

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

T.H., Appellant)	
)	
and)	Docket No. 13-1324
)	Issued: February 25, 2014
U.S. POSTAL SERVICE, DALLAS)	
PERFORMANCE CLUSTER, Coppell, TX,)	
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2013 appellant filed a timely appeal from the December 10, 2012 and February 22, 2013 merit decisions 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.

ISSUES

The issues are whether: (1) OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 13, 2012 on the grounds that he had no residuals of his March 28, 2009 work injury after that date; (2) appellant received a \$27,821.72 overpayment of compensation; and (3) OWCP abused its discretion by refusing to waive recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on March 28, 2009 appellant, then a 35-year-old tractor-trailer operator, sustained a closed fracture of the middle phalanx of his left little finger, open wound of his left little finger without complications and contusion of his left little finger when the door of his work vehicle slammed on his left little finger.²

On April 16, 2009 Dr. Ryan Modlinski, an attending Board-certified orthopedic surgeon, released appellant to modified work with restrictions, including no lifting more than 10 pounds and no gripping or squeezing with his left hand. On April 24, 2009 appellant began working for the employing establishment in a modified position that involved scanning mail. In July 2009, he started a modified position that involved driving a tractor-trailer and a bobtail truck. Appellant stopped work on November 9, 2009 and has not returned to the employing establishment.

Appellant began working as a telephone banker for Wells Fargo Bank on January 4, 2010. His duties included handling incoming telephone calls from customers and addressing their banking needs.

Dr. Modlinski changed appellant's work restrictions in early August 2010 to allow him to lift up to 20 pounds.

Appellant was assessed under the National Reassessment Process (NRP) on August 13, 2010 and it was determined that the employing establishment did not have any work available within his established work restrictions. He was advised that, if work conditions remained unchanged, he would be placed on leave-without-pay status effective September 11, 2010.

In November 2010, appellant filed a claim (Form CA-2) alleging that he sustained a recurrence of disability on November 9, 2009 due to his March 28, 2009 work injury. He indicated on the form that he was earning \$12.50 per hour as a telephone banker for Wells Fargo Bank. OWCP began to compensate appellant, effective September 11, 2010, on the daily compensation rolls for wage loss due to NRP determination.

On April 27, 2011 OWCP asked Wells Fargo Bank to provide employment and pay rate information for appellant. Wells Fargo Bank responded that appellant was hired as a telephone banker on January 4, 2010 at \$12.25 per hour with pay increases occurring on July 1, 2010 (\$12.50 per hour), September 1, 2010 (\$12.88 per hour) and March 13, 2011 (\$13.15 per hour). Appellant's job involved taking incoming calls from customers to service their banking needs and his current pay rate was \$13.15 per hour.

In a June 23, 2011 memorandum, OWCP indicated that it would not be making a wage-earning capacity determination for appellant.

² At the time of his injury, appellant was working an average of 37.80 hours per week; his job required carrying up to 45 pounds and lifting up to 70 pounds. March 28, 2009 x-ray testing of his left hand showed tiny calcific density along the volar aspect of the proximal interphalangeal (PIP) joint of his little finger, which "could represent a small avulsion injury." No acute fracture or dislocation was seen otherwise. Appellant previously had surgery on his left middle finger and it has not been accepted that the March 28, 2009 work incident caused injury to any finger other than the left little finger.

In August 2011, OWCP referred appellant to Dr. Donald Mauldin, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on whether he continued to have residuals of his March 28, 2009 work injury.

