

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

_____)	
L.P., Appellant)	
)	
and)	Docket No. 19-0668
)	Issued: September 19, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Bend, OR, Employer)	
_____)	

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 4, 2019 appellant filed a timely appeal from an August 20, 2018 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish that modification of a December 23, 2009 loss of wage-earning capacity (LWEC) determination was warranted.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 20, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 28, 1998 appellant, then a 37-year-old vehicle operations maintenance assistant clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 8, 1998 he sustained lower back and hip injuries when the motor vehicle he was driving was struck by another vehicle while in the performance of duty. He stopped work on April 8, 1998 and returned to modified work on July 9, 1998. OWCP accepted the claim for lumbosacral joint ligament sprain and L3-4 lumbar intervertebral disc displacement without myelopathy. Appellant underwent authorized L3-4 discectomy surgery, which was performed on May 5, 1999 and L4-5 left-sided hemilaminectomy and discectomy, which was performed on December 17, 2008. On June 16, 2009 he accepted the modified position of vehicle operations and maintenance assistant, working eight hours per day, with restrictions of no lifting or carrying more than 40 pounds.

By decision dated December 23, 2009, OWCP issued an LWEC determination. It found that appellant had not lost any wage-earning capacity in his modified position of vehicle operations and maintenance assistant, which he had performed since June 16, 2009.

Appellant stopped work on April 5, 2014 and requested modification of the LWEC determination. OWCP denied his requests for modification by decisions dated June 25, 2015, April 26, 2016, and June 30, 2017.

On July 24, 2017 appellant appealed to the Board, and by decision dated March 9, 2018,⁴ the Board set aside OWCP's June 30, 2017 decision. The Board found that appellant's treating physicians generally supported a finding that appellant's accepted conditions had worsened, but it was unclear whether OWCP had accepted an L4-5 condition due to the April 8, 1998 employment injury. The Board remanded the case to OWCP to prepare a statement of accepted facts (SOAF) and to refer appellant for a second opinion evaluation to determine whether his accepted conditions had worsened such that he could no longer perform the duties of the modified position.

On October 23, 2017 OWCP received a progress note dated October 16, 2017 from Dr. Mark J. Krisburg, a Board-certified general surgeon, who diagnosed lumbar spondylosis, lumbar degenerative disc disease, and left lumbar radiculitis. Dr. Krisburg noted appellant's medical history, noted his physical examination findings, and opined that appellant was permanently disabled from work.

On May 17, 2018 OWCP referred appellant for a second opinion evaluation with Dr. Paul Cederberg, a Board-certified orthopedic surgeon, regarding appellant's employment-related diagnoses and whether the accepted conditions had worsened. The letter included questions for the second opinion examiner and indicated that the physician should refer to the enclosed job

³ Docket No. 17-1624 (issued March 9, 2018).

⁴ *Supra* note 1.

description and indicate whether appellant was capable of performing the duties as described after April 5, 2014. No job description was enclosed.

In a June 7, 2018 report, Dr. Cederberg, based on a review of the SOAF as well as appellant's medical history, diagnosed permanent lumbar strain superimposed on lumbar degenerative disc disease and aggravation of preexisting L3-4 and L4-5 degenerative disc disease. He noted that appellant had not returned to work at the employing establishment since stopping work on April 5, 2014, but that he was working in a small body shop which he operated spray-painting automobiles. Dr. Cederberg noted that he did not have diagnostic imaging studies for review, but appellant's physical examination revealed pain with extremes of lumbar motion, no percussive lower back tenderness, and negative straight leg testing. He related that appellant developed low back pain and pain into the left lower extremity after sitting for 20 minutes. Dr. Cederberg opined that appellant's total disability ceased one year after his L4-5 discectomy. He noted that on physical examination there were no neurologic deficits, no appreciable lower extremity weakness or atrophy, and functional low back range of motion. Dr. Cederberg concluded that appellant was capable of performing the duties of the vehicle maintenance clerk position, as he understood it. In the report and attached work capacity evaluation form (Form OWCP-5c), he advised that appellant was capable of performing sedentary work with restrictions of no lifting more than 20 pounds and pushing/pulling up to 50 pounds.

