

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

_____)	
W.G., Appellant)	
)	
and)	Docket No. 18-0374
)	Issued: August 28, 2018
DEPARTMENT OF THE NAVY,)	
CHARLESTON NAVAL SHIPYARD,)	
Charleston, SC, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 13, 2017 appellant filed a timely appeal from a June 21, 2017 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 has met his burden of proof to establish that OWCP's March 13, 1998 loss of wage-earning capacity (LWEC) determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. By decisions dated July 23, 2013 and June 16, 2016, the Board found that appellant failed to establish a basis for modifying OWCP's

¹ 5 U.S.C. § 8101 *et seq.*

March 13, 1998 LWEC determination.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 12, 1994 appellant, then a 41-year-old welder, injured his left thumb and wrist while in the performance of duty. OWCP accepted the claim for left thumb ulnar collateral ligament tear and authorized surgery.³ Appellant was unable to resume his regular duties as a welder. The employing establishment terminated his employment, effective October 28, 1994. OWCP subsequently paid him wage-loss compensation for temporary total disability. Appellant received wage-loss compensation on the periodic compensation rolls as of December 1994.

In February 1995, OWCP referred appellant for vocational rehabilitation services. Appellant completed vocational testing and began training at a technical college for an engineering graphics certification. He independently found a position as a container maintenance mechanic (land base) with the International Longshoremen's Association (ILA) and began work there on a trial basis, effective August 18, 1997. In correspondence dated August 27, 1997, appellant informed his rehabilitation counselor that "an opportunity of a lifetime" had arisen (with ILA) and he had begun temporary employment there. He informed the counselor that the position had been approved by his physician, Dr. Howard Brilliant, a Board-certified orthopedic surgeon, and was less demanding and strenuous than his welder position at the employing establishment.⁴ In December 1997, appellant began working full time as a container maintenance mechanic at ILA.

By decision dated March 13, 1998, OWCP determined that appellant's full-time reemployment with ILA fairly and reasonably represented his wage-earning capacity. The decision noted that, effective December 7, 1997, appellant earned \$520.00 per week as a container maintenance mechanic. Because his current earnings with ILA were less than those earned in his date-of-injury welder position, OWCP compensated him based on his loss of earning capacity.

By decision dated August 6, 1998, OWCP granted appellant a schedule award for 55 percent permanent impairment of the left thumb.

Appellant worked as a private sector container maintenance mechanic with ILA through October 2005. It is unclear why he stopped work entirely in October 2005.⁵ OWCP continued to pay wage-loss compensation based on the March 13, 1998 LWEC determination. In August 2009, it expanded acceptance of appellant's claim to include left wrist post-traumatic degenerative

² Docket No. 13-1105 (issued July 23, 2013); Docket No. 16-0679 (issued June 16, 2016).

³ On April 26, 1994 Dr. L.W. Mulbry, a Board-certified psychiatrist who practices hand surgery, performed closed reduction and percutaneous pinning of the rupture ulnar collateral ligament, left thumb metacarpophalangeal (MCP) joint.

⁴ Dr. Brilliant provided two disability certificates dated August 25, 1997. One certificate indicated that appellant "may return to work at new welding job." The other certificate noted that he "may return to work as [a] container maintenance mechanic...."

⁵ On an EN1032 form signed by appellant on October 11, 2005, he indicated that he was not working due to "injury on job."

arthritis.⁶ By decision dated September 24, 2009, OWCP denied appellant's claim for an additional schedule award.

By decision dated October 1, 2012, OWCP denied appellant's claim for additional wage-loss compensation. Appellant then appealed to the Board. In its July 23, 2013 decision, the Board found that he had not established a basis for modifying the March 13, 1998 LWEC determination. The Board reviewed the relevant medical evidence and the arguments presented and found that appellant had not met any of the three criteria for modification. Accordingly, the Board affirmed OWCP's October 1, 2012 decision.⁷

In April 2013 OWCP referred appellant to Dr. James F. Bethea, a Board-certified orthopedic surgeon for a second opinion evaluation. In an on April 30, 2013 report, Dr. Bethea indicated that appellant's accepted conditions had not resolved and opined that he could not return to work as a welder for the employing establishment.⁸

Appellant again requested modification in April 2014 and submitted additional medical evidence including a December 11, 2013 report from Dr. Bright McConnell, III, a Board-certified orthopedic surgeon, who had previously conducted a second opinion evaluation on June 5, 2009. In the December 11, 2013 report, Dr. McConnell diagnosed osteoarthritis of the left wrist and hand and found that appellant had increasing problems with his left thumb and wrist which caused difficulty in completing his current work requirements. He indicated that the restrictions found in 2009 were permanent.⁹ Dr. McConnell further noted that he did not have access to a formal job description for a container maintenance mechanic position and opined that if that position did not accommodate appellant's left hand restrictions, then he would not be able to continue in that specific occupation.

