

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

P.C., Appellant	)	
	)	
and	)	<b>Docket No. 18-1719</b>
	)	<b>Issued: June 19, 2019</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, City of Industry, CA, 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  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 11, 2018 appellant filed a timely appeal from an April 25, 2018 merit decision and an August 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly reduced appellant's wage-loss compensation effective April 29, 2018, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted

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<sup>1</sup> The Board notes that following the August 16, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

a temporary, limited-duty position; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On November 4, 2005 appellant, then a 46-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome while performing federal employment duties. On December 30, 2005 OWCP accepted his claim for bilateral carpal tunnel syndrome and tenosynovitis/tendinitis. On February 20, 2007 appellant returned to modified work. He stopped work on June 2, 2009 and underwent left carpal tunnel release. On July 8, 2009 OWCP placed appellant on the periodic rolls. Appellant underwent right carpal tunnel release on September 29, 2009. He did not return to work.

Appellant's physicians, Dr. Mumtaz A. Ali, a Board-certified neurologist, and Dr. Hamid Rahman, an orthopedic surgeon, found that he was totally disabled for the period September 29, 2009 through January 12, 2015. Beginning on February 9, 2015, Dr. Ali indicated that appellant could return to modified-duty work. In a duty status report (Form CA-17) dated February 8, 2016, he noted that appellant could not return to his date-of-injury position as a mail handler, but that he could lift up to 10 pounds and sit, stand, walk, bend, and stoop for eight hours a day. Dr. Ali further found appellant could twist, push, pull, reach above the shoulder, as well as perform simple grasping each for one hour a day. The employing establishment did not have light-duty work available within appellant's restrictions in February 2016.

On October 17, 2016 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his November 17, 2016 report, Dr. Einbund reviewed the SOAF and the medical evidence. He listed his findings on physical examination, including mild tenderness of the right wrist with normal sensation, negative Tinel's sign, and negative Phalen's test. In regard to appellant's left wrist, Dr. Einbund found volar tenderness, positive Phalen's test, and questionably positive Tinel's sign. He also reported loss of light touch over appellant's thumb, index, and long fingers with normal two-point discrimination. Dr. Einbund diagnosed ongoing carpal tunnel syndrome. He found that appellant could perform sedentary work, lifting, pushing, and pulling up to 20 pounds for three hours a day. Dr. Einbund recommended vocational rehabilitation and noted that appellant was hearing impaired.<sup>3</sup>

In a January 4, 2017 supplemental report, Dr. Einbund reviewed appellant's December 23, 2016 electromyogram and nerve conduction velocity (EMG/NCV) test results and found persistent or recurrent bilateral carpal tunnel syndrome. On January 4, 2017 he completed a work capacity evaluation (OWCP-5c) and indicated that appellant could work eight hours a day with restrictions. Dr. Einbund found that appellant could perform repetitive movements of his wrists for up to four hours a day. He also indicated that appellant could lift, push, and pull up to 20 pounds for three hours a day.

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<sup>3</sup> OWCP authorized American Sign Language interpreters for appellant's medical and vocational rehabilitation appointments.

On January 31, 2017 OWCP referred appellant for vocational rehabilitation services.

On April 13, 2017 appellant requested disability retirement and submitted a form report completed by Dr. Ali on April 10, 2017. Dr. Ali found that appellant could lift up to 20 pounds intermittently and could sit, stand, walk, and climb stairs continuously. He also indicated that appellant could bend, kneel, stoop, and twist continuously and perform reaching above the shoulder, fine manipulation, simple grasping, pushing, and pulling intermittently.

In notes dated August 17, October 2, and December 7, 2017, Dr. Ali noted appellant's report of constant pain and numbness in both wrists and hands. He found loss of range of motion in both wrists and that both wrists were tender to palpation. Dr. Ali diagnosed status postsurgical release of bilateral carpal tunnel syndrome with residual bilateral carpal tunnel syndrome and mild right ulnar neuropathy entrapment at the elbow. He found that appellant could perform modified work.

In a letter dated January 5, 2018, the employing establishment noted on December 15, 2017 that it had offered appellant a temporary modified mail handler position working eight hours a day which required him to prepare the mail for up to three hours and to perform quality control by comparing labels to sacks for up to five hours a day. The physical requirements of the position required appellant to lift, push, and pull one to three pounds for three hours intermittently. Appellant was also required to stand, walk, bend, twist, and perform simple grasping for eight hours intermittently. The vocational rehabilitation counselor assessed the job offer on December 21, 2017 and found as it required minimal lifting it was within appellant's work restrictions. On February 7, 2018 she found that that position was within 50 miles of appellant's home. Appellant did not respond to the offered position.

