

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

D.O., Appellant)

and)

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, RESERVOIR REGULATION &
WATER QUALITY SECTION, Portland, OR,
Employer**)

**Docket No. 15-0957
Issued: April 1, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 25, 2015 appellant filed a timely appeal from a December 3, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ 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 modify the loss of wage-earning capacity (LWEC) determination.

On appeal appellant argues that the position of information clerk is not suitable as it involves sitting, reaching, and handling duties that are beyond her capabilities. She contends that she was unable to finish her schoolwork due to cervical issues. Appellant also argues that she

¹ 5 U.S.C. § 8101 *et seq.*

has hearing loss which would interfere with her ability to deal with the public. Finally, she challenges OWCP's evaluation of the medical evidence and argues that there is no guarantee that she will not have a relapse if she returns to work.

FACTUAL HISTORY

This case has previously been before the Board. On July 26, 1991 appellant, then a 37-year-old hydrological technician, filed an occupational disease claim (Form CA-2) alleging that as a result of working the keyboard with her right hand she suffered numbness and tingling sensation in her right hand and pain in her neck. On June 7, 1991 OWCP accepted appellant's claim for spondylosis with myelopathy, phlebitis and thrombophlebitis of deep vessels of lower extremity, and peripheral vascular complications. On September 9, 1991 it also accepted appellant's claim for carpal tunnel syndrome and sprain of the neck. Appellant stopped work on May 15, 1992 when she experienced an increase of right hand/wrist symptomology. She returned to modified work in September 1992. On May 30, 1996 appellant was restricted from regular or modified work and did not return to her federal employment. OWCP paid medical and wage-loss compensation benefits.

Appellant participated in vocational rehabilitation. In an October 12, 2005 report, the vocational rehabilitation counselor found that appellant was capable of working as an information clerk. He noted that appellant had completed one year of clerical and business-related training at Clackamas Community College and had a high school diploma. The vocational rehabilitation counselor noted restrictions of no overhead work, lifting no more than two pounds with her right arm, and no repetitive flexion/extension or rotational motions of her cervical spine. He noted that the physical demands of an information clerk were sedentary and, therefore, within her restrictions. The vocational rehabilitation counselor noted that the job was performed in sufficient numbers in appellant's commuting labor market area so as to be considered reasonably available.

In an October 11, 2005 report, Dr. Eric W. Long, appellant's treating Board-certified physiatrist, noted that appellant could not sit for more than 30 minutes at a time or for more than 4 hours a day, stand for more than 15 minutes at a time or more than 30 minutes a day, and walk for more than 15 minutes at a time or 1 hour per day. Dr. Long opined that appellant was not physically capable of performing the work of an information clerk based on her tolerances for sitting, standing, and walking.

On July 17, 2006 OWCP proposed reducing appellant's compensation based on her ability to earn wages as an information clerk. It noted that the Department of Labor's *Dictionary of Occupational Titles* (DOT) describes the position of information clerk as follows:

“Answers inquiries from persons entering establishment: Provides information regarding activities conducted at the establishment, and location of departments, offices, and employees within the organization. Informs customer of location of store merchandise in retail establishment. Provides information concerning services, such as laundry and valet services, in hotel. Receives and answers requests for information from company officials and employees. May call

employees or officials to information desk to answer inquiries. May keep record of questions as asked.”

OWCP noted that the position was classified as sedentary in nature, with occasional lifting of up to one pound or exerting negligible force in pushing or pulling. It noted that the position primarily involves sitting which can be alternated with standing and walking, and that reaching and handling are required occasionally. OWCP noted that talking, hearing, and near visual acuity are performed frequently. It afforded appellant 30 days to submit any evidence or argument regarding her ability to earn wages in the position of information clerk. Appellant did not timely respond.

By decision dated August 21, 2006, OWCP finalized its proposed reduction of appellant’s compensation benefits, effective August 21, 2006, based on the constructive LWEC position of an information clerk.

Appellant requested modification of the LWEC and submitted an October 18, 2007 report from Dr. Long, who noted that appellant continued to be symptomatic, in spite of activity restrictions, and continued to have signs and symptoms of cervical spondylosis, with cervical radiculitis and cervical myelopathy. Dr. Long indicated that he had no doubt that her symptoms would progress rapidly if she attempted competitive employment. He noted that appellant was restricted from regular/modified work from August 2, 2006 through November 18, 2008.

By decision dated February 12, 2009, OWCP denied appellant’s request for modification of the LWEC decision. Appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a decision dated September 22, 2009, the hearing representative remanded the case for further development as to whether there was a material worsening of the cervical spine that would prevent appellant from performing the information clerk duties.

