

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

S.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Lauderdale, FL, Employer**

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**Docket No. 14-1280
Issued: June 24, 2015**

Appearances:
Joanne Wright, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 9, 2014 appellant, through her representative, filed a timely appeal from a November 15, 2013 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 met her burden of proof to establish that the May 7, 2009 wage-earning capacity decision should be modified.

On appeal, appellant's representative questions whether the case file was reconstructed properly and asserts that the statement of accepted facts provided to an OWCP referral physician and to the impartial examiner failed to include all accepted conditions, that OWCP failed to develop whether fibromyalgia was a consequential condition, and that in its November 15, 2013 decision OWCP misidentified a January 13, 2010 decision and did not address all contentions raised in an August 23, 2013 petition for modification.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 10, 1998 appellant, then a 35-year-old mail carrier, was injured when a mail box came out of a wall. OWCP accepted cervical and lumbar strains, aggravation of cervical and lumbar degenerative disc disease, and adjustment reaction. Appellant thereafter received intermittent compensation, stopped work in 2003, and did not return. She was placed on the periodic compensation rolls.

In 2007 OWCP referred appellant to Dr. David M. Tobolowsky, a Board-certified psychiatrist, for a second opinion evaluation. In a May 18, 2007 report, Dr. Tobolowsky described the history of injury, her past medical and psychiatric history, and his review of the statement of accepted facts and medical record. He performed mental status examination and psychological testing. Dr. Tobolowsky diagnosed dysthymic disorder, compulsive traits, and orthopedic injuries. He concluded that, from a psychiatric standpoint, appellant was not totally disabled from performing the duties of a letter carrier or any other employment, noting that she was attending school and that was far more cognitively challenging.

In a June 1, 2007 report, Anthony Fallon, Ph.D., an attending psychologist, diagnosed depressive disorder from pain caused by lumbar sprain/strain. He advised that appellant could return to work for eight hours a day but not at the employing establishment because she could not physically perform the duties of the mail carrier position. Dr. Fallon also diagnosed fibromyalgia, due to the employment injury.

OWCP referred appellant to vocational rehabilitation. In a September 14, 2007 report, Gregory A. Price, a rehabilitation counselor, noted that appellant had completed a bachelor of social work degree and that she had requested OWCP to authorize a plan for her to continue her education and obtain a master's of social work. OWCP did not approve the requested additional training but found the constructed positions of caseworker, caseworker (child welfare), caseworker (family), community worker, and social services aide as suitable. Job placement efforts were conducted but appellant did not obtain employment.

In January 2008, OWCP referred appellant to Dr. Brad K. Cohen, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Cohen was provided a set of questions and a statement of accepted facts dated November 4, 1999, with addenda dated May 1, 2007 and January 29, 2008. The statement of accepted facts identified the accepted conditions as cervical and lumbar strains and noted that appellant also had degenerative disc disease. It further identified the duties of the respective positions.

On February 21, 2008 Dr. Cohen reported appellant's complaints of neck and low back pain and that she stated that she had been diagnosed with fibromyalgia and myofascial pain syndrome. He described prior neck and back injuries from automobile accidents in 1986 and 1987. Dr. Cohen noted his review of the medical record and provided physical examination findings. He diagnosed chronic cervical strain with cervical degenerative disc disease and chronic lumbar strain. In answer to specific OWCP questions, Dr. Cohen advised that the diagnoses were related to appellant's January 10, 1998 work injury, and that she had reached maximum medical improvement. He opined that she could work eight hours a day. A March 20, 2008 functional capacity evaluation (FCE) reported that appellant had not demonstrated maximal

effort and exhibited equivocal pain focus. Dr. Cohen reviewed the FCE, noting that it demonstrated symptom-magnification with multiple positive Waddell's signs, pain behavior, submaximal effort, and was of limited value in establishing work restrictions. He completed a work capacity evaluation on March 25, 2008 advising that appellant could work eight hours with restrictions to her physical activities including a 15-pound lifting restriction.

