

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

J.W., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Richmond, VA, Employer**

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**Docket No. 13-1852
Issued: January 23, 2014**

Appearances:
Lonnie Boylan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 6, 2013 appellant, through his attorney, filed a timely appeal from a May 7, 2013 decision of the Office of Workers' Compensation Programs (OWCP), which denied authorization to change treating physicians and a May 13, 2013 decision which reduced his wage-earning capacity to zero. 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 abused its discretion in denying appellant's request to change physicians; and (2) whether OWCP properly reduced appellant's compensation effective March 11, 2013 based on its determination that his actual earnings as an internal revenue agent fairly and reasonably represented his wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 24, 2011 appellant, then a 44-year-old internal revenue agent, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome as a result of excessive use of his hands at work. He became aware of his condition and realized it resulted from his employment on May 1, 2011. Appellant stopped work and noted that the date of last exposure was May 20, 2011. OWCP accepted his claim for bilateral carpal tunnel syndrome. It later accepted bilateral radial tenosynovitis and temporary aggravation of osteoarthritis of the right thumb.

Appellant received medical treatment by Dr. Eduardo I. Garcia, Board-certified in pain medicine, for complaints of severe bilateral forearm pain, hand pain and wrist pain. Dr. Garcia diagnosed bilateral carpal tunnel syndrome and recommended outpatient physical therapy and additional diagnostic testing.

Appellant received disability compensation for the period July 31, 2011 to February 25, 2012 at a weekly pay rate of \$2,010.60.

On July 22, 2011 OWCP referred appellant, together with the medical record and a statement of accepted facts (SOAF), to Dr. William P. Osborne, Board-certified in occupational medicine, for a second-opinion examination to determine whether appellant had residuals of his work-related injury and his capacity to return to the job performed when injured. In an August 25, 2011 report, Dr. Osborne opined that appellant was able to return to work as a revenue agent due to normal electromyography and nerve conduction studies. In a September 2, 2011 work capacity evaluation, he diagnosed overuse syndrome and tenosynovitis of the forearm and wrist. Dr. Osborne advised that appellant could work eight hours a day doing sedentary to light and medium work. In a November 1, 2011 report, Dr. Garcia agreed with Dr. Mauldin that appellant was able to return to work with reasonable accommodations.

OWCP determined that a conflict in medical opinion existed and referred the case to Dr. Grant McKeever, a Board-certified orthopedic surgeon, for an impartial referee examination. In a February 17, 2012 report, Dr. McKeever reviewed appellant's history of injury and treatment and conducted an examination. He observed positive Tinel's and Finkelstein's signs and tenderness over the extensor hallucis longus at the wrist bilaterally. Dr. McKeever diagnosed bilateral carpal tunnel syndrome and bilateral de Quervain's tenosynovitis. He opined that appellant was able to return to work with restrictions.

Appellant returned to full-time limited duty on February 27, 2012. He continued to receive medical treatment. On April 16, 2012 appellant underwent an authorized right hand extensor tenosynovectomy. He stopped work and received wage-loss compensation. Effective May 23, 2012 appellant was placed on the periodic rolls at a weekly pay rate of \$2,010.60.

On September 7, 2012 OWCP referred appellant, along with the medical record and SOAF, to Dr. James E. Butler, a Board-certified orthopedic surgeon, for a second-opinion examination to determine whether his work injuries had resolved and whether he was able to return to work. In an October 16, 2012 report, Dr. Butler provided an accurate history of injury and reviewed the medical record. He noted appellant's complaints of pain in the bilateral wrists

and hands accompanied by numbness, tingling, burning, weakness and hypersensitivity. Examination of the right wrist revealed tenderness at de Quervain's area. Range of motion was normal. Phalen's test was positive bilaterally. Tinel's and Finkelstein tests were negative on the left and positive on the right. Dr. Butler diagnosed bilateral carpal tunnel syndrome, right greater than left and bilateral de Quervain's, operated on the right with complications. He opined that based on his examination findings that appellant was able to work eight hours a day with restrictions. Dr. Butler explained that appellant was unable to type, write and any other activities that involved repetitive use of both hands such as gripping, sorting, handling and lifting. He stated that the restrictions were temporary and could be resolved with surgery. Dr. Butler recommended that appellant be seen by a certified hand surgeon. In a work capacity evaluation form, he indicated that appellant could work eight hours a day with restrictions of no repetitive movements of the wrists, pushing, pulling or lifting. Dr. Butler stated that appellant could not type, write, grip, sort, handle or use hands to lift.

On October 31, 2012 OWCP requested clarification from Dr. Butler regarding appellant's work restrictions.

In a November 19, 2012 supplemental report, Dr. Butler responded that appellant's problems were soft tissue in nature and not related to his joints. He noted that appellant was able to lift up to 10 pounds occasionally and that he may be able to use voice recognized software as long as no typing was involved and mouse work was not repetitive or over two hours. In an updated work capacity evaluation form he repeated that appellant could not type or do anything repetitive with both hands, such as gripping, sorting, handling and lifting. Dr. Butler indicated that appellant could work up to two hours of repetitive wrist movements and lifting up to 10 pounds but no pushing or pulling.