In a report dated September 1, 2011, Dr. Mauldin provided a detailed description of appellant's factual and medical history, including examination findings and treatment regimens. He indicated that on examination of appellant's left hand no significant redness or erythema was observed. Dr. Mauldin stated that appellant was somewhat jumpy to palpation along the joint line medially and laterally at the PIP joint itself and noted that neurovascular status was grossly intact. Appellant could make almost a complete fist, lacking the last few millimeters of complete flexion into the wrist, but he had no major restricted movement from a functional perspective with his left little finger. Dr. Mauldin stated that appellant had complete extension of all joints and good flexion at the distal proximal interphalangeal (DIP) and metacarpophalangeal (MP) joints and mild restricted flexion up to just short of 90 degrees of the PIP joint with complete extension of his left little finger. He diagnosed status post crush injury to the left little finger with reported avulsion fracture of the distal portion of the lateral middle phalanx.³ Dr. Mauldin stated that there was no objective documentation of residuals of the work injury, but appellant had very mild restricted movement on a voluntary basis of the left little finger as it related to the fracture. He opined that the type of injury appellant sustained on March 28, 2009 normally would have resolved within three to four months maximum. Dr. Mauldin indicated that appellant's primary complaints were subjective in nature and were well beyond what one would normally expect for his injury this far after the injury. He found that there was nothing to indicate that appellant aggravated any condition on March 28, 2009 such that he would have permanent problems. Dr. Mauldin noted that there was no objective documentation other than very mild restricted movement of the left little finger on a voluntary basis. He noted that there itself were no fractures involving the DIP or PIP joints of the left little finger and one would not expect any significant residuals from a small avulsion fracture of the middle phalanx. Dr. Mauldin indicated that, based on the diagnostic testing and examination findings, there was no objective evidence that appellant could not return to his regular, full work activity in any capacity. He stated:

“A functional capacity evaluation will be carried out and appropriate forms filled out, if necessary, from that standpoint. However, as stated, there is no objective reasoning that this individual should be restricted with use of his left hand in any fashion.... The continued level of pain is inconsistent with a nonjoint-related fracture with what appears to be good movement with some degree of mild voluntarily restricted movement of the left little finger. Therefore, as previously stated, it is my opinion that this individual should have recovered well before this period of time from this type of an injury.”

Dr. Mauldin had appellant undergo a functional capacity evaluation on September 29, 2011.⁴ He provided an October 7, 2011 addendum in which he indicated that, based on the functional capacity evaluation and his examination findings, appellant could return

³ Dr. Mauldin indicated that there was no joint involvement of the DIP or PIP joints of appellant's left little finger in the initial x-ray findings.

⁴ The functional capacity evaluation indicated that appellant had limitations, including carrying up to 30 pounds, lifting up to 40 pounds, pulling up to 54 pounds and pushing up to 76 pounds.

to full work activity. OWCP provided a copy of Dr. Mauldin's reports to Dr. Modlinski for comment, but Dr. Modlinski did not respond.

Appellant filed a Form CA-7 claiming compensation for wage loss from August 29 to September 23, 2011. OWCP advised him that Dr. Mauldin indicated that he could work full duty without restrictions and provided him 30 days to provide supportive medical evidence for his disability. Appellant submitted a Form CA-17 dated August 28, 2011 in which a person with an illegible signature provided various work restrictions.

OWCP denied appellant's claim for wage loss during the period August 29 to September 23, 2011, but its hearing representative reversed this determination because OWCP had effectively terminated appellant's compensation without providing a required pretermination notice.

In a March 13, 2012 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits on the grounds that he ceased to have residuals of his March 28, 2009 work injury. It indicated that the weight of medical evidence regarding continuing work-related residuals rested with the opinion of Dr. Mauldin. Appellant was provided 30 days to present evidence and argument challenging the proposed termination.

Appellant submitted an April 5, 2012 report in which Dr. Nicholas Iagulli, an attending Board-certified orthopedic surgeon, stated that he presented with complaints of occasional sharp pain, a constant throbbing pain and severe, constant weakness of the left hand. He reported to Dr. Iagulli that the onset of his symptoms was gradual after the March 28, 2009 injury and that his symptoms were worse with activity. Dr. Iagulli indicated that appellant was not on any medication. He noted that, on examination, appellant reported PIP joint tenderness of his left small finger and extensor tendon tenderness, but noted normal grip strength, sensation, vascular impulses and range of motion in the left hand and wrist. Dr. Iagulli noted that appellant's x-rays showed stable hardware in the proximal phalange of his left middle finger and no degenerative joint disease in the PIP joint of his left little finger. He diagnosed left little finger pain, PIP joint chondromalacia and extensor tendinitis. Dr. Iagulli indicated that he would treat appellant's condition conservatively.⁵

On May 24, 2012 Dr. Iagulli completed a Form CA-17 indicating that appellant could work full-time limited duty, but he placed zeros beside all work activities. He listed the date of injury as March 28, 2009 but did not provide any clinical findings or diagnoses.

