United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	**Docket No. 16-0028**
	)	**Issued: November 28, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Dallas, TX, Employer	)	

Appearances:
Michael E. Woods, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 7, 2015 appellant, through her representative, filed a timely appeal from the September 28, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish a basis for modifying OWCP's May 29, 2012 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On May 2, 1997 appellant, then a 28-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and upper extremity injuries as a result of her federal employment. OWCP accepted the claim for cervical strain, right wrist ganglion cyst, bilateral wrist tendinitis, and bilateral carpal tunnel syndrome (CTS). Appellant underwent a series of bilateral carpal tunnel releases in 2002. Following surgery, she returned to work in a limited-duty capacity. OWCP has granted schedule awards for a combined 16 percent permanent impairment of the right upper extremity and 12 percent permanent impairment of the left upper extremity. In a May 28, 2009 decision, it accepted that appellant suffered a recurrence of disability beginning January 13, 2009.[3] Appellant received wage-loss compensation for temporary total disability, and she received compensation benefits on the periodic compensation rolls as of June 6, 2009.

With respect to continuing employment-related disability, OWCP referred appellant for a second opinion examination by Dr. Donald M. Mauldin, a Board-certified orthopedic surgeon. Dr. Mauldin examined appellant on May 3, 2011 and advised that, while she could not resume her former duties as a mail processing clerk, appellant could work full time at a sedentary level with a 10-pound lifting restriction. In a July 14, 2011 report, Dr. John Sazy, an attending orthopedic surgeon and neurosurgeon, diagnosed cervical stenosis at C4-5, C5-6, and C6-7, and advised that appellant required cervical fusion and was currently unable to return to work.

OWCP found that a conflict in the medical evidence existed and selected Dr. Dale R. Allen, a Board-certified orthopedic surgeon, as an impartial medical examiner (IME). In a report dated July 26, 2011, Dr. Allen found that appellant continued to suffer residuals of her accepted bilateral CTS and cervical strain. He noted that appellant's prognosis was poor given that she had not shown any improvement over the past 13 years. Dr. Allen doubted whether any further improvement was likely. He did not recommend surgery, particularly cervical fusion or additional carpal tunnel releases. Instead, Dr. Allen recommended continued conservative treatment, including anti-inflammatory drugs, nonnarcotic pain medications, and sleeping aids. He further noted that, although appellant was unable to resume her mail processor duties, she could work full time performing sedentary work with occasional lifting up to 10 pounds.

In August 2011, OWCP referred appellant for vocational rehabilitation services. In November 2011, it developed a rehabilitation plan for placement as a telemarketer, information clerk, or insurance clerk. According to the Department of Labor, *Dictionary of Occupational Titles* (DOT), the identified positions were sedentary in nature. For the position of information clerk, DOT No. 237.367-022, the rehabilitation counselor indicated the weekly earnings were $456.00, and the job was reasonably available in appellant's commuting area. As a sedentary

[3] OWCP also expanded appellant's claim to include tension headache (migraines), cervical intervertebral disc displacement, and chronic pain syndrome.

position, the lifting requirements were up to 10 pounds. After 90 days of job placement services, appellant was unable to secure employment. Her OWCP-sponsored vocational rehabilitation program ended as of April 10, 2012.

On April 12, 2012 OWCP issued a proposal to reduce appellant's compensation as she had the capacity to earn wages as an "insurance clerk." The DOT No. 237.367-022 was identified for the information clerk position, and the wages were $456.00 per week. Appellant was advised to respond within 30 days if she disagreed with the proposal. On May 14, 2012 appellant's representative submitted a letter arguing that OWCP had not met its burden of proof to reduce appellant's compensation as the medical evidence was insufficient.

By decision dated May 29, 2012, OWCP reduced appellant's wage-loss compensation effective June 3, 2012 based on her ability to earn weekly wages of $456.00 as an "Insurance Clerk." It found that the selected position was both vocationally and medically suitable. The later finding was based on Dr. Allen's July 26, 2011 opinion that appellant could perform sedentary work. An OWCP hearing representative with the Branch of Hearings and Review affirmed the decision on December 5, 2012. Since then, OWCP has denied modification of its May 29, 2012 LWEC determination on four separate occasions. Its most recent merit decision is dated September 28, 2015, and was issued in response to counsel's June 20, 2015 request for modification.[4]

On June 15, 2015 OWCP provided counsel a bypass history report, which consisted of 34 pages of screen shots with various codes and explanations why 32 physicians were bypassed during the June 29, 2011 referee selection process. Prior to June 15, 2015, the only relevant evidence regarding Dr. Allen's selection as an IME was an iFECS ME023 - Appointment Schedule Notification. This report was generated at "12:21:56 PM" on June 29, 2011.

In his June 20, 2015 request for modification, counsel specifically challenged OWCP's selection of Dr. Allen as an IME. He identified more than 30 physicians who OWCP bypassed between 11:20 a.m. and 1:21 p.m. on June 29, 2011. Thirteen physicians were reportedly bypassed after OWCP had already selected Dr. Allen at 12:21 p.m. Counsel conceded that several physicians were properly bypassed where there was no current telephone listing or the physician's telephone had been disconnected (Code O - Other). He also noted several other instances where the identified physician had previously examined appellant or an associate in the same practice had seen appellant, and thus, was appropriately bypassed (Code C - Conflict). Another instance involved a district medical adviser who OWCP properly bypassed (Code O). However, counsel noted six instances where he believed OWCP improperly bypassed a physician. The reported reason for bypassing these six physicians was because their respective appointment schedulers were not in the office at the time OWCP called to schedule an IME examination (Code O).[5] Counsel argued that because OWCP had not properly selected

[4] OWCP previously denied modification on December 4, 2014, April 8, and September 16, 2015. Its September 28, 2015 decision is similar to its September 16, 2015 decision, except for a slightly more detailed analysis on page 4 regarding Dr. Allen's selection as IME.