In a June 26, 2008 treatment note, Dr. Audie M. Rolnick, an attending Board-certified orthopedist, diagnosed improved lumbar strain, and disc herniation at C5-6 and C5-7. He advised that appellant could work six hours daily with limited bending and reaching. On June 27, 2008 Dr. Fallon advised that the work-related condition of dysthymic disorder was still present. He indicated that appellant should not return to work at the employing establishment and should continue her schooling instead of starting a rehabilitative effort.

On August 14, 2008 Mr. Price updated wage information for the identified positions.

OWCP determined that a conflict in medical evidence had been created between Dr. Rolnick and Dr. Cohen regarding appellant's work restrictions and thus referred her to Dr. Christopher A. Brown, Board-certified in orthopedic surgery, for an impartial evaluation.² In an October 9, 2008 report, Dr. Brown noted the history of injury and her complaint of lumbar pain with repetitive bending, cervical pain, and pain, numbness, and tingling in all four extremities. He reviewed the statement of accepted facts and medical record, including diagnostic studies. Range of motion of the cervical spine demonstrated that appellant touched her chin to chest, and laterally rotated and extended 10 degrees. Range of motion of the lumbar spine demonstrated that she flexed forward 60 degrees and extended and laterally flexed 30 degrees. Perception of light touch and pinprick was normal in all extremities, and motor strength was 5/5 in all extremities. Clonus, straight leg raising, and Romberg signs were negative. There were no Babinski signs, and appellant could toe and heel walk without difficulty. Dr. Brown concluded that, based on the job descriptions provided, his physical examination findings, the FCE results and his review of the prior records, she was capable of performing the duties of any of the constructed positions for eight hours a day.

On October 24, 2008 Dr. Rolnick reiterated that appellant was limited to six hours of work, noting that when she attempted to return to an eight-hour day, her neck and back pain increased. Appellant was separated from the employing establishment, effective December 20, 2008.

A February 17, 2009 investigative report from the employing establishment Office of Inspector General (OIG) reflected that appellant was pursuing a master's degree and was performing caseworker duties as a master's-level intern at a facility where she conducted individual and group therapy for 24 hours per week.

OWCP obtained current salary information from the employing establishment, and on February 18, 2009 OWCP proposed to reduce appellant's compensation based on her capacity to

² Dr. Brown was provided the same statement of accepted facts that had been provided to Dr. Cohen.

earn wages as a caseworker.³ Appellant disagreed with the proposed reduction. In a February 6, 2009 treatment note, Dr. Rolnick noted no significant complaints, with occasional aching in the neck area. He reiterated that appellant was limited to six hours of work daily because any increase caused significant neck problems. On March 27, 2009 Dr. Rolnick advised that she was having intermittent, occasional pain and was about to graduate from school. He noted no change in appellant's status. Dr. Rolnick recommended home exercise, occasional medication, and continued work restrictions.

On May 7, 2009 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Brown and reduced appellant's compensation benefits, effective that day, based on her capacity to earn wages as a full-time child welfare caseworker. This yielded a 54 percent loss of wage-earning capacity. Appellant's compensation was reduced accordingly. She timely requested a hearing.

On July 31, 2009 Dr. Rolnick reported that appellant continued to complain of neck pain, that she took no medication on a regular basis, and performed a home exercise program. He diagnosed herniated discs at C5-6 and C6-7 with degenerative spondylosis and central stenosis and requested an updated magnetic resonance imaging (MRI) scan study. Dr. Rolnick indicated that he would keep her on six hours of work daily with restrictions of limited bending and reaching and 15-minute breaks every three hours. An August 11, 2009 MRI scan study of the cervical spine demonstrated diffuse degenerative disc disease of the cervical spine with borderline spinal stenosis at C2-3 and disc protrusions at C3-4, C5-6, and C6-7. On August 31, 2009 Dr. Rolnick noted his review of MRI scan findings.

In a September 4, 2009 report, Dr. Arnold S. Zager, an attending Board-certified psychiatrist, noted that appellant reported a January 10, 1998 work injury and since had persistent orthopedic complaints, specifically pain and spasms in her right arm, and that she subsequently developed a reaction to the chronic right arm pain. He stated that her emotional state had further deteriorated because she had been "terminated" one month previously and that she became visibly distressed and tearful when presenting her history and appeared physically uncomfortable with regard to her right arm. Dr. Zager diagnosed dysthymic disorder, pain disorder due to physical and psychological causes, cervical orthopedic injury, and psychosocial stressors, and advised that appellant could not work until she emotionally stabilized.