In a letter dated March 9, 2018, OWCP provided appellant notice of its proposed reduction of his wage-loss compensation as he had refused to accept a temporary limited-duty assignment which accommodated his work-related limitations as determined by Dr. Einbund and would have paid him \$1,120.00 a week for working 40 hours. It advised him of the provisions of 20 C.F.R. § 10.500(a) and explained to him that his entitlement to wage-loss compensation would be reduced under this provision if he did not accept the offered temporary assignment or provide a written explanation with justification for his refusal within 30 days.

In a March 19, 2018 letter, appellant asserted that he could not perform the offered light-duty position due to his right shoulder condition. He indicated that he required disability retirement. Appellant provided a January 18, 2018 note from Dr. Ali which indicated that appellant had pulled a muscle in his right shoulder a month earlier. He otherwise repeated his previous findings and conclusions.

By decision dated April 25, 2018, OWCP reduced appellant's wage-loss compensation effective April 29, 2018 as he had not accepted the temporary limited-duty position offered on December 15, 2017 by the employing establishment. Using the formula set forth in *Albert C. Shadrack*<sup>4</sup> it noted his salary on the date disability began, June 2, 2009, was \$1,065.42 per week and the current pay rate for his job and step when injured was \$1,227.75, effective

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<sup>4</sup> 5 ECAB 376 (1953) (codified by regulation at 20 C.F.R. § 10.403).

December 15, 2017. OWCP found appellant capable of earning \$1,120.23 per week, the pay rate of the modified mail handler position. It determined that he had 91 percent wage-earning capacity which resulted in an adjusted wage-earning capacity of \$969.53 and a loss in earning capacity of \$95.89 per week or \$291.00 each four weeks. After deductions for health benefits, basic life insurance, and optional life insurance, this yielded a new compensation rate equal to \$5.38 each four weeks.

On July 5, 2018 appellant requested reconsideration of the April 25, 2018 decision. On February 19, March 29, April 26, May 24, and June, 21, 2018 Dr. Ali completed treatment notes and diagnosed bilateral carpal tunnel syndrome and mild right ulnar nerve neuropathy entrapment at the elbow. He indicated that appellant was capable of light-duty work. Dr. Ali signed April 26, May 24, and July 19, 2018 duty status reports (Form CA-17) and indicated only that appellant's restrictions were unchanged.

By decision dated August 16, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim finding that Dr. Ali's notes were cumulative.

### **LEGAL PRECEDENT -- ISSUE 1**

OWCP's regulations at section 10.500(a) provide in relevant part:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents [him or her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee's work restrictions.”<sup>5</sup>

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP procedures provide that the claims examiner should evaluate whether the evidence establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.<sup>6</sup> When the light-duty assignment either ends or is no longer

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<sup>5</sup> 20 C.F.R. § 10.500(a); *M.K.*, Docket No. 18-0907 (issued February 7, 2019).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(c)(1) (June 2013); *M.K.*, *id.*

available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.<sup>7</sup>

OWCP procedures further provide, “If there would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment).”<sup>8</sup>

A part-time light-duty assignment may be appropriate if it is for at least half of the total hours that the claimant was released for work, is not less than two hours per day, and there is written verification from the employing establishment verifying that it is not able to provide work for the total hours that the claimant was released for work.<sup>9</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly reduced appellant’s wage-loss compensation effective April 29, 2018 pursuant to section 10.500(a), for refusing a temporary limited-duty position.

On December 15, 2017 the employing establishment offered appellant a temporary modified mail handler position working eight hours a day which required him to prepare the mail on the AFSM 100 for up to three hours and to perform quality control by comparing labels to sacks for up to five hours a day. The physical requirements of the position required him to lift, push, and pull one to three pounds for three hours intermittently. Appellant was also required to stand, walk, bend, twist, and perform simple grasping for eight hours intermittently.

The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.<sup>10</sup>

The Board finds that the medical evidence of record shows that appellant could perform the temporary limited-duty assignment offered by the employing establishment in December 2017. The physical requirements of the offered temporary limited-duty assignment were within the medical restrictions as provided by Dr. Einbund in his November 17, 2016 and January 4, 2017

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at Chapter 2.814.8(c)(10).

<sup>9</sup> *Id.* at Chapter 2.814.9(d).

