

FACTUAL HISTORY

This case has previously been before the Board. By decision dated June 19, 2003, the Board affirmed in part and reversed in part a May 23, 2002 decision and set aside an August 8, 2002 decision.² The Board found that appellant did not establish an employment-related recurrence of disability beginning August 31, 2001. The Board reversed OWCP's termination of his authorization for medical treatment and also determined that he had submitted sufficient evidence to warrant reopening his case for further merit review on the issue of whether he established a recurrence of disability in August 2001. The Board remanded the case for OWCP to review the merits of the case. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

On remand, in a decision dated November 14, 2003, OWCP modified its May 23, 2002 decision and accepted that appellant had residuals of his accepted work injury requiring further medical treatment. By decision dated January 28, 2004, it accepted that he sustained an employment-related recurrence of disability on August 31, 2001.

On March 7, 2005 the employing establishment offered appellant a full-time position as a computer assistant. The position provided that the duties would be within his physical limitations and could accommodate any restrictions. The offer referred to a duty status report for the restrictions, which included lifting up to five pounds and final manipulation for one-half of an hour per day.

In a decision dated May 17, 2005, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a computer assistant with the employing establishment effective March 7, 2005 fairly and reasonably represented his wage-earning capacity.³

In a report dated May 9, 2006, Dr. Thomas A. Eskestrand, an attending Board-certified orthopedic surgeon, noted that appellant's temporary job working with computers was "continuing on."

By letter dated August 13, 2007, the employing establishment informed appellant that his current computer assistant position was not permanent but instead was funded through a pipeline reemployment program and was not to exceed a year. It advised him that it had found a permanent position similar to his current position and reassigned him to work in another department.

² Docket No. 03-205 (issued June 19, 2003). OWCP accepted that on September 20, 1995 appellant, then a 39-year-old electronics 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 his claims under the current file number. 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. Appellant stopped work on August 31, 2001.

³ On October 11, 2006 OWCP expanded acceptance of the claim to include right carpal tunnel syndrome. In a decision dated January 18, 2007, it denied his request for compensation for time lost from work on September 21, 2006.

In a March 16, 2009 memorandum, Major Shawna L. Bowshot, United States Air Force, noted that appellant had advised her that he was experiencing increased pain at work. She attributed the increase in symptoms to performing additional tasks at work. Major Bowshot recommended that appellant request assistance if necessary and clarify what work he was unable to perform.

On June 1, 2009 appellant filed claims for compensation for intermittent disability beginning April 28, 2009.⁴

On June 11, 2009 OWCP advised appellant of the criteria for modifying a wage-earning capacity determination. It requested medical evidence supporting disability for the period claimed.

By letter dated June 15, 2009, appellant related that he was reassigned from his original light-duty position on September 2, 2007. He alleged that he developed CRPS of the right upper extremity as a result of performing additional work outside of his limitations. Appellant submitted medical evidence from his attending physician finding that he was unable to work and indicating that he sustained CRPS due to his 1995 injury and resulting surgery.⁵ OWCP also developed the evidence by referring appellant to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination.⁶ By decision dated October 21, 2010, OWCP found that appellant had not established that the May 17, 2005 decision should be modified.

On February 9, 2011 appellant requested reconsideration and submitted additional medical evidence. By decision dated June 27, 2011, OWCP denied modification of its October 21, 2010 decision. It found that the medical evidence did not establish that he was totally disabled. OWCP indicated that it would separately address the issue of upgrading the accepted conditions to include CRPS.

On September 8, 2011 appellant again requested reconsideration. He argued that the employing establishment moved him to a position that required lifting and typing outside his

⁴ In a May 18, 2009 form report, Dr. James L. Benoist, a Board-certified internist, diagnosed carpal tunnel syndrome and complex regional pain syndrome (CRPS) due to employment activities and found that appellant was totally disabled beginning May 22, 2009.

⁵ In a report dated July 2, 2009, Dr. Eskestrand discussed appellant's medical history and diagnosed status post carpal tunnel release, postwrist sprain with debridement and CRPS of the right upper extremity. He determined that appellant was unable to work as he could not perform repetitive lifting of 10 to 20 pounds. Dr. Eskestrand noted that he sustained CRPS after his 1995 injury and resulting surgery.

