United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 13-1112**
	)	**Issued: November 12, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 26, 2013 appellant, through his attorney, filed a timely appeal from a February 22, 2013 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 over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant's actual wages as a vehicle mechanic fairly and reasonably represented his wage-earning capacity; and (2) whether appellant established that modification of OWCP's June 6, 2012 loss of wage-earning capacity determination was warranted.

On appeal, counsel contends that the wage-earning capacity was based on a makeshift position and that OWCP did not properly follow procedures related to the National Reassessment Process (NRP).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On November 16, 2001 appellant, then a 46-year-old automotive technician, filed an occupational disease claim alleging pain and numbness in his right hand and wrist due to repetitive duties. He became aware of his condition on June 1, 2001 and realized that it was causally related to his work on November 9, 2001. OWCP accepted appellant's claim for right wrist sprain and osteoarthritis of the right hand. Appellant did not stop work but returned to a full-time limited-duty position and worked in several modified positions.[2]

From February 12, 2002 to May 8, 2003 appellant came under the treatment of Dr. Franklin Shih, a Board-certified physiatrist, for mild right carpal tunnel syndrome and subluxation of the carpometacarpal joint. In a July 31, 2002 work capacity evaluation, Dr. Shih diagnosed carpal tunnel syndrome. He advised that appellant had reached maximum medical improvement and could return to work full time with permanent restrictions.

In a March 1, 2007 report, Dr. Shih noted that he last saw appellant four years prior for pain in the right thenar region at the carpometacarpal joint, de Quervain's tenosynovitis and nerve entrapment. On examination he found tenderness of the carpometacarpal joint, intact sensation to light touch and pin, motor examination was normal and reflexes symmetrical. Dr. Shih diagnosed right wrist and hand pain, carpometacarpal arthralgias, episodic de Quervain's and median nerve entrapment. In a duty status report dated March 1, 2007, he diagnosed right hand pain and right hand carpometacarpal arthrosis. Dr. Shih noted that appellant could work full time with restrictions of lifting/carrying limited to 15 pounds with the right arm for three hours, pulling/pushing limited to 15 pounds with the right arm for three hours and, with regard to the right hand, for simple grasping and fine manipulation he may perform light pinching and gripping frequently, right hand medium pinching and gripping strength occasionally and no right hand forceful pinching and gripping. In a form dated March 1, 2007, he diagnosed right carpometacarpal arthrosis and noted that appellant's residuals had not resolved and his condition was chronic and permanent.

On November 28, 2008 appellant was offered a limited-duty position as a full-time motor vehicle mechanic. The duties of the position included issuing vehicle repair parts for three hours a day, receiving and stocking vehicle repair parts for two hours a day, data entry for two hours a day and issuing and maintaining tools, vehicle keys and answering telephones for one hour a day. The physical requirements included standing for three hours a day, walking for one hour a day, sitting for three hours a day and lifting for one hour a day. The job offer noted that "this assignment will remain within the physical restrictions furnished by your treating physician. If a revision is necessary, you will be given a revised written modified assignment." Appellant

[2] On August 8, 2002 appellant was offered a limited-duty full-time assignment. The duties included occasional vehicle repair done within restrictions, work in the parts department including issuing automotive parts, entering data into a computer, filing, answering telephones, shuttling vehicles and towing vehicles. On September 10, 2003 appellant was offered a modified full-time job as a mechanic. The duties included lubing vehicles, changing oil and filter, washing vehicles, emission testing and front end alignment. On October 6, 2003 appellant was offered a full-time modified position. The duties included performing most of the duties with his left arm and hand. Hand and arm restrictions applied to the right arm only as there are no work restrictions for the left arm. The duties included washing vehicles, assisting with front end alignments and performing emission tests.

accepted the position. In a limited-duty assignment/position worksheet dated November 28, 2008, the employing establishment noted that appellant currently had a bid assignment (vehicle mechanic) but was working a limited-duty modified assignment.

In an April 26, 2010 letter, the employing establishment advised appellant that, pursuant to NRP, it was unable to identify available work within his medical restrictions. It informed him not to report for duty unless he was contacted and informed that necessary work tasks were identified within his medical restrictions.

On May 14, 2010 appellant filed a recurrence of disability claim alleging that on April 27, 2010 the employing establishment withdrew his modified-duty assignment. When he returned to work, he was at maximum medical improvement and required no additional treatment. The employing establishment noted on the Form CA-2a, that the work stoppage occurred on April 27, 2010. It noted that a limited-duty assignment was provided from the date of the original claim on June 1, 2001 to April 27, 2010. The employing establishment further noted that it was unable to identify any available necessary tasks within appellant's medical restrictions.

