developed reactive severe and recurrent lymphedema of his upper extremities, greatest right elbow-hand with any sustained or repetitive use of his hand." He stated that this new diagnosis had been documented in the past, and due to the new condition, appellant was not qualified for any work that required sustained repetitive use of the hands. In a report dated March 20, 2012, Dr. McManus stated that appellant had filed a new claim for post-traumatic upper extremity lymphedema and Raynaud's phenomena.

By decision dated April 17, 2012, OWCP denied modification of the July 31, 2009 loss of wage-earning capacity determination. It found the medical evidence was insufficient to warrant modification.

Appellant requested a hearing before an OWCP hearing representative, which was held on September 26, 2012.

By decision dated December 13, 2012, the hearing representative affirmed the April 17, 2012 OWCP decision. The hearing representative found the medical evidence was not sufficient to establish a material change in an employment-related condition resulting in disability for the selected position.

LEGAL PRECEDENT

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the opinion.⁵

ANALYSIS

OWCP issued a July 31, 2009 decision finding that appellant's wage-earning capacity was represented by the selected position of motor vehicle dispatcher. It determined his loss of wage-earning capacity (LWEC) using the formula developed in the *Albert C. Shadrick* decision.⁶ Appellant filed a claim on February 22, 2012 for a recurrence of disability. Since there was an existing LWEC determination in place, the issue is whether he established that modification of the July 31, 2009 LWEC was appropriate.⁷

A modification may be established by showing the original determination was erroneous. With respect to his claim for compensation filed on February 22, 2012, appellant did not raise this argument before OWCP or submit relevant evidence to establish the original determination was erroneous. OWCP found the selected position was vocationally and medically suitable. Dr. McManus had reviewed the position and found appellant could perform the duties on September 19, 2008. With respect to employee retraining or vocational rehabilitation, this argument is typically raised by OWCP to show that appellant's wage-earning capacity has increased and is not relevant to the current appeal.

Appellant has argued that his condition worsened such that the wage-earning capacity should be modified. The specific time he felt his condition worsened is not clear from the recurrence claim, as he noted several different dates. Appellant referred to June 25, 2009, a time when he was receiving compensation for total disability.

On the recurrence of disability claim form appellant also listed October 6, 2009. The Board notes that the evidence must establish a material change in the nature and extent of the injury-related condition. Dr. McManus treated appellant on October 6, 2009, but his reports do not establish a material change in the employment-related condition. He diagnosed a lymphedema, but this condition is not accepted as employment related. To establish a modification of the LWEC, the evidence must establish that the condition is causally related to the employment injuries, and that it resulted in disability for the selected position of motor

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

⁵ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁶ 5 ECAB 376 (1953).

⁷ See *Katherine T. Kreger*, 55 ECAB 633 (2004) (when an LWEC decision is in effect, a claim for a recurrence of disability is treated as a request for modification of the LWEC determination).

vehicle dispatcher.⁸ Dr. McManus stated that appellant was disabled and referred to a severe lymphedema. He did not provide a rationalized medical opinion on causal relationship between the diagnosed condition and either the 2001 occupational claim injuries or the October 18, 2005 traumatic injuries. Dr. McManus did not provide a rationalized opinion as to disability for the selected position.

Dr. McManus continued to treat appellant, but his reports do not establish a material change in an employment-related condition. He indicated in the February 9, 2011 and January 10, 2012 reports that appellant reported no change in his symptoms.

In a March 5, 2012 report, Dr. McManus opined that appellant had developed recurrent lymphedema of his upper extremities, noting the right elbow and hand, but again he does not explain how this condition developed and how this condition is causally related to appellant's employment injuries, or discuss disability for the selected position. The Board finds that the reports of Dr. McManus are insufficient to establish a modification based on a material change in an employment-related condition.

On appeal, appellant argues that his return to work was short-lived in 2005 and OWCP improperly shifted the burden of proof to him. The issue in this case is not a recurrence of disability after a limited return to work. OWCP issued an LWEC decision on July 31, 2009. The issue is whether that determination should be modified. For the reasons noted, the Board finds the evidence does not establish a modification. Appellant also briefly states that no jobs for the selected position were reasonably available. The Board notes that the CA-66 form prepared by the rehabilitation counselor opined that the position was reasonably available in appellant's commuting area and cited employment data to support the opinion. Appellant did not submit any evidence to establish that the position was not reasonably available in his commuting area. He may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly denied modification of the July 31, 2009 LWEC determination.

⁸ See *S.R.*, Docket No. 08-1000 (issued April 22, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 13, 2012 is affirmed.

Issued: June 12, 2013
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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