By decision dated July 2, 2012, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 13, 2012 based on the opinion of Dr. Mauldin. It indicated that, while the Form CA-17 of Dr. Iagulli recommended that appellant restrict his activities, there was no explanation regarding the need for such restrictions or explaining their relationship to the accepted work injury.

Appellant requested a hearing with an OWCP hearing representative. At the September 27, 2012 hearing, he testified that attending physician's indicated that he had possible nerve damage but that Dr. Mauldin did not address this matter. Appellant asserted that

⁵ Dr. Iagulli reported similar findings when appellant visited him on May 24, 2012.

Dr. Mauldin did not adequately evaluate his left little finger. He indicated that the functional capacity evaluation revealed that he could not perform full duty as he could only carry up to 30 pounds, lift up to 40 pounds, pull up to 54 pounds and push up to 76 pounds. Appellant stated that his date-of-injury job required him to lift a minimum of 70 pounds. He testified that he currently worked full time for Wells Fargo Bank as a collector in the automobile finance department, a job that required minimal lifting and that now makes “15 something” an hour.

At the hearing, appellant submitted an undated statement from in which Dr. Iagulli stated that he needed to work limited duty due to his left hand and that he had constant ongoing disability due to his workers’ compensation injury. Dr. Iagulli noted that appellant would need to attend an office appointment every three months for cortisone injections. He diagnosed left little finger pain, PIP joint chondromalacia and extensor tendinitis.

After the hearing, appellant submitted an October 17, 2012 report of Dr. Michael Muncy, an attending osteopath and Board-certified orthopedic surgeon, who described appellant’s March 28, 2009 work injury and indicated that he had apparent weakness and inability to resist attempts to extend his left finger while trying to flex it (compared to the right side). Dr. Muncy stated that, since retesting, appellant had a subjectively decreased sensation in the tip of that finger. He indicated that the DIP joint functioned normally with no gross instability, but that appellant was hypersensitive to touch and pain. Dr. Muncy discussed appellant’s functional capacity examination noting the limitations found in the report. He diagnosed chronic pain in the left little finger and PIP joint secondary to a crush injury on March 28, 2009. Dr. Muncy indicated that appellant most likely had a peripheral nerve or digital nerve injury secondary to this crush injury with chronic capsular pain of that PIP joint and tendinitis mainly of the extensor tendons. He opined that, based on his evaluation of the medical records and his physical examination, appellant was still having disabling chronic pain and weakness. Although the finger fracture was well healed, appellant had some permanent nerve injury and experienced chronic and permanent pain secondary to the crush injury around the joint and capsule.

In a December 10, 2012 decision, OWCP’s hearing representative affirmed OWCP’s July 2, 2012 termination decision. She also remanded the case to OWCP given that, subsequent to the termination, appellant had submitted medical evidence of Dr. Muncy which now created a conflict in the medical opinion evidence regarding continuing work-related residuals. The case was remanded to OWCP for referral to an impartial medical specialist.⁶

In a January 22, 2013 letter, OWCP advised appellant of its preliminary determination that he received a \$27,821.72 overpayment of compensation “because [you] were paid incorrectly, the pay was not based on your actual earning.” It also made a preliminary determination that he was not at fault in the creation of the overpayment. OWCP then provided a description of how it determined the amount of the \$27,821.72 overpayment of compensation, providing figures for the salary of appellant’s date-of-injury job and the current salary for this job. It indicated that appellant had \$527.77 per week in actual earnings without providing any explanation for this figure and determined that he had a wage-earning capacity of \$356.58 per

⁶ OWCP’s hearing representative also indicated that, on remand, an overpayment should be calculated based on the fact that appellant received actual wages from private employment while receiving OWCP compensation. After additional development of the medical evidence, OWCP reinstated appellant’s compensation for total disability and medical benefits.

week. OWCP noted that he was paid \$53,498.51 in compensation for the period September 11, 2010 to April 12, 2012, but that he should have been paid \$22,467.49. It advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. OWCP informed him that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment. Appellant did not submit any response within the allotted period.