Appellant submitted reports from Dr. Shih dated August 3, 2010 to March 19, 2011. Dr. Shih noted seeing appellant in 2007 for tenderness of the first carpometacarpal joint, mild discomfort at the wrist and decreased range of motion of the right wrist. He diagnosed chronic right upper extremity pain complex, multifactorial and right first carpometacarpal pain complaints. Dr. Shih noted that appellant had not recovered from his initial disability and could not return to regular duty. Appellant had chronic symptomatology since his original work injury and his complaints were mitigated by permanent work restrictions. In a light-duty activity restriction form dated March 29, 2011, Dr. Shih noted that appellant was able to work subject to restrictions beginning July 31, 2002 of lifting and carrying 0 to 10 and 10 to 20 pounds for one to three hours per day, no lifting and carrying over 20 pounds, repetitive motions of the hands limited to one to three hours and pushing and pulling 20 to 40 pounds was prohibited. He noted that the restrictions were permanent.

Appellant submitted several CA-7 claims for compensation for total disability dated March 4 to May 13, 2011. The employing establishment noted on these forms that appellant did not work due to the withdrawal of his limited-duty job pursuant to NRP.

In a June 6, 2012 decision, OWCP determined that appellant's actual earnings as a modified vehicle mechanic fairly and reasonably represented his wage-earning capacity effective December 6, 2008. It found that the position was medically and vocationally suitable and he demonstrated his ability to perform the duties of the position for 60 days or more. As appellant's actual earnings of $1,055.19 exceeded the current pay rate for his date-of-injury job of $1,025.75, it reduced his wage-loss compensation to zero. OWCP also denied modification of its retroactive loss of wage-earning capacity determination on the grounds that the medical evidence did not show that appellant sustained a material worsening of his accepted conditions.

On June 14, 2012 appellant requested an oral hearing which was held on September 28, 2012. His attorney asserted that OWCP failed to follow FECA Bulletin No. 09-05. Counsel noted that the recurrence should have been accepted as the employing establishment

confirmed the withdrawal of the accommodating position which was the basis for the recurrence. Appellant asserted that a retroactive wage-earning capacity determination was not appropriate as the jobs appellant performed were not permanent jobs, the jobs were withdrawn and modified at the will of the employing establishment and did not constitute performing any classified position. He noted that OWCP relied on the November 28, 2008 job offer where the employing establishment reserved the right to change the job at will and the job was designed to meet the restrictions of appellant which made it makeshift or odd lot. Appellant referred to the November 28, 2008 job offer which noted "If a revision is necessary, you will be given a revised written modified assignment." His attorney contended that Dr. Shih's reports confirmed that appellant had injury-related residuals.

In a February 22, 2013 decision, an OWCP hearing representative affirmed the June 6, 2012 decision. He found that the modified position on which the loss of wage-earning capacity determination was based, fairly and reasonably represented appellant's wage-earning capacity and was not makeshift in nature. The hearing representative further found the fact that the employing establishment subsequently reduced or eliminated his work hours was not in and of itself sufficient to demonstrate that the modified job was temporary. He denied modification of the June 6, 2012 loss of wage-earning capacity determination, finding that the medical evidence was insufficient to establish a material worsening of appellant's accepted conditions.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage earning of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.[3] 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.[4] OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[5] Its procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[6]

[3] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

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

[5] 20 C.F.R. § 10.403(c).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

FECA Bulletin No. 09-05, however, outlines procedures for light-duty positions withdrawn pursuant to NRP. Retroactive loss of wage-earning capacity determinations should not be made in such cases without approval from the District Director.[7]

ANALYSIS

The June 6, 2012 retroactive loss of wage-earning capacity determination was premised on appellant's actual wages as a modified vehicle mechanic since November 28, 2008. OWCP found that the modified position was medically and vocationally suitable and that he demonstrated the ability to perform the duties of the position for more than 60 days. The Board finds, however, that OWCP failed to establish that appellant's actual wages as a modified vehicle mechanic fairly and reasonably represented his wage-earning capacity.

The record supports that the employing establishment withdrew appellant's modified vehicle mechanic position under NRP as of April 27, 2010. In an April 26, 2010 letter, the employing establishment informed him that no work within his restrictions was available under NRP. In CA-7 claim forms signed by employing establishment officials, it was noted that appellant did not work due to the withdrawal of his limited-duty position.

The Board finds that OWCP did not adjudicate the claim with regard to FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims such as this, in which limited-duty positions are withdrawn pursuant to NRP. As OWCP failed to properly follow the guidelines in FECA Bulletin No. 09-05, the Board finds that it did not fully consider all criteria for making a retroactive wage-earning capacity determination.[8]

In light of the Board's decision regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that OWCP improperly determined appellant's loss of wage-earning capacity.

[7] FECA Bulletin No. 09-05 (issued August 18, 2009).

[8] *See F.G.*, Docket No. 11-1926 (issued September 26, 2012). In this case, the Board found that OWCP failed to establish that the claimant's actual wages as a modified distribution clerk fairly and reasonably represented his wage-earning capacity. The Board noted that OWCP's retroactive loss of wage-earning capacity determination was premised on the claimant's actual wages as a modified distribution clerk since March 23, 2009; however, OWCP did not adjudicate the claim with regard to FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims such as this, in which limited-duty positions are withdrawn pursuant to NRP. Moreover, the record did not establish that OWCP obtained the District Director's approval prior to the issuance of its retroactive loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated February 22, 2013 is reversed.

Issued: November 12, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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