On October 26, 2009 OWCP referred appellant to Dr. Darrell Weinman, a Board-certified orthopedic surgeon, for a second opinion. In a November 13, 2009 report, Dr. Weinman diagnosed bilateral carpal tunnel syndrome postoperative status bilateral carpal tunnel releases, cervical sprain, and cervical spondylosis with myopathy. He opined that appellant’s cervical spondylosis should not prevent her from performing at sedentary strength and the occasional handling and reaching required in the position of information clerk. In the work capacity evaluation, Dr. Weinman noted two-hour limitations on wrist movements, pushing, and pulling.

By decision dated January 4, 2010, OWCP denied modification of the August 21, 2006 LWEC determination.

Appellant requested a review of the written record on February 4, 2010 and submitted a medical report dated February 1, 2010 by Dr. Long. Dr. Long opined that it was clear that appellant’s cervical condition had worsened from 1999 to 2003, from 2003 to 2006, and from 2006 to 2008. He diagnosed upper extremity pain and numbness, onset early 1980s, with median lesions, palms, decompressed, ulnar neuropathy elbows right greater than left, no radial neuropathy proximal forearms or elbows, imaging evidence of right C4-5 disc herniation with

lateral recess/foraminal stenosis, symptomatic, C6-7 disc bulge, and bilateral C7 radiculitis right greater than left. Dr. Long noted that appellant did not have the sitting tolerance to function fulltime as an information clerk. He also noted that appellant had sustained bilateral sensorineural hearing loss which compromised her ability to function. Dr. Long discussed Dr. Weinman's report and noted that he had not addressed sensory disturbance in the upper limbs, hyperreflexia in the upper or lower limbs, or limitation of motion in the shoulder girdles. He also noted that Dr. Weinman documented marked limitation of cervical mobility and described a positive Waddell's sign that had not previously been described by Dr. Weinman. Finally, Dr. Long noted that Dr. Weinman completed an estimate of physical capacities that was grossly inconsistent with appellant's actual physical capacities. He opined that appellant was restricted from regular/modified work from June 18, 2009 through June 1, 2010.

By decision dated March 1, 2010, OWCP's Branch of Hearings and Review denied appellant's request for review of the written record as untimely as it was not filed within 30 days following the issuance of the January 4, 2010 OWCP decision.

On January 26, 2011 appellant requested reconsideration "of my reduced benefits," and argued that she was not able to work as an information clerk. By decision dated February 8, 2011, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

Appellant filed an appeal with the Board on June 28, 2011 under Docket No. 11-1607. In an April 23, 2012 decision, the Board found that, while appellant used the term reconsideration in her January 26, 2011 request, she implicitly asserted that the medical evidence established that her employment-related condition had worsened and that she could not tolerate a position as an information clerk. Thus, the Board found that OWCP should have developed the claim as a request for modification of her wage-earning capacity.² The facts as set forth in the Board's prior decision are hereby incorporated by reference.³

Upon remand, OWCP reviewed the evidence under the proper standard of proof and, by decision dated August 21, 2012, denied modification of the LWEC determination.

On August 19, 2013 appellant requested "reconsideration for modification" of the August 21, 2006 LWEC decision. In a letter in support of her reconsideration request, she argued that the position of information clerk was not suitable and that the LWEC determination should be reversed. Appellant noted that, at the time of the August 21, 2006 decision, after four years of returning to her position as a hydrological technician, she was not able to endure the pain of sitting at a computer for extended periods of time due to her cervical strain. She argued that as an information clerk sits most of the time, that nowhere in the position description does it state that an information clerk would be free to stand or walk alternated with sitting, and that no

² Docket No. 11-1607 (issued April 23, 2012).

³ In another appeal, the Board issued a decision on September 11, 2014 wherein it found that OWCP improperly determined that appellant forfeited her right to compensation from November 6, 1996 to December 14, 2009, and that, therefore, OWCP's overpayment and forfeiture decision issued on February 1, 2013 was reversed. Docket No. 13-1809 (issued September 11, 2014), *petition for recon. denied* (issued November 13, 2015).

employer was going to allow an employee to get up and walk around the room at will. Appellant also noted that she was awaiting authorization for surgery. She contended that her medicine caused drowsiness and that she loses her balance due to her neck problems. Appellant also discussed her hearing problems.

On October 30, 2013 appellant underwent a C5-6 anterior cervical discectomy for decompression of spinal cord; C5-6 and C6-C7 anterior interbody arthrodesis, and anterior instrumentation at C5, C6 and C7.