[5] Based on the bypass history report, all six physicians were bypassed after OWCP had already selected Dr. Allen as a referee physician.

Dr. Allen, his opinion was not entitled to the weight normally afforded an IME. As such, he argued that OWCP had not met its burden to justify modifying appellant's wage-loss compensation effective June 3, 2012.

In its September 28, 2015 decision, OWCP determined that appellant had not established a basis for modifying its prior LWEC determination. Specifically, it found that the evidence did not establish an error in OWCP's selection of Dr. Allen as an IME.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[6]

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect her wage-earning capacity in his disabled condition.[7]

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[8] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[9]

Modification of an LWEC determination is unwarranted 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 erroneous.[10] The burden of proof is on the party seeking modification of the LWEC determination.[11]

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[6] *Carla Letcher*, 46 ECAB 452 (1995).

[7] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[8] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[9] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[10] 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000).

[11] *Id*. at § 10.511.

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[12] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[13] Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

In the present case, counsel has argued that the May 29, 2012 LWEC determination was erroneous and therefore should be modified. He argues that OWCP failed to satisfy its burden in its initial LWEC decision because of misplaced reliance on Dr. Allen's July 28, 2011 report. Counsel identifies numerous physicians who OWCP bypassed after having already selected Dr. Allen at 12:21 p.m. on June 29, 2011. The bypass history report identified 13 instances where a physician was bypassed on or after 1:14 p.m. on June 29, 2011. Counsel took issue with some, but not all of the reasons offered for bypassing those particular physicians. Notwithstanding the reported rationale for bypassing the physicians, it is unclear from either the record or the September 28, 2015 decision why OWCP apparently continued to contact various physicians after having already appropriately scheduled an appointment with Dr. Allen.

Counsel asserts a reversal is warranted because the record does not indicate whether the referee was properly selected from the Physician Directory System (PDS). However, this argument is irrelevant as OWCP no longer utilizes the PDS for scheduling impartial medical evaluations. That system has been replaced by the iFECS-based medical management application (MMA).[15] While the PDS is no longer utilized, the same "strict rotational scheduling" process previously relied upon is incorporated into the MMA.[16] The Board has placed great importance on the appearance, as well as the fact of impartiality in selecting a referee physician, and only if the selection procedures designed to achieve impartiality are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.[17]

It remains unclear why OWCP continued to contact various physicians after it had already appropriately scheduled an appointment with Dr. Allen, however, there was no evidence presented that establishes the selection of Dr. Allen was itself improper. OWCP did bypass physicians prior to the selection of Dr. Allen, but provided valid reasons for each bypass, such as no telephone listing for the physician, or that appellant had previously seen that particular

[12] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[13] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[14] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[15] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013).

[16] *Id.*

[17] *L.W.*, 59 ECAB 471, 478 (2008).

physician. There was no violation of established procedures. Counsel concedes that the physicians bypassed prior to the selection of Dr. Allen were all properly bypassed. Code C is used when a physician has a prior connection to the claim, and Code O is used for situations such as when there is no current telephone listing, the physician's telephone had been disconnected, or no one answers the telephone.[18] Once the selection of Dr. Allen was properly made, the additional attempts to schedule and thus bypass physicians constitutes harmless error. The selection of Dr. Allen was made in accord with OWCP procedures.[19] The attempts to schedule a physician after the selection of Dr. Allen do not invalidate the proper selection of Dr. Allen as an IME in this case.

The Board finds that Dr. Allen's IME report represents the special weight of the medical evidence. Dr. Allen provided a complete report based on an accurate factual and medical background. He found that appellant could perform sedentary duty with a 10-pound lifting restriction. As noted above, a well-reasoned opinion from an IME is entitled to special weight.[20] The selected position of information clerk, although misidentified as insurance clerk, was a sedentary position with occasional lifting of 10 pounds. It was clearly within the work restrictions provided by Dr. Allen. The Board finds the probative medical evidence establishes the position was medically suitable.

The rehabilitation counselor confirmed that the position was vocationally suitable and was performed in appellant's commuting area.[21] The wages were reported as $456.00 per week. OWCP applied the *Shadrick* formula to determine the LWEC. The earnings of $456.00 are divided by the current pay rate for appellant's date-of-injury job, to determine the wage-earning capacity percentage.[22] The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage.[23] This amount is subtracted from the pay rate for compensation purposes to determine the LWEC.[24] OWCP found that appellant's LWEC was $438.92 per week. The record does not contain any evidence of error with respect to these calculations.

The Board accordingly finds that no error in the original May 29, 2012 LWEC determination has been established. Appellant has not alleged or shown that there was a material change in the nature and extent of the injury-related condition, or that the employee has been retrained or otherwise vocationally rehabilitated. It is appellant's burden of proof to modify the

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.6 (May 2013) (the Board notes that if a message is left on the physician's phone, the scheduler should allow at least two business hours for a return call before bypassing the physician).

[19] *Supra* note 15.

[20] *Supra* note 14.

[21] *Supra* note 7.

[22] 20 C.F.R. § 10.403(d).

[23] *Id*. at § 10.403(e).

[24] *Id.*

LWEC decision.[25] Appellant has not met any of the requirements for modification, and the Board therefore finds she did not meet her burden in this case.

CONCLUSION

The Board finds appellant did not meet her burden of proof to establish that a modification of the May 29, 2012 LWEC determination was warranted.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 2016
Washington, DC

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

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

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

[25] *Supra*, note 11.