

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

_____)	
)	
B.C., Appellant)	
)	
and)	Docket No. 13-850
)	Issued: November 19, 2013
U.S. POSTAL SERVICE, LAKELAND)	
DISTRICT, Palatine, IL, Employer)	
_____)	

Appearances:
Appellant, pro se
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 February 26, 2013 appellant filed a timely appeal from the January 16, 2013 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 met his burden of proof to establish that he sustained disability on or after July 12, 2010 due to his May 9, 2001 work injuries.

FACTUAL HISTORY

On May 9, 2001 appellant, then a 49-year-old manual distribution clerk, sustained injury when he was lifting boxes weighing between 15 to 35 pounds. He felt pain in his right arm and elbow. Appellant's claim was accepted for right lateral epicondylitis and right brachial neuritis.

¹ 5 U.S.C. §§ 8101-8193.

He underwent right ulnar surgery on September 23, 2005 and right lateral epicondylectomy and radial tunnel release surgery on January 9, 2006. The procedures were authorized by OWCP.

Consistent with his permanent work restrictions, appellant returned to work full time as a modified distribution clerk on February 22, 2007. By decision dated June 1, 2007, OWCP determined that his actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity with no wage loss.

On July 12, 2010 appellant filed a claim for compensation (Form CA-7) for wage loss beginning that day.² The employing establishment made a determination that no work was available within his restrictions as part of the National Reassessment Process (NRP).

In a July 19, 2010 letter, OWCP advised appellant that, to be entitled to compensation, his wage-loss claim beginning July 12, 2010 must be treated as a claim for modification of its June 1, 2007 wage-earning capacity decision. Appellant was informed of the three criteria necessary for modifying such decisions and afforded 30 days to provide evidence substantiating that he had met any of the criteria. A separate letter was sent to the employing establishment on July 19, 2010 requesting relevant information pertaining to his claim for wage loss.

Appellant submitted a May 26, 2010 report from Dr. Bassam Osman, an attending Board-certified neurologist, who diagnosed a recurrence of right radial tunnel syndrome, musculoskeletal etiology, carpal tunnel syndrome and polyneuropathy. In a June 10, 2010 report, Dr. Robert J. Fink, an attending Board-certified orthopedic surgeon, noted that appellant reported a history of a lifting injury at work on May 9, 2001. On August 16, 2010 he completed a form report which contained work restrictions which were similar to those recommended prior to appellant's work stoppage in July 2010. Dr. Fink listed the diagnosis due to the May 9, 2001 injury as radial tunnel syndrome.

In a September 1, 2010 decision, OWCP denied appellant's request for modification of its June 1, 2007 wage-earning capacity decision. It found that the medical evidence did not establish that he underwent a material change of his injury-related condition.

In a September 3, 2010 form report, Dr. Jacob Salomon, an attending Board-certified orthopedic surgeon, stated that appellant had bilateral carpal tunnel syndrome due to a May 9, 2001 injury and listed various work restrictions.³ The findings of an August 27, 2010 electromyogram of appellant's right arm showed no evidence for significant entrapment neuropathy at the level of the right elbow. The findings did reveal mild entrapment of both median nerves at the level of the wrist involving sensory fibers.

In February 11 June 7 and 30, 2011 reports, Dr. Salomon diagnosed work-related bilateral carpal tunnel syndrome. In a February 14, 2011 report, he provided a diagnosis of right-sided lateral chronic epicondylitis and multilevel cervical spondylosis. Dr. Salomon gave appellant a steroid injection in his right arm. In April 6 and May 4, 2011 form reports, he

² Appellant later filed CA-7 forms for additional periods of claimed wage loss.

³ Dr. Salomon later produced other work restriction forms on which he indicated that appellant had bilateral carpal tunnel syndrome due to a May 9, 2001 injury.

indicated that appellant had brachial neuritis due to a May 9, 2001 injury and listed various work restrictions. In June 7 and August 10, 2011 form reports, Dr. Salomon indicated that appellant had epicondylitis due to a May 9, 2001 injury and listed various work restrictions.

In a September 12, 2011 decision, OWCP affirmed the September 1, 2010 decision denying appellant's request for modification of its June 1, 2007 wage-earning capacity decision. It found that the medical evidence did not show that he underwent a material change in his injury-related condition.

In November 29, 2011 and January 30, 2012 form reports, Dr. Salomon advised that appellant had epicondylitis due to a May 9, 2001 injury and listed various work restrictions. On February 6, 2012 Dr. Anatoly Rozman, an attending Board-certified physical medicine and rehabilitation physician diagnosed bilateral carpal tunnel syndrome, left ulnar neuropathy and residual neuropathy of the right ulnar nerve.

In a September 13, 2012 decision,⁴ the Board set aside OWCP's September 12, 2011 decision and remanded the case for further development. The Board found that, with respect to the denial of appellant's claim for modification of a June 1, 2007 wage-earning capacity decision, OWCP did not discuss whether the original determination was erroneous or whether he had been retrained or vocationally rehabilitated or assess his case in accordance with FECA Bulletin No. 09-05 which discusses the proper procedures to be followed when a wage-earning capacity decision is in place and the dismissal of a claimant is due to NRP. The Board directed OWCP to follow the procedures found in FECA Bulletin No. 09-05. OWCP was directed to issue an appropriate decision on the merits of appellant's claims for compensation beginning July 12, 2010.

On remand, OWCP evaluated appellant's case under the procedures found in FECA Bulletin No. 09-05 to determine if the June 1, 2007 wage-earning capacity determination should be modified.