By decision dated May 8, 2014, OWCP found the evidence of record insufficient to establish a material worsening of appellant's accepted left thumb and wrist condition and denied modification.

On April 7, 2015 appellant again requested modification of the March 13, 1998 LWEC determination. He argued that the May 8, 2014 decision was erroneous because OWCP had not relied on a reasonably current medical examination in determining that the "constructed job of container maintenance mechanic" was medically suitable. Appellant submitted an April 24, 2014 letter from ILA Local 1422-A President, L.B., who provided a general description of the duties of an ILA mechanic in the maritime industry. L.B. explained that mechanics performed

⁶ In an order dated May 18, 2012, the Board dismissed appellant's September 13, 2011 appeal. It found that there was no final OWCP decision within the Board's jurisdiction. Docket No. 11-2032 (issued May 18, 2012).

⁷ *Supra* note 2.

⁸ Dr. Bethea noted that appellant accepted a light-duty assignment with ILA and worked there approximately eight years. He, however, did not specifically comment on whether appellant was able to work in a light-duty capacity. The Board notes that the most recent statement of accepted facts of record, dated April 21, 2011, does not indicate that appellant worked in private employment from 1997 to 2005.

⁹ The restrictions applied by Dr. McConnell in 2009 included left hand restrictions of one to two hours of reaching and reaching above the shoulder, repetitive movements of the wrist, and a five-pound lifting restriction for one to two hours.

maintenance/repair on intermodal chassis and containers, which included chassis tire maintenance/repair utilizing a 25-pound hammer and a ¾-inch impact gun. He also noted that tractor-trailer tires weighed approximately 75 pounds. L.B. further indicated that chassis repair required basic electrical knowledge and welding, and that repairing containers involved using a 25-pound hammer to straighten large steel panels. The steel panels and similarly sized sheets of flooring had to be manually lifted into place. Lastly, L.B. identified various tools utilized by mechanics and explained that the job required frequent bending, climbing, pushing, pulling, and lifting.

By decision dated May 26, 2015, OWCP denied modification of its March 13, 1998 LWEC determination. It explained that it had been based on appellant's actual earnings as a container maintenance mechanic, not a selected/constructed position he did not hold, and because the decision was based on his actual earnings, a reasonably current medical evaluation was not required. OWCP further noted that he had performed the ILA container maintenance mechanic position for nearly eight years, and there was nothing to suggest that this work, and the earnings derived from it, were not representative of his wage-earning capacity. Consequently, it found that appellant had not established a basis for modifying the March 13, 1998 LWEC determination. Because of a typographical error in the May 26, 2015 decision, OWCP made a minor correction and reissued the decision on June 8, 2015.

On June 24, 2015 appellant again requested modification. He submitted a report dated May 29, 2015 in which Dr. McConnell diagnosed osteoarthritis of the wrist and hand, and advised that appellant's work restrictions had not changed since he was last seen in 2013. Dr. McConnell found that appellant could not perform the duties of an ILA mechanic.

By decision dated September 10, 2015, OWCP found that Dr. McConnell's May 29, 2015 report was insufficient to establish a material change in the nature and extent of appellant's injury-related condition. Consequently, it denied modification of the March 13, 1998 LWEC determination.

Appellant then filed another appeal with the Board. In its June 16, 2016 decision, the Board found that he had not established a basis for modifying the March 13, 1998 LWEC determination and affirmed OWCP's September 10, 2015 decision.¹⁰ The Board reviewed the relevant medical evidence and the arguments presented and again found that appellant had not met any of the three criteria for modification.

On March 27, 2017 appellant again requested modification. He indicated that he was submitting new evidence that established a change in his injury-related condition and that the March 13, 1998 LWEC determination was erroneous, thereby warranting modification.

In a December 22, 2015 report, Dr. McConnell again reported that appellant had significant post-traumatic degenerative changes of his left wrist, MCP joint, and CMC joint of the left thumb, as clearly seen on x-ray. He again noted his review of the ILA description of job duties for maintenance and repair, and advised that the accepted condition could have been impacted by his work as a container maintenance mechanic from 1997 through 2005. Dr. McConnell indicated

¹⁰ *Supra* note 2.

that restrictions placed on appellant by Dr. Mulbry, an attending hand surgeon, were permanent.¹¹ He noted appellant's report that, during his employment as a container maintenance mechanic from 1997 through 2005, he had to perform activities which materially aggravated his left hand condition. Dr. McConnell concluded that appellant's condition was materially and permanently aggravated by performing the job requirements listed for repair and maintenance of containers which would, more likely than not, cause significant aggravation of his preexisting degenerative changes.