At the hearing, held on October 27, 2009, appellant's representative read an opening statement in which she maintained that Dr. Rolnick's restrictions were applicable. She also noted that appellant suffered from fibromyalgia and irregular blood pressure, which should have been taken into account when determining appellant's limitations, and that an incorrect pay rate was used in computing her disability compensation. Appellant testified that she received her master's degree earlier in 2009, and that her physician had always limited her to six hours of work a day. She noted that she had a 20-pound lifting restriction and was currently not working.

³ OWCP used the wage information provided by Mr. Price on August 14, 2008 to establish constructed weekly wage-earning capacity. The job identified on "Florida Occupational Employment and Wages" as a community and social service specialist, all other, had an entry level hourly rate of \$11.84 or \$473.60 for a 40-hour week.

In reports dated November 18 and December 23, 2009, Dr. Zager diagnosed depressive symptoms. He noted that she continued to go forward with aspirations to become a licensed social worker, given her physical restrictions. On November 30, 2009 Dr. Rolnick reiterated his findings and conclusions.

By decision dated January 13, 2010, an OWCP hearing representative affirmed the May 7, 2009 decision. On January 10, 2011 appellant, through her representative, requested reconsideration. Appellant asserted that Dr. Brown had not completed a required work capacity evaluation, and maintained that the medical evidence established that she could work no more than six hours a day.

In reports dated June 9, 2010 to January 4, 2011, Dr. Rolnick noted that appellant had complaints of intermittent neck and arm pain. He reiterated his diagnoses and advised that she could work six hours daily with a 20-pound weight restriction and no repetitive reaching or bending, lifting or twisting from the neck or lower back area, and no repetitive use of the left upper extremity.⁴

In a February 11, 2011 decision, OWCP denied modification of the prior decision. Appellant thereafter appealed to the Board.

On June 7, 2011 Dr. Rolnick diagnosed cervical disc disease with degenerative disc disease and mild-to-moderate spinal stenosis at C5-6; mild-to-moderate spinal stenosis with a protruding disc and mild bilateral foraminal stenosis at C6-7; and moderate foraminal stenosis at C7-T1. He advised that the condition was permanently disabling and that appellant was currently working with restrictions. On January 3, 2012 Dr. Rolnick indicated that there was no change in her work status.

In an order dated February 15, 2012, the Board, noting that it had not received the complete case record, set aside the February 11, 2011 OWCP decision and remanded the case to OWCP for proper assemblage and reconstruction of the case record, to be followed by an appropriate decision.⁵

In a July 3, 2012 report, Dr. Rolnick reiterated his findings and conclusions.

A memorandum to the file dated August 24, 2012 reported that the case record had been fully reconstructed, noting that the employing establishment had provided files dated from May 1990 to April 2002.

By decision dated August 24, 2012, OWCP again denied modification of the May 7, 2009 wage-earning capacity determination. It found that appellant had not submitted medical evidence supporting that she was physically incapable of performing the duties of caseworker.

⁴ On February 9, 2011 appellant's compensation was reduced to reflect that she no longer had an eligible dependent.

⁵ Docket No. 11-921 (issued February 15, 2012). In March 30, 2011 correspondence, OWCP requested that appellant and the employing establishment provide copies of any records pertaining to the claim.

On August 23, 2013 appellant again requested modification of the wage-earning capacity decision. Her representative asserted that the constructed position was not suitable based on appellant's education, and prior experience, and its availability in the open job market at the time the determination was made. She also contended that there was a conflict in medical evidence between Dr. Fallon and Dr. Tobolowsky regarding whether appellant could psychiatrically perform the duties of the selected position, the statement of accepted facts was incomplete, that fibromyalgia should have been developed as a consequential condition, and that appellant did not meet the specific vocational preparation (SVP) for the constructed position.

