United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 15-1853**
	)	**Issued: January 19, 2016**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 9, 2015 appellant, through counsel, filed a timely appeal from a July 23, 2015 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 this case.

ISSUE

The issue is whether appellant has established that a modification of a July 31, 2009 wage-earning capacity determination was warranted.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has been before the Board on a prior appeal.[2] On May 10, 2001 appellant, then a 47-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome as a result of his federal employment. OWCP accepted the claim on August 27, 2001 for bilateral carpal tunnel syndrome.[3] The record indicates that appellant underwent a right carpal tunnel release surgery on December 28, 2001 and a left carpal tunnel release surgery on January 25, 2002. He also had a left ulnar nerve decompression surgery on June 5, 2003. Appellant returned to a light-duty position, but stopped work on September 22, 2003. He returned to work at four hours a day on October 14, 2003 and then filed a traumatic injury claim (Form CA-1) for injuries occurring on October 18, 2005 when he fell on stairs, OWCP File No. xxxxxx349. OWCP accepted that claim for neck strain, right shoulder rotator cuff tear, and right shoulder adhesive capsulitis. Appellant began receiving compensation for temporary total disability which OWCP based on four hours a day for the occupational disease claim and four hours for the traumatic injury claim.

OWCP sent a copy of the job description for a motor vehicle dispatcher (Department of Labor's *Dictionary of Occupational Titles*, DOT # 249.157-014) to the attending physician, Dr. Michael McManus, a Board-certified occupational medicine specialist. The job description indicated that the job involved compiling lists of vehicles, assigning vehicles, recording data, maintaining records, and issuing equipment. The position was identified as sedentary, with a 10 pound lifting requirement, and occasional fingering and handling. OWCP requested an opinion as to whether appellant could perform the job duties. In a response dated September 19, 2008, Dr. McManus checked a box marked "approve this occupation."

By decision dated July 31, 2009, OWCP reduced appellant's compensation, finding that he had the capacity to earn wages of $470.40 a week in the position of motor vehicle dispatcher.

Appellant filed a claim for a recurrence of disability (Form CA-2a) on February 22, 2012. The evidence submitted included a report dated March 5, 2012 from Dr. McManus, who asserted that appellant's condition had worsened. Dr. McManus reported that 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." By decision dated April 17, 2012, OWCP denied modification of the wage-earning capacity determination. Appellant requested a hearing. On December 13, 2012 an OWCP hearing representative affirmed the April 17, 2012 decision.

In its June 12, 2013 decision, the Board affirmed the December 13, 2012 OWCP decision. The Board found that the medical evidence did not show a material change in the nature and extent of an injury-related condition. It was noted that OWCP had not accepted a lymphedema condition.

[2] Docket No. 13-0603 (issued June 12, 2013).

[3] A March 29, 2007 OWCP decision found the accepted conditions also included bilateral epicondylitis and right trigger finger.

Appellant continued to submit medical evidence regarding his condition. In a report dated March 8, 2013, Dr. McManus indicated that appellant reported "increased paresthesias involving ulnar distribution right hand with right dysesthesias interfering with sleep." He noted that appellant had permanent work restrictions and there was "no change." Dr. McManus noted a March 1, 2013 electromyogram/nerve conduction study (EMG/NCV) from Dr. Donald Bright, a neurologist. Dr. Bright reported that there was evidence of moderate right carpal tunnel, that had "progressed" since a 2008 study.

On August 15, 2014 appellant submitted a (Form CA-2a) notice of recurrence dated May 22, 2014. He submitted a May 8, 2013 report from Dr. Benjamin Betteridge, Board-certified in emergency medicine, who diagnosed carpal tunnel syndrome. Dr. Betteridge indicated that appellant reported pain and weakness in grip and was frustrated with continuing symptoms. Appellant also resubmitted the March 1, 2013 EMG/NCV study.

By letter dated August 19, 2014, OWCP requested that appellant submit additional evidence with respect to modification of a wage-earning capacity determination. Appellant submitted a September 12, 2014 statement asserting that he was totally disabled. According to him he could not do any repetitive work and had to take pain medication daily. In a report dated September 4, 2014, Dr. McManus opined that, because of appellant's multiple upper extremity conditions and surgeries, he had developed post-traumatic lymphedema of his right greater than left distal upper extremity. He reported that recent electrodiagnostic testing has confirmed a progression or worsening of appellant's right carpal tunnel syndrome status post carpal tunnel release. Dr. McManus opined, "This is a direct result of [appellant's] secondary upper extremity post[-]traumatic lymphedema. This chronic lymphedema which is aggravated by any sustained or repetitive use of his hands or upper extremities increases the pressure within the carpal tunnel and has resulted in a recurrence of his right carpal tunnel syndrome status post carpal tunnel release."

The case was referred to an OWCP medical adviser with respect to whether lymphedema should be accepted as a consequential injury. In a report dated September 18, 2014, the medical adviser, Dr. L.I. Weaver, opined that appellant's "bilateral upper extremity aching, stiffness, cold sensitivity, and diffuse brawny edema are more likely than not a consequence of his work, accepted conditions and surgery for the accepted conditions." The medical adviser indicated that the treating physician had reported the most likely diagnosis to explain the diffuse brawny swelling was bilateral lymphedema and it was most likely a consequence of appellant's work duties, accepted conditions, and surgery for the accepted conditions. On September 19, 2014 OWCP accepted lymphedema.

By decision dated October 16, 2014, OWCP found that the evidence of record was insufficient to warrant modification of the July 31, 2009 wage-earning capacity determination. It noted the lymphedema was an accepted condition, but Dr. McManus did not explain how the condition had changed such that appellant was disabled for the motor vehicle dispatcher position.

