

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

_____)	
J.B., Appellant)	
)	
and)	Docket No. 18-1021
)	Issued: December 4, 2018
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, New York, NY, Employer)	
_____)	

Appearances:
Paul H. Felser, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 19, 2018 appellant, through counsel, filed a timely appeal from a March 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has met his burden of proof to establish modification of the March 3, 2004 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On April 26, 1983 appellant, then a 34-year-old U.S. Marshal, filed a traumatic injury claim (Form CA-1) alleging that on October 7, 1982 he sustained a gunshot wound to the head when a suspect fired on him with an automatic weapon. He stopped work on October 7, 1982 and did not return. OWCP accepted the claim for an open wound of the scalp with complications, postconcussion syndrome, post-traumatic stress disorder (PTSD), and an adjustment reaction. It paid appellant wage-loss compensation for total disability subsequent to his injury.

By decision dated March 2, 2004, OWCP reduced appellant's wage-loss compensation as his actual earnings as a clinical data analyst 2, effective February 28, 2000, fairly and reasonably represented his wage-earning capacity. It applied the formula set forth in *Albert C. Shadrick*³ to determine his compensation rate every 28 days.

On March 22, 2004 appellant requested an oral hearing before an OWCP hearing representative, which was held on July 29, 2004. By decision dated October 18, 2004, the hearing representative affirmed the March 2, 2004 LWEC determination. He noted that appellant had contested the calculation of his pay rate and found that OWCP properly determined his pay rate for compensation purposes.

In a report dated March 3, 2015, Dr. Laura Rosenbaum-Bloom, a Board-certified psychiatrist, discussed appellant's history of PTSD and depression after being shot while working as a U.S. Marshal. She advised that she began treating him in June 2014 when he relocated to the area, noting that she had increased his medication due to a "recurrence of depression, loneliness, and hopelessness." Dr. Rosenbaum-Bloom indicated that appellant worked at home as a medical coder for a local hospital which left him "more isolated and depressed. [Appellant] feels he cannot handle the level of work they are demanding from him at the hospital." She opined that his move to Hilton Head Island, South Carolina had exacerbated his depression and PTSD, and further noted that his uncle who lived nearby had died a few months earlier. Dr. Rosenbaum-Bloom found that appellant was totally disabled due to PTSD arising from his 1982 employment injury.

In a March 12, 2015 record of conference form, appellant's private employer discussed his unacceptable work performance. During a meeting with that employer, he resigned as he did not believe that he could sufficiently improve.

Appellant, on March 20, 2015, informed OWCP that he was unable to work due to his employment injury and requested an increase in his wage-loss compensation. In response to OWCP's request for additional information, he related that his condition had worsened in May 2014 such that he could not leave his home or otherwise function.

³ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

In a report dated May 20, 2015, Dr. Rosenbaum-Bloom advised that appellant had experienced an acute stress reaction, PTSD, and chronic major depressive disorder since his October 7, 1982 employment injury. She related that moving to South Carolina had “been disastrous for [appellant]” and aggravated his symptoms of disability. Dr. Rosenbaum-Bloom advised that appellant could no longer work as a medical coder. She noted that he had believed that working from home would be beneficial, but instead found it isolating. Dr. Rosenbaum-Bloom related:

“[Appellant’s] depression has worsened, he has thoughts of suicide and has no desire to be with others. The above symptoms are all a result of his PTSD since being shot in 1982. [Appellant] has been in treatment for PTSD and depression. His symptoms have waxed and waned throughout since his injury. The symptoms have worsened since [appellant] has moved here and gotten to the point where he cannot handle the stress from his current job.”

On July 29, 2015 OWCP advised appellant of the provisions for establishing modification of an LWEC determination. It requested that he submit reasoned medical evidence supporting that he sustained increased disability due to his employment injury.

Dr. Rosenbaum-Bloom, in an August 27, 2015 report, opined that appellant was currently unable to work due to his stress disorder. She advised that his increase in symptoms resulted from his 1982 employment injury, rather than his move to South Carolina. Dr. Rosenbaum-Bloom noted that after appellant moved to South Carolina his symptoms had increased such that he could no longer perform his employment. She opined that his chronic, acute stress disorder was “exacerbated by [appellant’s] current situation, and a direct result from the original injury which changed his trajectory of his life and how he responded to his surroundings.” Dr. Rosenbaum-Bloom advised, “In my professional opinion [appellant’s] original medical condition has significantly worsened and therefore [he] would qualify for modification.”