<sup>10</sup> See *M.K.*, *supra* note 7; *J.J.*, Docket No. 17-0885 (issued June 16, 2017); *G.C.*, Docket No. 17-0140 (issued April 13, 2017); *N.D.*, Docket No. 15-0027 (issued February 4, 2016); *T.T.*, 58 ECAB 296 (2007).

reports<sup>11</sup> as well as within Dr. Ali's April 10, 2017 report.<sup>12</sup> The Board finds that the medical restrictions provided by these physicians reflect appellant's ability to work at the time that the employing establishment offered him the temporary limited-duty assignment. These reports, which are detailed and well rationalized, are entitled to the weight of the evidence and establishes that appellant has the ability to perform the offered limited-duty employment.<sup>13</sup>

The Board further finds that OWCP complied with its procedural requirements by advising appellant on March 9, 2018 of the offered assignment in writing and by providing him a pretermination notice, with opportunity to respond, since he was receiving wage-loss benefits on the periodic rolls. The Board notes that no procedural requirements beyond those set forth in 20 C.F.R. § 10.500(a) need be afforded to appellant prior to reduction of his benefits.<sup>14</sup> OWCP properly applied the provisions of *Shadrick* in determining his loss of wage-earning capacity. The offered position was for eight hours a day.<sup>15</sup>

The remaining evidence of record is insufficient to contradict that appellant had the capacity to perform the offered limited-duty position. Appellant provided a January 18, 2018 note from Dr. Ali which indicated that appellant had pulled a muscle in his right shoulder a month earlier. Dr. Ali otherwise repeated his previous findings and conclusions. His January 18, 2018 note did not address the specific requirements of the offered position and did not offer an opinion that appellant could not perform the offered position. Thus, this report is of limited probative value in supporting appellant's disability claim.<sup>16</sup>

The evidence of record reflects that appellant declined the temporary limited-duty assignment offered by the employing establishment, which was suitable and would have provided earnings of \$1,120.23 per week. Therefore, OWCP properly reduced his wage-loss compensation, effective December 15, 2017, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted the temporary limited-duty assignment.

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<sup>11</sup> Dr. Einbund found that appellant could perform sedentary work, eight hours a day, with restrictions on repetitive movements of his wrists for more than four hours a day and lifting, pushing, and pulling up to 20 pounds for no more than three hours a day.

<sup>12</sup> Dr. Ali found that appellant could lift up to 20 pounds intermittently, and could sit, stand, walk, and climb stairs continuous. He also indicated that appellant could bend, kneel, stoop, and twist continuously and perform reaching above the shoulder, fine manipulation, simple grasping, pushing, and pulling intermittently.

<sup>13</sup> *Supra* note 12.

<sup>14</sup> *M.K.*, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>17</sup>

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.<sup>18</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>19</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's July 5, 2018 request for reconsideration of the April 25, 2018 decision did not show that OWCP erroneously applied or interpreted a specific point of law, nor did it attempt to advance a relevant legal argument not previously considered by OWCP. Accordingly, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>21</sup>

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted additional notes from Dr. Ali dated February 19, March 29, April 26, May 24, and June 21, 2018 as well as April 26, May 24, and July 19, 2018 duty status reports. The Board finds, however, that this medical evidence does not constitute relevant and pertinent new evidence not previously considered by OWCP. Dr. Ali's reports repeat evidence already in the case record. The reports, therefore, are duplicative and cumulative.<sup>22</sup> Therefore, this evidence is insufficient to

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<sup>17</sup> 20 C.F.R. § 10.606(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>18</sup> *Id.* at § 10.607(a).

<sup>19</sup> *Id.* at § 10.608(a); *see also H.H.*, *supra* note 17; *M.S.*, 59 ECAB 231 (2007).

<sup>20</sup> *Id.* at § 10.608(b); *see also H.H.*, *supra* note 17; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>21</sup> *H.H.*, *supra* note 17.

<sup>22</sup> *T.T.*, Docket No. 18-1682 (issued February 22, 2019).

require OWCP to reopen appellant's claim for consideration of the merits.<sup>23</sup> Thus, appellant is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

As appellant's request for reconsideration failed to meet any of the criteria under 20 C.F.R. § 10.606(b)(3), the Board accordingly finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 20 C.F.R. § 10.608.

**CONCLUSION**

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective April 29, 2018, pursuant to section 10.500(a), for refusing a temporary limited-duty position. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 16 and April 25, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 19, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>23</sup> *Id.*; *L.H.*, 59 ECAB 253 (2007).