

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 24, 2000 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his right shoulder, wrist, and hip when he slipped on an icy sidewalk and fell while in the performance of duty. OWCP accepted the claim for right shoulder strain and bursitis and authorized arthroscopic surgery, which was performed on August 11, 2000 and November 21, 2002. It paid appellant wage-loss compensation benefits on the supplemental rolls, effective September 13, 2002. Appellant did not immediately stop work.

In a work capacity evaluation (Form OWCP-5c) dated February 24, 2003, Dr. Jeffrey Jones, a Board-certified orthopedist, returned appellant to work effective March 3, 2003. He noted that appellant was still in rehabilitation and had limited use of his right arm. Dr. Jones noted that appellant was undergoing carpal tunnel release surgery on April 10, 2003. He provided restrictions of sedentary-duty work, answering the telephone, and no lifting or carrying. Dr. Jones limited appellant to two hours walking, no reaching above the right shoulder, no operating a motor vehicle, no repetitive movements of the wrists or elbow, and no pushing, pulling, or lifting.

On February 28, 2003 the employing establishment offered appellant a restricted-duty assignment as a letter carrier working eight hours per day from 8:30 a.m. to 5:00 p.m. The non-scheduled days would follow his normal rotation. The duties of the position were answering telephones and checking carrier mark-up work. The physical requirements were talking, walking, and writing. The position was in conformance with the restrictions of no walking over two hours, no reaching overhead on the right side, no driving, and no pushing, pulling, or lifting. The job offer was signed by appellant's manager on March 11, 2003.

In a statement dated March 23, 2003, appellant notified OWCP that he returned to work in a limited-duty status on March 15, 2003. He indicated that he would continue to work his limited-duty assignment until April 10, 2003, when he would undergo carpal tunnel surgery.

On July 25, 2003 appellant filed a notice of recurrence (Form CA-2a), alleging that on June 11, 2003 he had worsening pain in the right shoulder and neck. By decision dated November 13, 2003, OWCP denied his claim for a recurrence of disability. On February 6, 2004 appellant requested reconsideration and submitted medical evidence. By decision dated March 29, 2004, OWCP denied modification of the November 13, 2003 decision.

By decision dated August 10, 2004, OWCP found that appellant's actual earnings as a full-time light-duty carrier, effective March 11, 2003, fairly and reasonably represented his wage-earning capacity. It noted that he had performed the position for more than 60 days. OWCP also

³ *Order Remanding Case*, Docket No. 05-1986 (issued June 5, 2006); Docket No. 08-877 (issued February 11, 2009); *Order Remanding Case*, Docket No. 11-1038 (issued January 25, 2012); *Order Remanding Case*, Docket No. 21-1059 (issued May 20, 2022).

found that, as his actual earnings met or exceeded the current wages of the job he held on the date of injury, appellant had no LWEC.⁴

In a letter dated March 26, 2005, appellant requested reconsideration of the March 29, 2004 decision. He asserted that he submitted sufficient evidence to support his claim for recurrence of disability on June 11, 2003.

By decision dated July 6, 2005, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On August 2, 2005 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 16, 2005, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing. It found that since he had previously requested reconsideration on the same issue he was not entitled to an oral hearing as a matter of right.

On September 27, 2005 appellant appealed to the Board. By order dated December 16, 2005, the Board noted that OWCP failed to produce the case record and remanded the case for reconstruction and proper assemblage. The Board advised that, to fully protect appellant's appeal rights, an appropriate decision should be issued.⁵

By decision dated June 13, 2007, OWCP denied appellant's request for reconsideration of the March 29, 2004 recurrence decision, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On February 4, 2008 appellant appealed the June 13, 2007 decision to the Board. By decision dated February 11, 2009, the Board set aside the June 13, 2007 decision, finding that appellant's March 26, 2005 request for reconsideration was timely filed. The Board remanded the case to OWCP to apply the proper standard of review for timely requests for reconsideration, to be followed by a *de novo* decision.⁶

By decision dated May 1, 2009, OWCP denied modification of the March 9, 2004 decision.

