

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

D.P., Appellant

and

**DEPARTMENT OF THE AIR FORCE, U.S. AIR
FORCE ACADEMY, CO, Employer**

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**Docket No. 14-301
Issued: July 16, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 25, 2013 appellant filed a timely appeal from a November 14, 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.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation to zero based on its finding that his actual earnings as a computer assistant effective September 2, 2007 fairly and reasonably represented his wage-earning capacity; and (2) whether appellant established that the April 4, 2013 loss of wage-earning capacity determination should be modified.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated June 19, 2003, the Board affirmed in part and reversed in part a May 23, 2002 OWCP decision finding that appellant had not established a recurrence of disability beginning August 31, 2001 and terminating authorization for medical treatment.² The Board affirmed OWCP's finding that he had not established an employment-related recurrence of disability beginning August 31, 2001 but reversed the termination of his authorization for medical treatment. The Board set aside an August 8, 2002 decision denying appellant's request for further review of the merits of his claim under 5 U.S.C. § 8128(a) after finding that he had submitted sufficient evidence to warrant reopening his case for further merit review. By decision dated July 6, 2012, the Board set aside a June 27, 2011 decision denying modification of a May 17, 2005 loss of wage-earning capacity decision and a September 26, 2011 nonmerit decision denying his request for reconsideration.³ The Board found that appellant had established that the May 17, 2005 loss of wage-earning capacity determination was issued in error as it was based on a temporary position. The facts of the case as set forth in the prior decision are hereby incorporated by reference.

On August 13, 2007 the employing establishment advised appellant that his current position as a computer assistant was not permanent as it was funded through a pipeline reemployment program. It reassigned him to a permanent position as a computer assistant with similar duties.

On September 2, 2007 appellant accepted the reassignment position as a computer assistant at the employing establishment. He worked in that position until he received disability retirement from the Office of Personnel Management (OPM) effective January 16, 2010.⁴ Appellant subsequently elected benefits under FECA.

By letter dated November 26, 2012, appellant requested that OWCP accept his claim for complex regional pain syndrome (CRPS). On January 8, 2013 OWCP referred him to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of appellant's injury-related condition, disability and whether he sustained CRPS causally related to his employment. It further requested that Dr. Lotman address whether appellant was capable of performing either his date-of-injury position as an electronic technician or his permanent light-duty position as a computer assistant.

² Docket No. 03-205 (issued June 19, 2003). OWCP accepted that on September 20, 1995 appellant, then a 39-year-old electronic technician, sustained a right wrist fracture in the performance of duty. He further sustained right carpal tunnel syndrome and right mononeuritis of the upper extremity under file number xxxxxx129. OWCP combined appellant's claims under file number xxxxxx542. Appellant retired on disability on March 14, 1998. In a decision dated April 9, 2001, OWCP found that he had no loss of wage-earning capacity as of December 12, 2000 based on his actual earnings in private employment as a component engineer. On March 7, 2005 appellant returned to work with the employing establishment as a computer assistant.

³ Docket No. 12-55 (issued July 6, 2012).

⁴ In a letter dated January 7, 2010, OPM indicated that it had determined that he was disabled from work as a computer assistant as the result of a right upper extremity condition.

In a report dated March 1, 2013, Dr. Lotman discussed appellant's complaints of pain in his right upper extremity with numbness in the median distribution of the right hand. On examination of the right upper extremity he found a minimal loss of sensation and a "slight bluish discoloration of the hands and fingers." Dr. Lotman noted that appellant had pain on the dorsal aspect of the right wrist, loss of range of motion of the fingers, hair loss on the right versus the left and slight swelling over the triangular fibrocartilage complex. He answered "yes" to the question of "Do you find clinical objective findings to support a diagnosis of complex regional pain syndrome of the right upper extremity as related to the accepted work-related condition." Dr. Lotman noted that appellant had continuing pain throughout his right upper extremity not related to inciting events. He stated that could not diagnose any other condition which would cause these symptoms and physical findings.