On November 13, 2013 OWCP modified the LWEC decision of August 21, 2006 finding that the medical evidence was sufficient to establish a material worsening of her work-related condition effective October 30, 2013, following the surgery. However, the November 13, 2013 decision denied modification of the LWEC decision prior to October 30, 2013 based on a lack of medical evidence establishing that appellant was unable to perform the duties of an information clerk prior to her surgery.

By letter dated October 13, 2014, appellant again requested reconsideration of the LWEC determination. She contended that all of her medical conditions were not considered in that she had substantial hearing loss that would interfere with her work as an information clerk. Appellant also argued that her physicians indicated that she could not do the sitting and reaching required for the position of information clerk.

By decision dated December 3, 2014, OWCP denied modification of the November 13, 2013 decision.

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.⁴

Board precedent⁵ and OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.⁶ The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated.⁷ OWCP procedures further

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); *see also M.S.*, Docket No. 15-520 (issued May 19, 2015).

⁵ *See, e.g., G.E.*, Docket No. 14-1588 (issued May 12, 2015); *D.M.*, Docket No. 11-1549 (issued June 21, 2012).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁷ *Id.* at Chapter 2.1501.3(a) (June 2013); *see also supra* note 5.

provide that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met.⁸

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background of reasonable medical certainty, and supported by medical rationale explaining the decision.⁹

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical evidence.

Appellant contends that her LWEC determination, as set forth in the August 21, 2006 OWCP decision, should be modified as the original rating was in error. She also contends that her employment accepted conditions have changed, *i.e.*, worsened, since the original LWEC decision.

The Board rejects appellant's allegation that she could sustain further injury if she worked as an information clerk. A fear of future injury is not compensable under FECA.¹² Furthermore, appellant's argument that the position was not suitable due to her hearing issues is without merit. In determining an employee's LWEC based on a position defined as suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions.¹³ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury for which appellant may receive compensation.¹⁴ There is no evidence that appellant's hearing was

⁸ *Id.* at Chapter 2.1501.4 (June 2013); *see also supra* note 5.

⁹ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ 20 C.F.R. § 10.321.

¹² *Manuel Gill*, 52 ECAB 282, 286 n.5 (2001).

¹³ *D.S.*, Docket No. 13-1397 (issued May 23, 2014).

¹⁴ *James Henderson, Jr.*, 51 ECAB 619 (2000).

significantly impaired prior to her accepted employment injury. Therefore, any difficulty that appellant may have in hearing is not to be considered in determining appellant's LWEC.

The Board finds that at the time that OWCP issued the August 21, 2006 decision finding that appellant's LWEC was based on her ability to perform the duties of information clerk, Dr. Long, appellant's treating physician, opined that appellant was not physically capable of performing the work of an information clerk based on her tolerances for sitting, standing, and walking. On October 18, 2007 Dr. Long indicated that appellant was restricted from regular/modified work from August 2, 2006 through November 18, 2008, noting signs of cervical spondylosis with cervical radiculitis and cervical myelopathy.

In a September 22, 2009 decision, an OWCP hearing representative determined that the opinions of Dr. Long established a *prima facie* case and that a second opinion was necessary. On remand, OWCP referred appellant to Dr. Weinman. Dr. Weinman opined that appellant's cervical spondylosis should not prevent her from performing sedentary strength and occasional handling and reaching required for the position of information clerk. In a February 1, 2010 medical opinion, Dr. Long strenuously disagreed with Dr. Weinman's conclusion. He noted, *inter alia*, that appellant did not have the sitting tolerance to function full time as an information clerk; that nothing in Dr. Weinman's report indicated that he recognized that she had sensory disturbance in her upper limbs, hyperreflexia in the upper or lower limbs, or limitation of shoulder girdles; and that Dr. Weinman's estimate of appellant's physical capabilities was grossly inconsistent with appellant's actual physical capacities. Dr. Long indicated that appellant remained restricted from work.

The conflict in the medical evidence between appellant's treating physician, Dr. Long, who opined that appellant was unable to work as an information clerk, and the physician who performed a second opinion for OWCP, Dr. Weinman, who opined that appellant was able to work as an information clerk was not resolved. Therefore, there remains an unresolved conflict in the medical evidence with regard to appellant's ability to work as an information clerk.¹⁵

The Board finds that the relevant evidence with regard to whether appellant could perform the duties of an information clerk to be in equipoise. It is well established that where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹⁶ The Board will remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical evidence.

¹⁵ See *M.M.*, Docket No. 07-2135 (issued November 25, 2008) (the Board remanded as OWCP had not waited for the opinion of the impartial medical examiner prior to issuing its opinion).

¹⁶ See *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); see also 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 13, 2014 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 1, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board