United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 18-0196**
	)	**Issued: July 12, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Fairview Park, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 November 6, 2017 appellant, through counsel, filed a timely appeal from an August 24, 2017 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 the claim.[3]

[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.*

[3] The record provided to the Board includes evidence received after OWCP issued its August 24, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has met his burden of proof to modify an August 9, 2016 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On September 24, 2010 appellant, then a 60-year-old city letter carrier, filed a traumatic injury claim (Form CA-1), alleging that on that date he twisted his right knee when he stepped on acorns in the performance of his federal employment duties. He stopped work on September 24, 2010 and did not return. OWCP assigned OWCP File No.xxxxxx872 and initially accepted the condition of right knee sprain. It subsequently expanded acceptance of the claim to include an aggravation of osteoarthritis right lower leg, aggravation of internal derangement of the right knee, and aggravation of tear of medial meniscus of the right knee. OWCP paid appellant compensation on the supplemental rolls as of November 9, 2010 and on the periodic rolls as of April 10, 2011.

Appellant has two other work-related claims for his right knee. Under OWCP File No.xxxxxx789, OWCP administratively adjudicated a February 25, 2003 incident when appellant's right knee "went out" while walking in the snow. Appellant lost no time from work and OWCP did not accept an injury resulting from the incident. Under OWCP File No. xxxxxx313, OWCP accepted a January 6, 2010 traumatic injury for a right knee sprain and medial meniscus tear when appellant slipped getting out of his truck and twisted his right knee. Appellant underwent OWCP-authorized right knee surgery on June 22, 2010. He returned to full duty on August 10, 2010. OWCP administratively combined the current case, File No. xxxxxx872, with File Nos.xxxxxxx798 and xxxxxx313, with the latter claim serving as the master file.

Appellant entered into vocational rehabilitation based on the September 18, 2013 medical findings of Dr. William R. Bohl, a Board-certified orthopedic surgeon and OWCP second opinion physician. Dr. Bohl opined that appellant was able to work an eight-hour day in a sedentary position with restrictions of no bending/stooping, squatting, kneeling, climbing, one hour of standing and walking, and no more than 20 pounds to push, pull, and lift. The position of order clerk was identified as being appropriate to appellant's physical restrictions and vocational capabilities. Appellant unsuccessfully underwent a 90-day job search for the identified position. On January 6, 2015 the rehabilitation file was closed.

In March 2016, OWCP referred appellant to Dr. Robert B. Leb, a Board-certified orthopedic surgeon, for a second opinion evaluation and updated medical evaluation. In an April 21, 2016 report, Dr. Leb described appellant's prior medical history and presented examination findings. He opined that appellant's ongoing symptomology was secondary to the accepted osteoarthritis diagnosis. Dr. Leb opined that appellant had restrictions of lifting no more than 20 pounds, no squatting, kneeling, or climbing, and limited stooping and bending. He indicated that appellant could sit in an unrestricted manner. Dr. Leb also completed a work capacity evaluation (Form OWCP-5(c).

On May 9, 2016 OWCP again referred appellant for vocational rehabilitation services. As appellant had previously been in vocational rehabilitation services with job goals identified and approved in 2015, OWCP requested the rehabilitation counselor to obtain updated labor market

studies for the previously selected positions of order clerk, and telephone solicitor. This was completed on May 19, 2016.

On May 31, 2016 OWCP provided position descriptions relating the duties and strength requirement of the selected positions to Dr. Leb and requested his opinion on whether appellant was capable of performing such positions. In a June 27, 2016 addendum report, Dr. Leb reviewed the job descriptions of order clerk, and telephone solicitor and opined, within a reasonable degree of medical certainty, that appellant was physically capable of working either of those positions.

On July 8, 2016 OWCP proposed to reduce appellant's compensation based on his capacity to earn wages as an order clerk, *Dictionary of Occupational Titles* (DOT) No. 249.362-026, which required sedentary strength with no climbing, balancing, steeping, kneeling, crouching, and crawling, with frequent reaching, handling, and fingering. It noted that Dr. Leb had opined that appellant was capable of performing such position. OWCP also noted that the vocational rehabilitation counselor had determined that the order clerk position was the most appropriate based on appellant's work history and transferrable skills analysis and that it was reasonably available at a higher average weekly salary of $379.00 than $341.00 for the position of telephone solicitor. Appellant was afforded 30 days to submit additional information if he disagreed with the proposed reduction in compensation. No further information was received.

By decision dated August 9, 2016, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as an order clerk. It found that the position was medically and vocationally suitable and represented his wage-earning capacity.

Appellant, through counsel, timely requested a telephonic hearing before an OWCP hearing representative.

At the February 28, 2017 hearing, appellant, through counsel, sought modification of the LWEC determination and testified that appellant was in need of additional surgery. Counsel noted that appellant had 70 percent service-connected disability for post-traumatic stress disorder (PTSD) and 10 percent service-connected disability for hearing loss, which were preexisting conditions. Appellant testified that he had been diagnosed with scoliosis, for which he was receiving disability from the Department of Veterans Affairs (VA), and that he had been recently diagnosed with carpal tunnel syndrome. He testified that that his carpal tunnel syndrome began while he was working for the employing establishment, but he never filed a claim for it. Appellant testified that he was limited by his carpal tunnel syndrome and did not believe he could perform the duties of the order clerk position. He also testified that he unable to perform the duties of the order clerk position on a sustained basis. No additional evidence was received.