By letter dated December 5, 2012, OWCP provided Dr. Garcia with a copy of Dr. Butler's medical reports and requested whether he agreed with his findings. On December 20, 2012 Dr. Garcia agreed with Dr. Butler's opinion. He included a duty status report advising that appellant could return to full-time work with restrictions of intermittent sitting, standing, walking, simple grasping, fine manipulation and driving a vehicle.

In a January 25, 2013 worksheet, OWCP noted that appellant received an underpayment in the amounts of \$264.74 and \$2,853.08 because he was paid at an incorrect pay rate. It adjusted his compensation to reflect a weekly pay rate of \$2,069.73 or an annual amount of \$107,626.00.

On February 27, 2013 the employing establishment provided appellant with a light-duty job offer as an internal revenue agent with a return to work date of March 11, 2013. It noted that his work restrictions included a maximum of two hours a day of repetitive wrist movements and lifting up to 10 pounds and no pushing or pulling. The employing establishment described appellant's duties and stated that he would not be required to perform those physical aspects of the position which would be in conflict with the medical restrictions.

By letter dated March 2, 2013, appellant's counsel requested that the February 27, 2013 written light-duty job offer be amended to include that no repetitive typing was allowed. On

March 5, 2013 the employing establishment amended the February 27, 2013 light-duty job offer to include two hours a day maximum of nonrepetitive mouse work that assumed no typing.

On March 6, 2013 appellant accepted the limited-duty position of internal revenue agent as a GS 13, Step 6 at an annual salary of \$107,626.00. On March 11, 2013 he returned to full-time light duty on March 11, 2013.

By letter dated April 8, 2013, appellant's counsel requested authorization for appellant to receive treatment from Dr. Edward Wolski, a family practitioner, who specializes in pain medicine. He explained that appellant was referred to Dr. Wolski by Dr. Garcia, because Dr. Wolski's clinic was capable of providing all treatments instead of appellant having to see multiple physicians in one area, as suggested by Dr. Butler.

On April 9, 2013 OWCP denied appellant's request to authorize treatment by Dr. Wolski. It advised appellant to locate a physician with the same specialty as Dr. Wolski near his residence.

In a May 3, 2013 wage-earning capacity memorandum, OWCP noted that appellant was compensated at a weekly pay rate of \$2,069.73 effective July 31, 2011 as a GS 13, Step 6. It found that he returned to work, eight hours a day, on March 11, 2013 and received actual earnings of \$2,128.87 weekly. OWCP advised that appellant had a loss of wage-earning capacity of zero effective March 11, 2013.

In a decision dated May 7, 2013, OWCP denied appellant's request to transfer treatment to Dr. Wolski. It noted that Dr. Butler had recommended an evaluation by a certified hand surgeon, but Dr. Wolski's specialty was in Family Practice and Pain Management. OWCP determined that appellant's request to change to a treating physician that was 300 miles from his home was not reasonable.

By decision dated May 13, 2013, OWCP found that appellant had been employed as a full-time modified internal revenue agent effective March 11, 2013, with actual earnings of \$2,128.87 per week. This was equivalent to the pay rate for the position he held at the time of his injury such that no loss of wages occurred. OWCP found that appellant's actual earnings fairly and reasonably represented his wage-earning capacity and he had worked in the position for over 60 days. It advised that he remained entitled to medical benefits for his work-related condition.

LEGAL PRECEDENT -- ISSUE 1

The payment of medical expenses incident to securing medical care is provided for under section 8103 of FECA. The pertinent part provides that an employee may initially select a physician to provide medical services, appliances and supplies, in accordance with such regulations and instruction as the Secretary considers necessary.²

² *Id.* at § 8103(a).

When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval. In all other instances, however, the employee must submit a written request to OWCP with his reasons for desiring a change of physician. OWCP will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician, who specializes in treating conditions like the work related one or the need for a new physician when an employee has moved.³

Any transfer of medical care should be accomplished with due regard for professional ethics and courtesy. No transfer or termination of treatment should be made unless it is in the best interest of the claimant and the government. Employees who want to change attending physicians must explain their reasons in writing and OWCP must review all such requests. OWCP may approve a change when: the original treating physician refers the claimant to another physician for further treatment; the claimant wants to change from the care of a general practitioner to that of a specialist in the appropriate field or from the care of one specialist to another in the appropriate field; or the claimant moves more than 50 miles from the original physician (since OWCP has determined that a reasonable distance of travel is up to a roundtrip distance of 100 miles). It must use discretion in cases where other reasons are presented.⁴

The Board has recognized that OWCP, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. It, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to show merely that the evidence could be construed to produce a contrary conclusion.⁵

ANALYSIS -- ISSUE 1

On April 8, 2013 appellant, through counsel, submitted a written request to receive medical treatment from Dr. Wolski. He explained that Dr. Wolski was referred to appellant by his treating physician, Dr. Garcia, because Dr. Wolski was capable of providing all treatments instead of appellant having to see multiple physicians in one area. OWCP denied counsel request.