In a January 16, 2013 decision, OWCP vacated the June 1, 2007 wage-earning capacity decision as the evidence of file supported modification of the decision. It found that appellant had not established that he had disability on or after July 12, 2010 due to his accepted work injuries. Under FECA Bulletin No. 09-05, OWCP requested clarification from the employing establishment regarding whether the February 22, 2007 job offer was a *bona fide* position at the time of the rating by the June 1, 2007 decision.⁵ It determined that the evidence substantiated that the February 22, 2007 job offer was not regular work but "make work" or "odd lot" and therefore not an actual *bona fide* position.⁶ Therefore, OWCP determined that the formal wage-

⁴ Docket No. 12-809 (issued September 13, 2012).

⁵ The employing establishment provided a letter dated January 7, 2013 advising of four separate job offers beginning with the February 22, 2007 offer for a modified position, Forms PS-50 dated July 10, 2012 and September 1, 2007, Form OWCP-5 dated November 2, 2006, Form CA-17 dated June 27, 2012 and a work status form dated June 7, 2010.

⁶ OWCP found that the February 22, 2007 job offer did not provide an adequate description of the duties of the modified position. It noted that the duties of the job only consisted of working on manual letters or carrying out any other work as instructed by his supervisor within his physical restrictions.

earning capacity determination it issued on June 1, 2007 should be modified. It then evaluated the medical evidence of record to find that there was no rationalized medical evidence showing that appellant had disability due to his accepted work injuries on or after July 12, 2010.

LEGAL PRECEDENT

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁷ Chapter 2.814.11 of the procedure manual provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.⁸ FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If a formal wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁹

An employee seeking benefits under FECA has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹⁰ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹

Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues, which must be proved by a preponderance of reliable, probative and substantial medical evidence.¹²

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁹ FECA Bulletin No. 09-05 (issued August 18, 2009). *See also M.D.*, Docket No. 11-733 (issued July 11, 2012).

¹⁰ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

¹¹ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹² *W.D.*, Docket No. 09-658 (issued October 22, 2009).

ANALYSIS

Appellant's claim was accepted for right lateral epicondylitis and right brachial neuritis. He underwent right ulnar surgery on September 23, 2005 and right lateral epicondylectomy and radial tunnel release surgery on January 9, 2006. On June 1, 2007 OWCP determined that appellant's actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity with no wage loss. Appellant stopped work after a determination was made that no work was available as part of NRP. Following the prior appeal to the Board OWCP found that the June 1, 2007 wage-earning capacity determination was not regular work but "make work" or "odd lot" and therefore not an actual *bona fide* position. OWCP determined that the June 1, 2007 wage-earning capacity decision should be vacated.¹³ It then found that appellant had not submitted rationalized medical evidence showing that he had disability due to his accepted work injuries on or after July 12, 2010.

The Board notes that the only adverse final determination before it is whether OWCP properly found that appellant did not meet his burden of proof to establish that he sustained disability commencing July 12, 2010 due to his accepted work injuries.¹⁴ The Board finds that appellant did not submit sufficient medical evidence to establish that his disability on or after July 12, 2010 was due to the accepted conditions.

In a September 3, 2010 form report, Dr. Salomon, an attending Board-certified orthopedic surgeon, noted that appellant had bilateral carpal tunnel syndrome due to his May 9, 2001 injury. Dr. Salomon listed various restrictions on appellant's work activities.¹⁵ In February 11, June 7 and 30, 2011 reports, Dr. Salomon reiterated that appellant had work-related bilateral carpal tunnel syndrome. However, the reports do not establish that appellant had work-related disability on or after July 12, 2010. The Board notes that OWCP has not accepted that appellant sustained bilateral carpal tunnel syndrome due to the May 9, 2001 work injury or any other work cause. Moreover, Dr. Salomon did not provide a rationalized opinion addressing how the carpal tunnel syndrome related to the May 9, 2001 work injury and the medical evidence of record does not otherwise contain such an opinion.¹⁶

In April 6 and May 4, 2011 form reports, Dr. Salomon indicated that appellant had brachial neuritis due to a May 9, 2001 injury and listed various work restrictions. In June 7, August 10 and November 29, 2011 and January 30, 2012 form reports, he found that appellant had epicondylitis due to a May 9, 2001 injury and listed various work restrictions. Again, Dr. Salomon did not provide any narrative of how appellant had work-related epicondylitis or brachial neuritis more than 10 years after the occurrence of the May 9, 2001 injury. In addition,

¹³ See *supra* notes 7 through 9.

¹⁴ See 20 C.F.R. §§ 501.1(g), 501.2(c).

¹⁵ Dr. Salomon later produced other work restriction forms on which he indicated that appellant had bilateral carpal tunnel syndrome due to a May 9, 2001 injury.

¹⁶ Dr. Salomon did not provide any notable discussion of the May 9, 2001 work injury in any of his reports. On August 16, 2010 Dr. Fink, an attending Board-certified orthopedic surgeon, listed work restrictions and indicted that the diagnosis due to the May 9, 2001 injury was radial tunnel syndrome. However, radial tunnel syndrome is not an accepted condition and the medical evidence does not otherwise show such a work-related cause.

he did not provide any findings on examination or diagnostic testing with the reports or provide any explanation of how appellant's observed medical condition necessitated these work restrictions. The reports do not constitute rationalized medical evidence showing that appellant had disability on or after July 12, 2010 due to the work injuries he sustained on May 9, 2001.¹⁷

For these reasons, appellant did not submit sufficient medical evidence to establish that he had work-related disability on or after July 12, 2010.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he had disability on or after July 12, 2010 due to his work injuries sustained on May 9, 2001.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 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

¹⁷ See *supra* notes 10 through 12.