Progress notes dated June 18, 2018 from Dr. Krisburg related unchanged findings. Dr. Krisburg, in a July 17, 2018 report, noted review of appellant's diagnostic tests and that his physical examination revealed full extremity range of motion, tender left buttock with pain radiating into posterior left thigh, and intact gross motor and sensation on light touch. He diagnosed left lumbar radiculitis and lumbar degenerative disc disease and indicated that appellant was permanently disabled.

By decision dated August 20, 2018, OWCP, relying upon the opinion of Dr. Cederberg, denied modification of its December 23, 2009 LWEC modification.

LEGAL PRECEDENT

An LWEC determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represent a claimant's ability to earn wages. Compensation payments are based on the LWEC determination and it remains undisturbed until properly modified.⁵

OWCP has, by regulation, defined when modification of an LWEC determination should occur providing that:

“If OWCP issues a formal loss of wage-earning capacity determination including a finding of no loss of wage-earning capacity, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP. Modification of such a determination is only warranted where the party

⁵ *W.R.*, Docket No. 18-1782 (issued May 29, 2019); *L.T.*, Docket No. 18-0797 (issued March 4, 2019); *Katherine T. Kreger*, 55 ECAB 633 (2004).

seeking the modification establishes either that 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. However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision, such as where an employee has a demonstrated need for surgery.”⁶

Further definition as to when modification of a formal LWEC determination should occur, if the claimant’s medical condition has materially changed, is provided in OWCP’s procedures.⁷ These procedures provide for modification of a LWEC determination when “current medical evidence demonstrates either: (a) a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability; or (b) that the work-related condition has improved and disability has decreased.”

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP’s June 30, 2017 decision because the Board considered that evidence in its March 9, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.⁸

As instructed by the Board, OWCP referred appellant, together with a SOAF and the medical evidence of record, for a second opinion examination to determine appellant’s employment-related diagnoses, and whether the accepted conditions had worsened such that appellant could not perform the duties of the modified position of vehicle operations and maintenance assistant, the position upon which the LWEC determination was based. The Board notes, however, that OWCP did not provide the second opinion examiner, Dr. Cederberg, with a position description for the modified position.

In his June 7, 2018 report, Dr. Cederberg diagnosed a permanent lumbar strain superimposed on lumbar degenerative disc disease and aggravation of preexisting L3-4 and L4-5 degenerative disc disease. Without the benefit of the position description, he opined that appellant was capable of performing the vehicle maintenance clerk position, as he understood the position. Dr. Cederberg also advised that appellant was capable of returning to work in a sedentary capacity with restrictions of no lifting more than 20 pounds and no pushing/pulling more than 50 pounds.

Based on a review of Dr. Cederberg’s June 7, 2018 report and Form OWCP-5c, the Board finds that the report lacks proper foundation as he was not provided the necessary job position for

⁶ 20 C.F.R. § 10.511.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013); *see also* C.S., Docket No. 18-1610 (issued April 25, 2019).

⁸ *T.J.*, Docket No. 18-1477 (issued April 4, 2019).

a reasoned medical opinion as to whether appellant could perform the position on which the LWEC determination had been based.⁹

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹⁰ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. As instructed by the Board, OWCP further developed the medical evidence by seeking an opinion from a second opinion physician as to whether appellant's condition had materially worsened, such that he could not perform the duties of the modified position he had previously accepted and which formed the basis of the LWEC determination. It failed, however, to provide Dr. Cederberg with the position description, and then did not request that he clarify whether appellant was capable of performing the modified position, which included restrictions of lifting up to 50 pounds, when he restricted appellant to lifting no more than 20 pounds.¹¹

On remand OWCP shall provide a statement of accepted facts which properly describes the requirements of the modified position and a copy of the position description to Dr. Cederberg for a supplemental opinion as to whether his employment-related conditions worsened such that he was disabled from the modified position after April 5, 2014. After this and such other development of the evidence as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

⁹ See *C.S.*, *supra* note 7.

¹⁰ *Id.* S.S., Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹¹ See *S.S.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 19, 2019
Washington, DC

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

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

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