⁶ On September 8, 2010 Dr. Lotman diagnosed a tear of the triangular fibrocartilage complex of the right wrist, status post arthroscopy and pinning of the carpal ligamentous injury to the right wrist, a history of carpal tunnel syndrome and release, ulnar nerve compression of the right elbow and CRPS. He found no objective evidence that appellant's condition had worsened since May 17, 2005. In a work restriction evaluation, Dr. Lotman found that appellant could work full time with restrictions on reaching with the right arm, twisting, bending and stooping four hours per day, performing repetitive movements of the wrists and elbows for two hours per day moving up to five pounds, lifting up to five pounds one hour per day, kneeling with up to five pounds four hours per day and squatting four hours per day.

physical limitations. Appellant also argued that OWCP should accept CRPS as employment related. He submitted additional medical evidence.

By decision dated September 26, 2011, OWCP denied appellant's request for reconsideration after finding that it was insufficient to warrant reopening the case for further merit review under 5 U.S.C. § 8128. It noted that the computer assistant position was a pipeline funded position to provide the employing establishment time to place him in a regular position. OWCP indicated that the reassigned position was similar and within his restrictions.

On appeal appellant argues that his original light-duty position was within his work restrictions but that he was moved to a new position as computer assistant with "no lifting restrictions or typing restrictions." OWCP found the position suitable because it had the same title as the prior position. He also argues that his case should be expanded to include CRPS.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

ANALYSIS

OWCP accepted that appellant sustained a right wrist fracture, right carpal tunnel syndrome and right mononeuritis of the upper extremity. On March 7, 2005 he accepted a position as a full-time computer assistant with the employing establishment. The position required fine manipulation, including keyboarding up to 30 minutes per day and lifting up to five pounds for one and a half hours per day. The employing establishment noted that the offer was within appellant's work tolerance and that it could accommodate any restrictions.

⁷ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁸ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁹ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹⁰ *Id.*

By decision dated May 17, 2005, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a computer assistant with the employing establishment effective March 7, 2005 fairly and reasonably represented his wage-earning capacity. On June 1, 2009 he requested compensation for disability beginning April 28, 2009. On appeal and before OWCP, appellant argued that he was reassigned from his original position as a computer assistant and placed in a position outside his work restrictions.

Once a wage-earning capacity determination is in place, it can only be modified if appellant can show that his condition materially worsened or if there is sufficient evidence to establish that the original determination was in error.¹¹ OWCP based its wage-earning capacity finding on the March 7, 2005 job offer of computer assistant. By letter dated August 13, 2007, however, the employing establishment specified that the computer assistant position was not permanent but instead was funded through a pipeline reemployment program and was not to exceed a year. When determining whether earnings in alternative employment fairly and reasonably represented the employee's wage-earning capacity, OWCP may not consider the work suitable when the job is temporary and the employee's previous job was permanent.¹² It does not appear that appellant's date-of-injury position was temporary. The modified computer assistant position offered on March 7, 2005 was a position created through pipeline funding and by definition was temporary in nature. The employing establishment subsequently moved appellant to another position as a full-time computer assistant in August 2007. Consequently, he has established that the May 17, 2005 wage-earning capacity determination should be modified.¹³ Upon return of the case record, OWCP should adjudicate his claim for wage-loss compensation.

On appeal appellant argues that he sustained CRPS due to his employment injury. The Board's jurisdiction is limited to reviewing final decisions of OWCP.¹⁴ OWCP has not formally adjudicated whether it should expand acceptance of the claim to include CRPS and thus the issue is not before the Board at this time.¹⁵

CONCLUSION

The Board finds that appellant has established that the May 17, 2005 wage-earning capacity should be modified.¹⁶

¹¹ See *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009); see also *R.J.*, Docket No. 10-2114 (issued June 15, 2001).

¹³ See *Thomas A. Harper*, Docket No. 97-314 (issued July 9, 1998) (finding, *inter alia*, that a temporary position created through pipeline funding did not fairly and reasonably represent a claimant's wage-earning capacity).

¹⁴ 20 C.F.R. § 501.2(c).

¹⁵ *Id.*

¹⁶ In view of the Board's disposition of the merits, the issue of whether OWCP properly denied his request to reopen his case for further review of the merits under 5 U.S.C. § 8128 is moot.

ORDER

IT IS HEREBY ORDERED THAT the September 26 and June 27, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this opinion of the Board.

Issued: July 6, 2012
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