On October 27, 2014 OWCP received a note dated October 17, 2014 from Dr. McManus, indicating that appellant had received a denial from OWCP and wished to discuss the reasons he could not perform the dispatcher position. Dr. McManus indicated that appellant would discuss with his representative and bring the denial letter to Dr. McManus for review. In a report dated

October 23, 2014, he provided results on examination and indicated that appellant continued to have permanent work restrictions.

In a report dated November 12, 2014, Dr. McManus wrote that appellant had post-traumatic lymphedema, as noted in his prior chart notes. He reported that appellant's condition was recurrently aggravated by any repetitive use of his hands, and that he had involvement of the right or dominant hand much more severe than the left hand. Dr. McManus reported that this edema results in progressive limited use of his hand function with aggravation of his carpal tunnel symptoms, digit, stiffness, and pain. He opined, "Due to this condition, [appellant] has previously failed or been unable to complete a computer retraining class. The job of dispatcher requires repetitive use of keyboard and rapid fingering. [Appellant] would be unable to perform this job due to his chronic upper extremity deficits, lymphedema, and recurrent right carpal tunnel syndrome."

On June 5, 2015 appellant, though counsel, submitted a request for reconsideration. He submitted a December 10, 2014 report from Dr. McManus, indicating that he had reviewed the job description for a motor vehicle dispatcher. Dr. McManus reported that appellant "cannot lift or carry 5 pounds for 5-1/3 hours per day, much less 10 pounds occasionally for 1/3 of the day due to the swelling in his arms or his bilateral recurrent upper extremity lymphedema, which has caused a recurrence of his right carpal tunnel syndrome." He further noted that appellant could not reach frequently for 2/3 of the workday due to his recurrent upper extremity lymphedema and recurrent right carpal tunnel syndrome, and that his work restrictions were five pounds lifting for one hour per day, no pushing or pulling of more than five pounds per day, and no reaching in front or above his head for more than one hour per day, with no keyboarding. Dr. McManus concluded, "The chronic lymphedema is the reason for lowering [appellant's] weight restriction to [five] pounds and the repetitive motion to even 1/3 of the day exacerbates the swelling and edema in his arms and hands. [To] a reasonable medical certainty, [appellant] cannot perform the job duties of motor vehicle operator [sic]."

In a report dated July 8, 2015, Dr. McManus provided results on examination. He indicated that appellant continued to have permanent work restrictions.

By decision dated July 23, 2015, OWCP declined to modify the July 31, 2009 wage-earning capacity determination. It found that the increased work restrictions were based on a telephone consultation, and the dispatcher position did not involve constant keyboarding or rapid fingering, as described by Dr. McManus. In addition, OWCP found that the change in restrictions was based largely on complaints of recurrent swelling with repetitive motions, but on-going medical evidence showed only mild edema on the right hand/wrist.

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.[4] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[5]

ANALYSIS

In the present case, OWCP determined on July 31, 2009 that the selected position of motor vehicle dispatcher represented appellant's wage-earning capacity. Appellant seeks to modify the wage-earning capacity determination on the basis that there was a material change in the nature and extent of the injury-related condition. He therefore bears the burden of proof to modify the wage-earning capacity determination.

In his September 4, 2014 report, Dr. McManus noted a worsening of appellant's carpal tunnel syndrome on an EMG/NCV report and opined that it was the result of the lymphedema increasing the pressure within the carpal tunnel. He opined in his November 12, 2014 report that the edema results in progressive limited use of appellant's hand function with aggravation of his carpal tunnel symptoms, with stiffness and pain. In his December 10, 2014 report, Dr. McManus indicated that he had reviewed the job requirements for the motor vehicle dispatcher position and opined that appellant could not perform the position.

The Board notes that at the time of the Board's last decision on June 12, 2013 the condition of lymphedema was not an accepted condition. OWCP further developed the evidence and referred the evidence to an OWCP medical adviser for an opinion as to whether the lymphedema was a consequential injury. Based on the opinion of the medical adviser, OWCP accepted lymphedema as a consequential injury on September 19, 2014.

In the case of *M.M.*, the claimant had submitted medical evidence supporting a worsening of a newly diagnosed shoulder condition.[6] The issue in the case was whether a wage-earning capacity determination should be modified. OWCP requested an opinion from an OWCP medical adviser as to whether the shoulder condition was a consequential injury. Based on the opinion of the medical adviser, the condition was accepted as a consequential injury. The Board held that OWCP should have further developed the issue of whether there was a worsening of the accepted shoulder condition such that it constituted material change in the nature and extent of the injury-related condition.

A similar situation is presented in the instant case. Appellant requested modification of a wage-earning capacity determination and submitted supporting evidence. OWCP began development of the medical evidence, but failed to do a complete job that resolved all of the relevant issues. Having determined that the lymphedema was employment related, OWCP should have further developed the medical evidence to determine if it warranted modification of the wage-earning capacity determination.

[4] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[5] *Id.*

[6] Docket No. 11-0681 (issued October 4, 2011).

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[7] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[8] In this case, appellant alleged and submitted medical evidence in support of her claim that her condition worsened following the issuance of a wage-earning capacity determination. OWCP began to develop the evidence by seeking an opinion from the district medical adviser as to whether his lymphedema condition was consequential to the accepted injury. It failed, however, to seek clarification as to whether appellant's condition had materially worsened due to the lymphedema condition. Without such information, an informed decision cannot be reached on the relevant issue.

On remand, OWCP should secure a probative opinion on the issue presented. After such further development as is necessary, it should issue a merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development.

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

[8] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2015 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 19, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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