The Board finds that OWCP did not abuse its discretion by denying appellant's request to change physicians to Dr. Wolski. The Board notes that Dr. Wolski's office is located 300 miles

³ 20 C.F.R. § 10.316.

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.5.c (February 2012).

⁵ *Daniel J. Perea*, 42 ECAB 221 (1990).

away from appellant's home. Accordingly, a roundtrip would be 600 miles, which far exceeds the 100-mile roundtrip radius that OWCP has determined to be reasonable.⁶ The Board finds that this is an unnecessary distance to travel, especially since appellant resides within 50 miles of Houston, Texas a large metropolitan area.⁷ Such a long distance to travel for care does not appear necessary and reasonable or in his best interest.

On appeal, appellant's counsel contends that Dr. Butler referred appellant to Dr. Wolski for treatment and noted that his clinic was capable of providing all treatments suggested by Dr. Butler even if Dr. Wolski was not a certified hand specialist. He also noted that, although the physician was over 298 miles away, appellant was willing to use four hours of sick leave and personally pay for the amount of mileage involved. While appellant offered reasons for requesting to see Dr. Wolski, OWCP provided sufficient reason for denying his request. It has broad discretion in approving services provided under FECA and the only limitation on OWCP's authority is that of reasonableness.⁸ In this case, there is no evidence of manifest error, clearly unreasonable judgment or illogical action on the part of OWCP. Appellant's arguments on appeal do not demonstrate that OWCP's decision to deny the change in physicians was an abuse of discretion.

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

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.⁹ It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹⁰

Section 8115(a) of FECA 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.¹¹ 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.¹² Once OWCP

⁶ *Supra* note 4.

⁷ *See R.B.*, Docket No. 13-88 (issued March 8, 2013); *D.L.*, Docket No. 10-318 (issued September 8, 2010).

⁸ *Supra* note 5.

⁹ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁰ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

¹¹ 5 U.S.C. § 8115(a).

¹² *Lottie M. Williams*, 56 ECAB 302 (2005).

determined that the actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles developed in the *Albert C. Shadrick*¹³ decision, now codified at 20 C.F.R. § 10.403, in order to calculate the adjustment in the employee's compensation.

OWCP's procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days¹⁴ and OWCP may determine wage-earning capacity retroactively after the claimant has stopped work.¹⁵

ANALYSIS -- ISSUE 2

OWCP accepted appellant's May 24, 2011 claim that he sustained bilateral carpal tunnel syndrome as a result of his work duties as an internal revenue agent. It expanded his claim to include bilateral radial tenosynovitis and temporary aggravation of osteoarthritis of the right thumb. Appellant stopped work on May 20, 2011 and returned to full-time limited duty on February 27, 2012. On April 16, 2012 he underwent surgery and stopped work again. Appellant received wage-loss compensation and was placed on the periodic rolls. In reports dated October 16 and November 19, 2012, Dr. Butler, the second-opinion examiner, recommended that appellant return to full-time work with restrictions of no repetitive use of the hands including, typing, writing, gripping, sorting, handling and lifting up to 10 pounds. He noted that appellant could use voice recognition computer software and was limited to two hours of mouse work with no typing. On March 11, 2013 appellant returned to work in a full-time limited-duty position as an internal revenue agent. The position was GS-13, Step 6 at an annual salary of \$107,626.00. The employing establishment listed the details of the position including its duties and noted that appellant work restrictions included a maximum of two hours a day of repetitive wrist movements, no typing, pushing or pulling and lifting more than 10 pounds.

The Board finds that OWCP properly determined that appellant's actual earnings in his work as an internal revenue agent beginning March 11, 2013 were equal to the current pay rate of his May 24, 2011 date-of-injury position. Appellant was no longer disabled for work.¹⁶ As noted, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.¹⁷ The Board finds that the internal revenue agent position was consistent with his restrictions and abilities. Appellant worked in the position for over 60 days. His performance of this position in excess of 60 days is persuasive evidence

¹³ 5 ECAB 376 (1953).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.e(1) (October 2009).

¹⁵ *Id.* at Chapter 2.814.7(e) (October 2009).

¹⁶ 20 C.F.R. § 10.5(f) (disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury).

¹⁷ *Supra* note 12.

that the position represents his wage-earning capacity.¹⁸ There is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs. Accordingly, the Board finds that OWCP properly determined that he had no loss of wage-earning capacity as his actual wages met the current pay rate for the position he held at the time of injury.¹⁹

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

CONCLUSION

The Board finds that OWCP properly denied appellant's request to change attending physicians. The Board also finds that OWCP properly determined that his actual earnings as an internal revenue agent fairly and accurately represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the May 7 and 13, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 23, 2014
Washington, DC

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

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

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

¹⁸ See *William D. Emory*, 47 ECAB 365 (1996).

¹⁹ *Gregory A. Compton*, 45 ECAB 154 (1993).