On February 9, 2016 OWCP referred appellant to Dr. John Custer, a Board-certified psychiatrist, for a second opinion examination. It asked Dr. Custer to evaluate appellant’s current condition and disability and address whether appellant’s relocation adversely affected his condition.

In a report dated February 18, 2016, Dr. Custer reviewed appellant’s history of a bullet wound to the forehead on October 7, 1982 during an exchange of gunfire in which a fugitive was killed. Appellant subsequently worked as a medical coder for approximately 13 years in Albany, New York, and then as a coder in South Carolina, near the residence of an uncle. His uncle died a few months after appellant moved to the area. Dr. Custer noted:

“[Appellant stated that] he was the only coder for the entire hospital. He was working from home and the lack of contact with the outside world was driving him ‘crazy.’ [Appellant] was getting constant e[-]mails and in general it was much more stressful and overwhelming than his job up in Albany, New York, in which he was one of many coders for the hospital. He became stressed, and then became depressed and did not want to get out of bed and do his work and quit the job.”

Dr. Custer noted that appellant felt better after he stopped work, but needed income. He diagnosed PTSD, residual symptoms only, mild dysthymia, and possible paranoid personality traits. Dr. Custer related that appellant's PTSD symptoms had decreased since the shooting and that he currently had some residual symptoms of PTSD, but did not meet the full criteria for a diagnosis. He found that his dysthymia or persistent depressive disorder "could potentially be related to [appellant's] original 1982 work injury" as he lost his career and identity. Dr. Custer opined that appellant's move caused an increase in symptoms, and noted that he was close to an uncle who had recently died, which also affected his present condition. He found that he could give and take supervision, but that deadlines might "provide some added stress to [appellant's] condition." Dr. Custer opined that appellant could not work in large groups of people due to PTSD-related anxiety. He disagreed with Dr. Rosenbaum-Bloom's finding that his uncle's death and move to South Carolina failed to adversely affect his symptoms. In a work capacity evaluation for psychiatric/psychological conditions (Form OWCP-5a), Dr. Custer opined that appellant could work eight hours per day in an office setting or away from large groups of the public. He indicated that he could not work in law enforcement.

In a March 3, 2016 attending physician's report (Form CA-20), Dr. Rosenbaum-Bloom diagnosed PTSD, major depressive disorder, and an acute stress disorder. She checked a box marked "yes" indicating that the condition was caused or aggravated by employment. Dr. Rosenbaum-Bloom found that appellant was totally disabled beginning March 2015 to the present.

By decision dated March 23, 2016, OWCP denied modification of its March 2, 2004 LWEC determination. It found that Dr. Custer's opinion constituted the weight of the evidence and established that appellant had not sustained a material change in the nature and extent of his accepted work injury. OWCP noted that he had voluntarily resigned from employment.

Appellant, on April 27, 2016, requested a review of the written record by an OWCP hearing representative.

In support of his request appellant submitted an April 22, 2016 report by Dr. Rosenbaum-Bloom in which she diagnosed ongoing PTSD, major depressive disorder in partial remission, and dysthymia. She opined that the paranoid personality traits found by Dr. Custer resulted from hypervigilance associated with PTSD. Dr. Rosenbaum-Bloom advised that appellant's employment-related PTSD remained active and affected his decisions and world view. She noted that his compensation was reduced in 2000 when he began working as a medical coder. Dr. Rosenbaum-Bloom opined that appellant's new position as a medical coder in South Carolina exacerbated his symptoms of PTSD such that he could not perform the concentration necessary for the position. She found that he was currently totally disabled due to PTSD.

By decision dated October 12, 2016, OWCP's hearing representative affirmed the March 23, 2016 decision. She found that appellant's condition resulted from his move to South Carolina and the stress due to his position in private employment, which she found were intervening, nonemployment-related causes.