On May 4, 2010 appellant requested reconsideration. By decision dated July 29, 2010, OWCP denied modification of the May 1, 2009 decision. On November 30, 2010 appellant again requested reconsideration. By decision dated December 29, 2010, OWCP denied his request for reconsideration, of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁴ On August 24, 2004 appellant filed a Form CA-2a, alleging that on August 4, 2004 he dislocated his right shoulder. By decision dated April 5, 2005, OWCP denied his claim for a recurrence of disability beginning on August 4, 2004. On July 8, 2005 appellant requested reconsideration of the April 5, 2005 decision.

⁵ Docket No. 05-1986 (issued December 16, 2005).

⁶ Docket No. 08-877 (issued February 11, 2009).

On March 17, 2011 appellant appealed to the Board. By order dated January 25, 2012, the Board set aside the December 29, 2010 decision, finding that OWCP did not properly consider all the evidence submitted at the time of the December 29, 2010 decision. The Board remanded the case to OWCP for proper consideration of the evidence followed by a *de novo* decision.⁷

In a decision dated May 24, 2012, OWCP denied modification of the July 29, 2010 decision.

On May 28, 2013 appellant requested reconsideration. By decision dated June 14, 2013, OWCP denied his request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP continued to receive medical evidence related to appellant's right shoulder conditions.

On February 19, 2021 appellant requested reconsideration. He requested a "reversal of the WEC determination." Appellant indicated that he returned to work on March 15, 2003 pursuant to a March 11, 2003 limited-duty job offer and worked for 18 days or 144 hours. He stopped work on April 10, 2003 and underwent surgery under a separate claim, OWCP File No. xxxxxx125. Appellant returned to limited-duty work on June 5, 2003 under the March 11, 2003 job offer and worked an additional 25.72 hours. He indicated that it became clear to him that his shoulder and neck conditions precluded him from performing the March 11, 2003 job offer. Appellant reported working 1.72 hours on June 11, 2003 and was placed off duty by his attending physician. He noted that this was the last day he worked for the employing establishment. Appellant indicated that he submitted pay stubs and a spreadsheet summary establishing that he only worked 21 days and 1.72 hours during the period that he returned to work on March 15, 2003 under the March 11, 2003 limited-duty job offer until the August 10, 2004 LWEC determination. He asserts that the August 10, 2004 LWEC determination was in error since he worked only one-third of the required 60 days.

OWCP received a copy of a restricted-duty assignment for a letter carrier dated February 28, 2003, a letter from an employing establishment injury compensation specialist dated March 12, 2003, a routing slip dated March 17, 2003, a statement from appellant dated March 23, 2003, and a copy of OWCP's decision dated August 10, 2004, all previously of record.

By decision dated May 20, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim.

On July 7, 2021 appellant, through his representative, appealed to the Board. By order dated May 20, 2022, the Board set aside the May 20, 2021 decision, finding that appellant's February 9, 2021 request for reconsideration was a request for modification of the August 10, 2004

⁷ Docket No. 11-1038 (issued January 25, 2012).

LWEC determination. The Board remanded the case to OWCP to apply the proper standard of review for modification of LWEC determinations, to be followed by a *de novo* decision.⁸

OWCP received additional evidence including reports from Dr. Jones dated March 2 and May 20, 2003, and March 1, 2006, a note from an OWCP case manager dated June 4, 2003, and a July 8, 2003 report from Dr. Elaine M. Tunaitis, a Board-certified psychiatrist and employing establishment physician, all previously of record.

By decision dated October 17, 2022, OWCP denied modification of the August 10, 2004 LWEC determination.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁹ Generally, wages actually earned are the best measure of 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.¹⁰ A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.¹¹ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.¹²

OWCP's procedures provide guidelines for determining wage-earning capacity based on actual earnings. Reemployment may not be considered representative of the injured employee's wage-earning capacity when an injured employee who has been released to full-time work is working less than full-time hours, the job is temporary where the employee's job when injured was permanent, and the job represents permanent seasonal employment in an area where year-round employment is available (unless the employee was a career seasonal or temporary employee when injured).¹³ In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.¹⁴

⁸ Docket No. 21-1059 (issued May 20, 2022).

⁹ 5 U.S.C. § 8115(a); *see K.B.*, Docket No. 20-0358 (issued December 10, 2020); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁰ *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

¹² *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹³ *Supra* note 10.

¹⁴ *See A.J.*, Docket No. 10-0619 (issued June 29, 2010).