Appellant also submitted a June 23, 2016 letter from L.B. In a word-for-word copy of his April 24, 2014 letter, L.B. provided a general description of the duties of an ILA mechanic in the maritime industry.

By decision dated June 21, 2017, OWCP denied modification of the March 13, 1998 LWEC determination. It noted that the June 23, 2016 letter from L.B. was a duplicate of his April 24, 2014 letter that had previously been reviewed by the Board. OWCP found Dr. McConnell's December 22, 2015 report of diminished probative value because he relied on an inaccurate and incomplete employment history. It further noted that a formal job description of appellant's duties in the container maintenance position was not provided.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.¹² A loss of wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.¹³ Generally, an employee's actual earnings best reflect his wage-earning capacity.¹⁴ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹⁵

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.¹⁶ Modification of a wage-earning capacity determination is unwarranted unless there is a material change in the nature and extent of the injury-related

¹¹ A report from Dr. Mulbry identifying work restrictions cannot be found in the case record.

¹² 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹³ *See Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁴ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹⁵ *Id.*

¹⁶ *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.¹⁷ The burden of proof is on the party seeking modification.¹⁸

ANALYSIS

The Board finds that appellant failed to establish a basis for modifying OWCP's March 13, 1998 LWEC determination.

Appellant asserts on appeal that the March 13, 1998 LWEC determination was erroneous because the record does not contain evidence that the position on which it was based, a container maintenance mechanic position with ILA, was a full-time position. The record, however, supports that, in August 1997, appellant, who found the position on his own, began work on an "on call" basis with ILA as a container maintenance mechanic, and that on December 6, 1997 he began a regular 40-hour per week employment position. Appellant continued in this position until October 2005.

Appellant also asserts that the evidence, based on Mr. Bailey's June 23, 2016 letter, established error in the March 13, 1998 LWEC determination. As to L.B.'s June 23, 2016 letter, this is a word-for-word duplicate of his letter dated April 24, 2014 which was previously reviewed by OWCP and the Board. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁹ There is, therefore, no evidence to support that the March 13, 1998 LWEC determination was erroneous.

The Board also finds that Dr. McConnell's December 22, 2015 report did not establish a material change in his employment-related condition. In his December 22, 2015 report, Dr. McConnell noted that he had reviewed the ILA container maintenance mechanic duties provided by L.B. and advised that appellant was unable to perform these duties. As the Board explained in its June 16, 2016 decision, while Dr. McConnell indicated that appellant could not perform certain ILA mechanic duties as outlined by L.B., the current record did not demonstrate that appellant regularly performed the duties described by L.B. when he was employed by ILA from August 1997 through October 2005. The Board noted that, when appellant accepted the container maintenance mechanic position in August 1997, he represented that it was "less demanding" and "less strenuous" than his prior position with the employing establishment, and that some of the duties L.B. described clearly exceeded the physical requirements of appellant's date-of-injury welder position, and were, therefore, inconsistent with appellant's previous representation that his new ILA job was less demanding and less strenuous. L.B. provided only a "general description" of what was required of an ILA mechanic and did not address appellant's specific employment history from August 1997 through October 2005, and he did not mention appellant by name in either his April 24, 2014 or June 23, 2016 correspondence. Appellant submitted no specific evidence describing his employment for that period. There is, therefore, no probative evidence to establish his job duties from August 1997 through October 2005.

¹⁷ 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

¹⁸ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁹ *See B.R.*, Docket No. 17-0294 (issued May 11, 2018).

Thus, as Dr. McConnell relied on an inaccurate and incomplete history, his December 22, 2015 report is insufficient to establish a material change in the nature and extent of appellant's injury-related condition. The burden is on appellant to establish that the March 13, 1998 LWEC determination should be modified.²⁰ The Board finds that the evidence submitted with appellant's most recent request for modification is insufficient to establish a basis for modifying OWCP's March 13, 1998 LWEC determination.²¹

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that OWCP's March 13, 1998 LWEC determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 28, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁰ *Supra* note 18.

²¹ *See D.Q.*, Docket No. 17-1220 (issued May 18, 2018). The Board also notes that OWCP procedures regarding suitable work, is not relevant to the merit issue in this case, which is modification of an LWEC determination.