In response to the question of whether the accepted employment injury caused objective symptoms, Dr. Lotman related that appellant had "physical findings today with coldness, discoloration and edema of the right upper extremity. [Appellant] also has loss of motion in the hands and fingers." He found that appellant was disabled from working as an electronic technician but could work in the computer assistant position considering only his CRPS. Appellant noted that he had neck and back problems unrelated to his work injury. In a March 4, 2013 work restriction evaluation, Dr. Lotman advised that appellant could work four hours a day with restrictions and noted that he was "on significant pain medi[cations]." He provided work limitations of reaching for 30 minutes, pushing, pulling and lifting up to 10 pounds for one hour per day and performing repetitive wrist and elbow movements for one hour per day. Dr. Lotman found that appellant could not operate a motor vehicle at work.

Based on Dr. Lotman's report, by decision dated April 4, 2013, OWCP retroactively reduced appellant's compensation to zero. It found that his actual earnings as a computer assistant effective September 2, 2007 fairly and reasonably represented his wage-earning capacity.

In another decision dated April 4, 2013, OWCP denied appellant's request for compensation for disability based on its finding that he had not established that the April 4, 2013 loss of wage-earning capacity determination should be modified. It also denied his request to expand his claim to include CRPS.

On April 10, 2013 appellant requested reconsideration of the April 4, 2013 decisions. He argued that both Dr. Lotman and Dr. James Benoist, a Board-certified internist and his attending physician, found that appellant was unable to drive.

On August 14, 2013 OWCP accepted appellant's claim for right CRPS.

On August 14, 2013 OWCP informed Dr. Benoist that it had accepted appellant's claim for right carpal tunnel syndrome, a right wrist fracture and right CRPS. It requested that he address the side effects of any prescribed medication.

In a report dated September 13, 2013, Dr. Benoist related that he treated appellant for right carpal tunnel syndrome, pain from a right wrist fracture and right CRPS. He discussed appellant's medications to control pain for his CRPS and his Elavil for depression.

On September 16, 2013 OWCP requested that Dr. Lotman review progress reports from Dr. Benoist from 2012 and 2013 and explain his rationale for finding that appellant could not operate a motor vehicle at work. In a September 19, 2013 response, Dr. Lotman stated that he placed a restriction on driving at work because appellant took two opiate pain relievers. He stated, "It is my opinion that these two medications along with the Elavil places [appellant] at a higher risk for alertness and dexterity in driving a vehicle at work, which could place himself or other employees at risk."

By decision dated November 14, 2013, OWCP denied modification of its April 4, 2013 decision wage-earning capacity decision. It noted that Dr. Benoist's progress reports did not establish side effects from his medication. OWCP further found that, while Dr. Lotman indicated that appellant was at an increased risk driving a motor vehicle, he did not actually find that he was experiencing problems with alertness or dexterity.

On appeal, appellant contends that he worked outside of his restrictions and had to take opiates for CRPS. He maintained that Dr. Lotman found that he could not drive due to his narcotic use. Appellant stated that he no longer drives a motor vehicle.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA⁵ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.⁶ 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.⁷ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁸ has been codified at 20 C.F.R. § 10.403. 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.⁹ Its procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.¹⁰

The Federal (FECA) Procedure Manual provides that OWCP can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did

⁵ See *supra* note 1.