Dr. Rosenbaum-Bloom, in a report dated October 2, 2017, discussed appellant's history of a 1982 employment injury and his subsequent employment in various low-stress positions. She

advised that after he relocated to South Carolina the “chronicity of the PTSD caused him to decompensate to the point where he cannot maintain any work at present.” Dr. Rosenbaum-Bloom disagreed with Dr. Custer’s conclusions, noting that appellant had required continued treatment for PTSD since his injury, was not close to his uncle, and did not have a support network prior to his move. She related:

“Given the work incident, and the ongoing difficulties documented by [appellant’s] physicians, the lack of resolution of his classic PTSD symptoms years after the incident, in spite of ongoing therapy and pharmacological management his recent regression is not medically unexpected. I think [appellant’s] lack of connection and his inability or desire to make friends or go out of his comfort zone is more a response to the PTSD than his move to Hilton Head[, SC] or the death of his uncle.”

Dr. Rosenbaum-Bloom noted that medical reports demonstrated that appellant had received treatment for PTSD since the injury. She related: “I think that the retraining for [appellant] as a medical coder was well intentioned, but did not consider that the position may have been too demanding given his fragile mental and emotional state.” Dr. Rosembaum-Bloom found that appellant was totally and permanently disabled from employment.

On October 10, 2017 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Custer erred in finding that appellant had few PTSD symptoms prior to his move. He maintained that Dr. Custer did not provide rationale for attributing appellant’s deteriorating condition solely to his move, especially given his prior relocations. Counsel contended that OWCP asked Dr. Custer a leading question when it asked if the unfamiliarity of appellant’s environment after his move aggravated his symptoms. He argued that, at a minimum, a conflict in medical opinion existed between Dr. Custer and Dr. Rosenbaum-Bloom. Counsel further asserted that the original LWEC determination failed to properly consider appellant’s ongoing emotional condition.

By decision dated March 30, 2018, OWCP denied modification of its March 2, 2004 LWEC determination. It found that appellant’s relocation to South Carolina constituted an independent, intervening cause of the worsening of his 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.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵

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

⁴ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁵ See *M.K.*, Docket No. 17-1852 (issued August 23, 2018).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁶

Once the work-related character of any injury has been established, the subsequent progression of that condition remains compensable so long as it is clear that the real operative factor is the progression of the compensable injury and so long as the worsening is not shown to have been produced by an independent, nonindustrial cause.⁷

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.⁸ 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.⁹

ANALYSIS

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

OWCP accepted that appellant sustained an open scalp wound with complications, postconcussion syndrome, PTSD, and an adjustment reaction due to an October 7, 1982 employment injury. Appellant stopped work on October 7, 1982.

Thereafter, appellant returned to the workforce. By decision dated March 2, 2004, OWCP reduced his compensation as it found that his actual earnings beginning February 28, 2000 as a clinical data analyst 2 fairly and reasonably represented his wage-earning capacity. It paid appellant compensation for partial wage loss resulting from his accepted October 7, 1982 employment injury.

On March 20, 2015 appellant requested a resumption of wage-loss compensation for total disability. He asserted that he was no longer able to work as a result of his October 7, 1982 employment injury. OWCP denied modification of its LWEC determination. It noted that Dr. Custer, an OWCP referral physician, attributed the increase in appellant's disability to stress resulting from his relocation to South Carolina and new position in private employment as a medical coder for a local hospital, which it found constituted an independent, intervening cause.

⁶ See *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ See A. Larson, *The Law of Workers' Compensation* § 10.01 (June 2010); see also *W.M.*, Docket No. 16-1658 (issued May 3, 2017).

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

As noted, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as it is clear that the real operative factor is the progression of the compensable injury and so long as the worsening is not shown to have been produced by an independent, nonindustrial cause.¹⁰ The Board finds that a conflict in medical opinion exists regarding whether the worsening of appellant's psychiatric condition resulted from stress arising from his private employment and relocation, an independent, nonindustrial cause, or constituted a natural progression of his underlying condition.

In a report dated March 3, 2015, Dr. Rosenbaum-Bloom advised that she began treating appellant in June 2014 after he moved into the area. She increased his medication as he had a recurrence of depression. Dr. Rosenbaum-Bloom noted that appellant experienced more depression and isolation while working from home as a medical coder. She opined that his move to Hilton Head, South Carolina had exacerbated his depression, noting that his uncle who lived in the area had recently died. Dr. Rosenbaum-Bloom found that appellant was totally disabled from work as a result of PTSD, which she attributed to the October 7, 1982 work injury.