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.¹⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁶

Section 8124(a) of the Federal Employees' Compensation Act¹⁷ and section 10.126 of the implementing regulations,¹⁸ require that final decisions of OWCP contain findings of fact and a statement of reasons. A decision denying a claim for benefits should contain a correct description of the basis for the denial in order that the parties in interest will have a clear understanding of the precise defect of the claim and the kind of evidence which would overcome it.¹⁹

ANALYSIS

The Board finds that this case is not in posture for decision.

As OWCP issued a formal LWEC determination, the decision will remain in place unless there is a material change in the nature and extent of the injury-related position, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.

Appellant asserted that the original August 10, 2004 LWEC determination was erroneous. OWCP procedures²⁰ require that an employee work in the selected position for at least 60 days before a wage-earning capacity analysis is performed. Appellant contends that he did not work the required 60 days of the limited-duty letter carrier position, rather he worked a total of 21 days during the entire period when he returned to work on March 15, 2003 until the August 10, 2004 LWEC determination was issued. He further stated that he stopped work on April 10, 2003, and underwent surgery under a separate claim, OWCP File No. xxxxxx125. Appellant submitted paystubs from March 8 through September 3, 2003 and a summary spreadsheet of the paystubs and hours worked.

The Board finds that OWCP did not make findings regarding the evidence and arguments appellant submitted in support of his request to modify the August 10, 2004 LWEC

¹⁵ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3a (June 2013).

¹⁶ *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁷ 5 U.S.C. § 8124(a).

¹⁸ 20 C.F.R. § 10.126.

¹⁹ *Patrick Michael Duffy*, 43 ECAB 280 (1991).

²⁰ *Supra* note 10.

determination.²¹ OWCP did not address appellant's assertion that the original August 10, 2004 LWEC determination was erroneous. It denied his request without complying with the review requirement of FECA and its implementing regulations.²² Section 8124(a) of FECA (5 U.S.C. § 8124(a)) provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation. Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons. As well, OWCP's procedures provide that the reasoning behind OWCP's decision should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²³

In the October 17, 2022 decision, OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, why he did not meet his burden of proof to modify the August 10, 2004 LWEC determination. It did not address the evidence submitted by him in relation to his assertion that the original August 10, 2004 LWEC determination was erroneous. This case must therefore be remanded to OWCP for a *de novo* decision on appellant's request for modification of the August 10, 2004 LWEC determination that describes the evidence submitted on reconsideration, and provides detailed reasons for accepting or rejecting the request pursuant to the relevant standards.²⁴

The Board further instructs OWCP to administratively combine the current claim before the Board, OWCP File No. xxxxxx482, and OWCP File No. xxxxxx125.²⁵ OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between files.²⁶ In the present claim, appellant asserts that he returned to work on March 15, 2003 and continued to work until April 10, 2003, when he went on leave to undergo carpal tunnel surgery under OWCP File No. xxxxxx125. His period of total disability under OWCP File No. xxxxxx125 appears to overlap the period for which the August 10, 2004 LWEC determination was based in OWCP File No. xxxxxx482 and therefore should be considered in determining whether the August 10, 2004 LWEC determination was erroneous.

²¹ See *Order Remanding Case, R.C.*, Docket No. 20-1671 (issued May 6, 2021); *Order Remanding Case, J.K.*, Docket No. 20-0556 (issued August 13, 2020); *Order Remanding Case, C.D.*, Docket No. 20-0450 (issued August 13, 2020); *Order Remanding Case, T.B.*, Docket No. 20-0426 (issued July 27, 2020).

²² See *M.G.*, Docket No. 21-0893 (issued December 27, 2021); *Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); see also 20 C.F.R. § 10.607(b).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²⁴ See *A.G.*, Docket No. 21-0817 (issued July 26, 2022); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *T.M.*, Docket No. 17-1609 (issued December 4, 2017); *J.J.*, Docket No. 11-1958 (issued June 27, 2012).

²⁵ This claim was accepted for carpal tunnel syndrome. It is not before the Board on this appeal.

²⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

The Board will therefore set aside OWCP's October 17, 2022 decision and remand the case for findings of fact and a statement of reasons, to be followed by a *de novo* decision on appellant's request for modification of the August 10, 2004 LWEC determination.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 29, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board