By decision dated April 4, 2017, an OWCP hearing representative found that appellant did not meet his burden of proof to establish that the August 9, 2016 LWEC determination should be modified. The hearing representative found that appellant's argument that the selected position of order clerk was not medically suitable because of his knee and back conditions was not supported by the position description and was within Dr. Leb's medical restrictions. The hearing representative also noted that appellant provided no medical evidence to support that his PTSD or hearing loss prevented him from performing the duties of the order clerk position. Additionally, since his alleged carpal tunnel condition had not been accepted as employment related and was a

subsequently-acquired condition, any limitations from that condition were immaterial to the LWEC determination.

On June 5, 2017 appellant, through counsel, requested reconsideration. He argued that the information from the VA showed that the totality of appellant's conditions were not fully analyzed.

Evidence offered in support of reconsideration included a response sheet from the VA regarding a supplemental statement of the case which was considered in appellant's VA appeal and pages 17 through 21 of the supplemental statement of the case. The partial supplemental statement of the case discussed the VA's evaluation of appellant's PTSD, which it had assigned a 70 percent disability evaluation. However, on page 21, the VA denied appellant's claim for "individual unemployability" as it had not received a completed VA Form 21-8940.

By decision dated August 24, 2017, OWCP denied modification of its prior decision. It found that the partial supplemental statement of the case from the VA was insufficient to establish that his constructed LWEC determination was issued in error.

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]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.[5] 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 materially changed; or (3) the claimant has been vocationally rehabilitated.[7]

The burden of proof is on the party attempting to show a modification of the LWEC determination.[8] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[9]

[4] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[5] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

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

[7] *Id*. at Chapter 2.1501.3(a).

[8] *Jennifer Atkerson*, 55 ECAB 317 (2004).

[9] *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

ANALYSIS

The Board finds that appellant has not established that the August 9, 2016 LWEC determination should be modified.

OWCP accepted appellant's claim for the condition of right knee sprain, aggravation of osteoarthritis right lower leg, aggravation of internal derangement of the right knee, and aggravation of the right medial meniscus of right knee. On August 9, 2016 it found that appellant could perform the duties of an order clerk, a sedentary position, and reduced his compensation to reflect his wage-earning capacity in that job. In its April 4, 2017 decision, OWCP found that appellant had not established a basis to modify the LWEC determination. Following a later request for review, it again denied modification of the LWEC determination on August 24, 2017. The issue is whether appellant established that the August 9, 2016 LWEC determination should be modified.

Appellant, through counsel, argued that the original LWEC determination was erroneous. He argued that appellant's knee, back, carpal tunnel, PSTD, and hearing conditions rendered the order clerk position medically unsuitable. However, counsel has not provided any medical evidence to support this assertion. In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury[10] Consideration is not given to conditions which arise subsequent to the employment injury.[11]

Dr. Leb specifically found that appellant could perform a sedentary job, which did not require him to lift more than 20 pounds, with no squatting, kneeling, or climbing and limited stooping and bending. He also reviewed the job description of order clerk and found that it was within appellant's restrictions. Appellant has provided no medical evidence to support that his PTSD, hearing loss, and back conditions prevented him from performing the selected position. While appellant has a carpal tunnel condition, this condition has not been accepted as employment related and there is no evidence to negate that this condition was subsequently acquired. Thus, any limitations based on appellant's carpal tunnel condition would not be material to the LWEC determination.

Before OWCP and on appeal, counsel argues that the totality of appellant's conditions were not fully analyzed. In support, he submitted a partial supplemental statement of the case from the VA. This indicated that appellant's claim for "individual unemployability" based on his 70 percent disability for PTSD was denied due to what appears to be a technicality of not filing a required form. While the VA indicated that appellant had 70 percent disability due to PTSD, this finding does not constitute medical evidence, nor is it sufficient to establish disability under FECA.[12] The Board notes that findings of other federal agencies are not dispositive with regard to questions

[10] *See Jess D. Todd,* 34 ECAB 798, 804 (1983).

[11] *John D. Jackson***,** 55 ECAB 465 (2004); *N.J.,* 59 ECAB 397 (2008).

[12] The Board has consistently held that a disability determination under one statute or by one agency does not establish disability under the other statute. *See Rufus C. Woodward*, Docket No. 92-2033 (issued September 10, 1993).

arising under FECA.[13] Thus, even if a complete supplemental statement from the VA was submitted, it would not establish that the LWEC determination was erroneous.

After OWCP found that appellant could perform the duties of an order clerk, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties, such that the LWEC determination should be modified.[14] Appellant, however, did not submit any additional medical evidence to establish a change in his accepted conditions. Accordingly, there is no medical evidence of record which establishes a change in appellant's employment-related condition such that a modification of OWCP's LWEC determination would be warranted.

There is also no indication that appellant had been retrained or otherwise vocationally rehabilitated following the LWEC determination.

Appellant has not established a material change in the nature and extent of the injury-related condition, that he had been retrained or otherwise vocationally rehabilitated, or that the original determination was erroneous. Thus, the Board finds that he has failed to meet his burden of proof to warrant modification of the LWEC determination.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish modification of the August 9, 2016 LWEC determination.

[13] *See Daniel Deparini*, 44 ECAB 657 (1993).

[14] *Phillip S. Deering*, 47 ECAB 692 (1996).

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 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