⁶ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁷ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403(c).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.6(a) (July 2013)

not occur because of any change in the injury-related condition affecting the ability to work.¹¹ The procedure manual further provides, “Before proceedings with a[n] LWEC [loss of wage-earning capacity] determination, the [claims examiner] should ensure that current medical evidence is on file that establishes that the injury-related condition does not prevent the employee from performing the position upon which the LWEC determination is being considered.”¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right wrist fracture on September 20, 1995 in the performance of duty and right carpal tunnel syndrome and right mononeuritis under file number xxxxxx129. On September 2, 2007 appellant accepted a position as a computer assistant with the employing establishment and worked in that position until he retired on disability effective January 16, 2010. He elected to receive compensation from OWCP. By decision dated April 4, 2013, OWCP reduced appellant’s compensation to zero after finding that his actual earnings as a computer assistant beginning September 2, 2007 fairly and reasonably represented his wage-earning capacity. In a second decision dated April 4, 2013, it denied his request for disability compensation after finding that he had not established modification of the loss of wage-earning capacity determination. On April 10, 2013 appellant requested reconsideration.

There are situations when a retroactive loss of wage-earning capacity determination may be appropriate. As noted, OWCP’s procedures provide that it can make a retroactive loss of wage-earning capacity determination if appellant 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 the injury-related condition affecting the ability to work.¹³ Its procedures provide, however, that it is rare to issue a retroactive determination after an employee is no longer working and that OWCP must ensure that medical evidence supports that the work injury does not prevent the employee from performing the position that is the basis for the loss of wage-earning capacity determination.¹⁴ Prior to issuing its April 4, 2013 loss of wage-earning capacity determination, OWCP referred appellant to Dr. Lotman for a second opinion to determine whether his injury-related condition had worsened. Based on Dr. Lotman’s report, it found that his actual earnings as a computer assistant beginning September 2, 2007 fairly and reasonably represented his wage-earning capacity and retroactively issued a loss of wage-earning capacity determination.

The Board finds that OWCP did not meet its burden of proof by issuing a retroactive loss of wage-earning capacity determination. OWCP must evaluate any work stoppage and determine whether it is employment-related prior to issuing a retroactive loss of wage-earning

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.815.7(a) (June 2013).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; see also *K.E.*, Docket No. 10-1211 (issued April 14, 2011).

capacity determination.¹⁵ In his February 19, 2013 report, Dr. Lotman diagnosed CRPS based on clinical findings of right upper extremity loss of motion, coldness, discoloration and edema. Regarding whether the work injury continued to cause objective symptoms, he advised that the persistent findings included the reduced motion, coldness, swelling and discoloration of the right upper extremity. Dr. Lotman opined that appellant could work in the computer assistant position. In a March 4, 2013 work restriction evaluation, however, he determined that appellant could work only four hours a day with restrictions and noted that he was on substantial pain medication. Dr. Lotman further provided work restrictions, including reaching for 30 minutes, pushing, pulling and lifting up to 10 pounds for one hour per day, performing repetitive wrist and elbow movements for one hour per day and not operating a motor vehicle at work. At that time, he had not clarified whether the restriction for working only four hours a day was for the work-related condition or for other conditions. Although clarification of the report was sought by OWCP, the retroactive wage-earning capacity decision preceded the receipt of the supplemental report Dr. Lotman.¹⁶ The March 1, 2013 report of Dr. Lotman, therefore, is insufficient to establish that appellant's work stoppage did not occur because of any change in his injury-related condition affecting his ability to work.¹⁷ Consequently, OWCP did not meet its burden of proof to retroactively reduce appellant's compensation.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation to zero based on its finding that his actual earnings as a computer assistant effective September 2, 2007 fairly and reasonably represented his wage-earning capacity.¹⁸

¹⁵ See *William M. Bailey*, 51 ECAB 197 (1999).

¹⁶ The clarification report from Dr. Lotman further supported the finding that appellant's work-related condition prevented him from performing the wage-earning capacity position. Furthermore, OWCP expanded appellant's claim to include CRPS even before receiving Dr. Lotman's supplemented report.

¹⁷ See *C.Y.*, Docket No. 07-1156 (issued April 1, 2008).

¹⁸ In view of the Board's finding regarding the appropriateness of the loss of wage-earning capacity determination, the issue of whether appellant has established that the loss of wage-earning capacity decision should be modified is moot.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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