In a February 22, 2013 decision, OWCP determined that appellant received a \$27,821.72 overpayment of compensation. It did not provide any elaboration on how the overpayment was calculated. OWCP did not provide any finding on whether appellant was at fault in the creation of the overpayment and stated, "After carefully studying your case and fully considering any additional evidence or arguments submitted, we have decided not to waive the overpayment. The reasons for this decision are explained in the enclosed memorandum." However, the attached memorandum did not contain any explanation for why OWCP denied waiver of recovery of the overpayment. OWCP requested that appellant forward a check in the amount of \$27,821.72.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁷ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that on March 28, 2009 appellant sustained a closed fracture of the middle phalanx of his left little finger, open wound of his left little finger without complications and contusion of his left little finger when the door of his work vehicle slammed on his left little finger. Appellant received compensation for total disability, but OWCP terminated his wage-loss compensation and medical benefits effective April 13, 2012 based on the opinion of Dr. Mauldin, a Board-certified orthopedic surgeon, who served as an OWCP referral physician.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Mauldin. The September 1 and October 7, 2011 reports of Dr. Mauldin establish that appellant ceased to have residuals of his March 28, 2009 work injury after April 13, 2012.

In a report dated September 1, 2011, Dr. Mauldin indicated that, on physical examination of the left little finger, appellant had complete extension and mild restriction of flexion up to just

⁷ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁸ *Id.*

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

short of 90 degrees of the PIP joint. Appellant could make almost a complete fist and neurovascular status was grossly intact. Dr. Mauldin stated that there was no objective documentation of residuals of the March 28, 2009 work injury, but that appellant had very mild restricted movement on a voluntary basis of the left little finger. He opined that the type of injury appellant sustained on March 28, 2009 normally would have resolved itself within a three- to four-month period of time at a maximum. Dr. Mauldin indicated that appellant's primary complaints were subjective in nature and were well beyond what one would normally expect for his injury this far after the injury. He found that there was nothing to indicate that appellant aggravated any condition on March 28, 2009 such that he would have permanent problems and posited that he could return to his regular, full work activity.¹⁰ Dr. Mauldin requested that appellant undergo a functional capacity evaluation, but noted "there is no objective reasoning that this individual should be restricted with use of his left hand in any fashion...."

Dr. Mauldin had appellant undergo a functional capacity evaluation on September 29, 2011. He provided an October 7, 2011 addendum in which he indicated that, based on the functional capacity evaluation and his examination findings, appellant could return to full work activity. Appellant had argued that the physical limitations noted in the functional capacity evaluation showed that she still had work-related residuals.¹¹ However, Dr. Mauldin reviewed the evaluation findings and reaffirmed his opinion that appellant had no work limitations due to the March 28, 2009 work injury as this injury had resolved itself.

The Board has carefully reviewed the opinion of Dr. Mauldin and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Mauldin provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹² He provided medical rationale for his opinion by explaining that there were no objective findings showing that appellant continued to have residuals of the March 28, 2009 work injury. Dr. Mauldin suggested that the very minor little finger deficits observed on examination were due to volitional action of appellant's part.