On May 20, 2015 Dr. Rosenbaum-Bloom diagnosed an acute stress reaction, PTSD, and an exacerbation of major depressive disorder. She noted that appellant's relocation to Hilton Head, South Carolina had increased his depression and exacerbated his disability, but attributed his current symptoms to the 1982 work injury as it altered his response to his surroundings. Dr. Rosenbaum-Bloom opined that his original condition had worsened such that LWEC determination should be modified.

OWCP referred appellant to Dr. Custer for a second opinion examination. On February 18, 2016 Dr. Custer noted that appellant's position in South Carolina as a medical coder was significantly more stressful than his prior work in Albany, New York. He diagnosed residual symptoms of PTSD, mild dysthymia, and possible paranoid personality traits. Dr. Custer found that, while appellant had some residual PTSD, he did not meet the full criteria for the diagnosis. He advised that the dysthymia could be related to his 1982 employment injury due to his loss of career and identity. Dr. Custer opined that appellant's move to South Carolina and the death of his uncle exacerbated his symptoms. He determined that appellant could work full time in an office environment as long as he was away from large groups of people and the position was not in law enforcement.

Dr. Rosenbaum-Bloom, on April 22, 2016, diagnosed ongoing PTSD, major depression in partial remission, and dysthymia. She opined that the paranoid personality symptoms found by Dr. Custer resulted from hypervigilance attributable to appellant's PTSD. Dr. Rosenbaum-Bloom advised that appellant's work as a medical coder in South Carolina aggravated his condition and that he was now currently disabled. On October 2, 2017 she found that he decompensated in South Carolina after his relocation due to his chronic PTSD. Dr. Rosenbaum-Bloom disagreed with Dr. Custer's opinion that appellant's uncle's death and appellant's move to South Carolina resulted in his symptoms, noting that he was not close to his uncle and had no friends in his prior locations. She found that appellant was totally disabled from employment and advised that his recent regression was not unexpected given the lack of resolution of his PTSD symptoms.

¹⁰ See *supra* note 7; see also *C.H.*, Docket No. 13-2179 (issued April 23, 2014).

Dr. Rosenbaum-Bloom opined that working as a medical coder may have been too demanding in view of his mental state.

The Board finds that the case is not in posture for decision as a conflict in medical evidence between Dr. Custer, who found that appellant could work in an office setting and that any exacerbation of his emotional condition resulted solely from his relocation to South Carolina and change in private employment, and Dr. Rosenbaum-Bloom, who found that his condition had materially changed such that he was unable to work any duties and that the increase in disability resulted from his October 7, 1982 work injury. While Dr. Rosenbaum-Bloom determined that his move and resulting new position as a medical coder exacerbated his symptoms, she attributed his increased disability to chronic PTSD arising from his employment injury.

If there is disagreement between OWCP's referral physician and appellant's physician, OWCP will appoint a third physician who shall make an examination.¹¹ For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.¹² The Board finds that the medical opinions of Dr. Custer and Dr. Rosenbaum-Bloom are of equal weight and are in conflict as to whether appellant's accepted conditions have worsened such that he is unable to perform the duties of the constructed position.

As there exists an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case will be remanded for OWCP to refer appellant, together with the medical record and a statement of accepted facts, to an appropriate Board-certified physician to determine whether his accepted conditions have worsened such that he is unable to perform the duties of a clinical data analyst 2.¹³ The impartial medical examiner should address whether any increase from partial to total disability resulted from factors he encountered in his private employment, an independent, intervening cause, or constituted a natural progression of the compensable work injury.¹⁴ After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹¹ 5 U.S.C. § 8123(a); *see V.G.*, Docket No. 17-1341 (issued July 16, 2018).

¹² *See M.R.*, Docket No. 17-0634 (issued July 24, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹³ *See B.C.*, Docket No. 18-0407 (issued September 17, 2018).

¹⁴ *See supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 4, 2018
Washington, DC

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

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

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