On September 4, 2012 Dr. Rolnick noted appellant's complaint of worsening neck pain that radiated into her left elbow. He stated that she had not worked for several months as her private employer could not accommodate her restrictions. Dr. Rolnick reported tenderness on examination in the cervical area, noted MRI scan findings, and advised that new cervical spine x-rays showed degenerative disc disease from C3-7. He diagnosed multilevel degenerative disc disease and foraminal stenosis with no evidence of myelopathy and advised that appellant's work restrictions remained the same.

On September 25, 2012 Dr. Rolnick reported that she was doing much better on medication and with physical therapy. He reiterated his diagnoses and restrictions.

On November 13, 2012 Dr. Rolnick stated that appellant had returned to baseline and her pain was controlled with home traction, stretching, and exercise. He reiterated his diagnoses and restrictions.

In a July 14, 2013 letter, Dr. Rolnick noted no change in appellant's work status and that she had reached maximum medical improvement with regard to the work injury. He found no material worsening of her accepted condition which was stable but that it would exacerbate if she performed repetitive work. On July 16, 2013 Dr. Rolnick diagnosed that appellant had an exacerbation of low back pain with no radiation and reiterated his recommendations. In an October 22, 2013 treatment note, Dr. Rolnick found appellant's pain level relatively low. He diagnosed cervical herniated disc and advised that there was no change in her work status.

In a November 15, 2013 decision, OWCP found that appellant had not met her burden of proof to modify the May 7, 2009 wage-earning capacity determination. It noted that her contentions had been previously addressed, adding that Dr. Rolnick had also found that there had been no material change in her work-related condition.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶ OWCP regulations and procedures provide that once a formal loss of wage-earning capacity decision has been issued, modification is not

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004).

warranted unless one of three criteria is met.⁷ The procedures contain provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provided that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provided that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved, or that the claimant has been vocationally rehabilitated.⁸

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a statement of accepted facts.⁹

ANALYSIS

Appellant asserts that the May 7, 2009 wage-earning capacity determination was erroneous because the statement of accepted facts provided to an OWCP referral orthopedist, Dr. Cohen, and to the impartial orthopedic examiner, Dr. Brown, did not include all accepted conditions. The first statement of accepted facts was prepared on November 4, 1999 and stated that the accepted conditions were cervical and lumbar strains. Although the statement of accepted facts was updated on June 6, 2001, May 1, 2007, and January 29, 2008, it never reflected additional accepted conditions of aggravation of cervical and lumbar degenerative disc disease and adjustment reaction with physical symptoms. Because the statement of accepted facts sent to Drs. Cohen and Brown was not accurate, the original May 7, 2009 wage-earning capacity decision was in error. The Board finds that, accordingly, the November 15, 2013 decision denying modification of the May 7, 2009 wage-earning capacity determination must therefore be reversed.¹⁰

As to appellant's contention that OWCP failed to develop whether fibromyalgia was a consequential condition, a claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, the claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.¹¹ While Dr. Fallon diagnosed fibromyalgia due to the employment injury, he provided no explanation or rationale for his conclusions. Furthermore, there is no indication that a diagnosis of fibromyalgia was preexisting at the time of the January 10, 1998 employment injury.

⁷ 20 C.F.R. § 10.511; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501.1 (June 2013).

⁸ *Id.* at Chapter 2.1501.3a.

⁹ *Donald E. Ewals*, 51 ECAB 428 (2000).

¹⁰ *See Donald E. Ewals*, *supra* note 10.

¹¹ *J.J.*, Docket No. 09-27 (issued February 10, 2009).

The Board also notes that although a January 14, 2010 decision was misidentified as a Board decision rather than a decision of an OWCP hearing representative on page three of the November 15, 2013 decision, this is harmless error, because earlier in the decision, OWCP clearly identified the January 14, 2010 decision as from the Branch of Hearings and Review.¹² Based on the Board's finding regarding the flawed statement of accepted facts, it need not consider the additional assertions raised in this appeal.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a consequential fibromyalgia condition. The Board further finds that, because the statement of accepted facts sent to an OWCP referral orthopedist and to the impartial orthopedic examiner was flawed, appellant met her burden of proof to establish that the May 7, 2009 wage-earning capacity decision was issued in error and must be reversed.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: June 24, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² Compare pages two and three of the November 15, 2013 decision.