Appellant submitted reports of Dr. Nicholas Iagulli, an attending Board-certified orthopedic surgeon, but these reports are of limited probative value regarding the existence of continuing work-related residuals. In April 5 and May 24, 2012 reports, Dr. Iagulli diagnosed left little finger pain, PIP joint chondromalacia and extensor tendinitis. However, he did not provide a clear opinion that these conditions were related to the March 28, 2009 work injury. The Board notes that it has not been accepted that appellant sustained a PIP joint or extensor tendon injury on March 28, 2009. On May 24, 2012 Dr. Iagulli completed a Form CA-17 indicating that appellant could work limited duty on a full-time basis, but he placed zeros beside all work activities. Although he listed the date of injury as March 28, 2009, he did not provide

¹⁰ Dr. Mauldin noted that there itself were no fractures involving the DIP or PIP joints of the left little finger and one would not expect any significant residuals from a small avulsion fracture of the middle phalanx.

¹¹ The functional capacity evaluation indicated that appellant had limitations, including carrying up to 30 pounds, lifting up to 40 pounds, pulling up to 54 pounds and pushing up to 76 pounds.

¹² See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

any clinical findings or diagnoses or otherwise provide medical rationale explaining how the March 28, 2009 injury could have caused such disability.¹³

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁴ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁵

Section 8115(a) of FECA provides that 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.”¹⁶ The Board has stated, “Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.”¹⁷

Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee’s particular needs or a position that is seasonal in an area where year-round employment is available.¹⁸ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-

¹³ In her December 10, 2012 decision, OWCP’s hearing representative indicated that, after OWCP’s proper termination action, appellant submitted medical evidence which required additional development of the medical evidence. The record contains an April 2, 2013 document discussing this matter, but no final, adverse decision was issued by OWCP between December 10, 2012 and the filing of the present appeal.

¹⁴ 5 U.S.C. § 8102(a).

¹⁵ *Id.* at § 8129(a).

¹⁶ *Id.* at § 8115(a).

¹⁷ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as “the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*.” (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee’s wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee’s compensation.

¹⁸ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (July 1997).

time position.¹⁹ OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.²⁰

OWCP procedure specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would tend to overcome it.”²¹

ANALYSIS -- ISSUE 2

The Board finds that the case was not in posture for decision regarding whether appellant received a \$27,821.72 overpayment of compensation. In finding that he received a \$27,821.72 overpayment; it appears that OWCP conducted a wage-earning capacity determination based on his private employment with Wells Fargo Bank. However, this apparent wage-earning capacity determination is deficient in several respects and cannot presently serve to support the finding of a \$27,821.72 overpayment. OWCP did not provide adequate findings of fact and reasoning in support of its calculation of the overpayment. It did not provide any notable discussion of the Board precedent regarding the determination of wage-earning capacity, nor did it make a clear finding that appellant’s work for Wells Fargo Bank fairly and reasonably represented his wage-earning capacity. OWCP indicated that appellant had actual wages of \$527.77 per week without appropriately explaining how this figure was calculated. The record reflects that he started working for Wells Fargo Bank in January 2010 at \$12.25 per hour, but his earnings per hour changed over time. OWCP did not indicate the number of hours worked per week that it used in making the \$527.77 calculation and the record does not otherwise reflect the number of hours per week that appellant worked for Wells Fargo Bank over time.²²

Given the deficiencies in OWCP’s calculation of the overpayment, appellant would not fully understand the deficiencies in his claim and how to overcome them.²³ The case shall be remanded to OWCP to provide an explanation, with adequate fact findings and reasoning, regarding appellant’s overpayment. After such proceedings as it deems necessary, OWCP shall issue an appropriate decision regarding the overpayment.²⁴

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits effective April 13, 2013 on the grounds that he had no

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(3) (July 1997).

²⁰ *See id.* at Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

²¹ *See id.* at Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

²² It is further noted that, when OWCP made its final determination on the overpayment on February 22, 2013, it did not discuss the matter of fault and did not explain its decision to deny waiver of recovery of the overpayment.

²³ *See id.*

²⁴ Given the remand of the case to OWCP concerning the fact and amount of the overpayment, it is not necessary for the Board to consider the third issue of waiver at this time.

residuals of his March 28, 2009 work injury after that date. The Board further finds that the case is not in posture for decision regarding whether appellant received a \$27,821.72 overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed. The February 22, 2013 decision of OWCP is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 25, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board