United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 21-0272**
	)	**Issued: August 4, 2021**
SMITHSONIAN INSTITUTION, S. DILLON RIPLEY CENTER, Washington, DC, Employer	)	

Appearances:
Roderick Walls, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On October 16, 2020 appellant, through counsel, filed a timely appeal from a September 10, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 21-0272.[2]

On February 24, 1997 appellant, then a 45-year-old museum protection officer, filed a traumatic injury claim (Form CA-1) alleging that on January 11, 1997 she slipped and fell on ice while in the performance of duty. She stopped work on January 12, 1997.

[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] The Board notes that, following the September 10, 2020 decision, appellant submitted additional evidence to OWCP. 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*.

Appellant returned to light-duty work on March 13, 1997. On April 23, 1997 OWCP accepted the claim for lumbosacral strain. It later expanded the acceptance of the claim to include a herniated disc at L5-S1. Appellant again stopped work on May 21, 1997 and did not return.

On February 3, 2010 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Steven Fuller, an osteopath specializing in orthopedic surgery, for a second opinion evaluation to determine the nature of her accepted conditions, the extent of disability, and appropriate treatment.

In a March 5, 2010 report, Dr. Fuller noted his review of the SOAF and medical record. He provided physical examination findings and diagnosed lumbar radicular pain and lumbar degenerative disc disease at L5-S1 with prior history of disc herniation. Dr. Fuller opined that appellant had lumbar paravertebral muscle weakness and muscle imbalance related to chronic deconditioning and sedentary activity. He found that she had reached maximum medical improvement (MMI). Dr. Fuller noted that appellant had lumbar degenerative disc disease, which could be related to her accepted employment injury. He indicated that she could not perform her regular duties as a security guard. Dr. Fuller opined that appellant was capable of working a light-duty job with limited lumbar bending and twisting, no lifting of more than 20 pounds, and limited standing and walking.

In an April 8, 2010 report, appellant's treating physician, Dr. Michael Ellerbusch, a Board-certified specialist in physical medicine and rehabilitation, reviewed Dr. Fuller's March 5, 2010 report. He concurred with Dr. Fuller's assessment and noted that appellant had reached MMI.

On July 1, 2010, based on Dr. Fuller's findings, OWCP referred appellant for vocational rehabilitation services.

In a letter dated January 10, 2011, OWCP informed appellant that, based on information from the vocational rehabilitation agency, it appeared that she had discontinued good faith participation in an OWCP-approved job placement program. Appellant was given 30 days to contact OWCP and resume a good faith effort, and was instructed that, if she did not cooperate, action would be taken to reduce her compensation to reflect the wage-earning capacity that she would have in the job that the rehabilitation counselor found to be within her restrictions and abilities.

On April 14, 2011 OWCP proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages as a Receptionist, Department of Labor, *Dictionary of Occupational Titles*, #237.367-038, at the rate of $340.80 per week. It found that the position was medically and vocationally suitable and represented her wage-earning capacity. OWCP afforded appellant 30 days to respond to the proposed reduction in her compensation.

By decision dated June 21, 2011, OWCP reduced appellant's wage-loss compensation, effective July 3, 2011, based on her capacity to earn wages as a receptionist.

OWCP continued to receive medical evidence related to appellant's spinal conditions.[3]

On August 16, 2020 appellant requested reconsideration of OWCP's June 21, 2011 decision. She asserted that Dr. Fuller did not examine her on March 5, 2010 and only asked her questions related to her hypertension medication. Appellant alleged that she requested Dr. Fuller's March 5, 2010 report from OWCP, but never received it. She contended that her case was mishandled and that she was never released back to work. Appellant requested reimbursement and reinstatement, noting that she was not given the opportunity to recover. She indicated that she was unable to sit, stand, or walk and suffered from muscle spasms and swollen feet. Appellant asserted that Dr. Fuller's report was fabricated as he never examined her in his office.

In an August 28, 2020 attending physician's report (Form CA-20), Dr. Perry Savage, a Board-certified orthopedic surgeon, described the accepted employment injury and diagnosed aggravation of degenerative disc disease and stenosis. He checked a box marked "Yes" indicating that appellant's conditions were caused or aggravated by the described employment activity. Dr. Savage noted that appellant was disabled as of November 20, 2019 and was not advised to return to work.

By decision dated September 10, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.[4]

The Board having duly considered this matter finds that this case is not in posture for decision.

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 the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[5] The burden of proof is on the party attempting to establish a modification of the LWEC determination.[6]

The Board finds that appellant's August 16, 2020 request for reconsideration was, in fact, a request for modification of the June 21, 2011 LWEC determination. It is well established that a

[3] By decision dated October 25, 2012, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right lower extremity. The award ran for 34.56 weeks for the period October 21, 2012 through June 19, 2013.

[4] OWCP incorrectly noted the date of decision for which review was sought as June 11, 2020 instead of June 21, 2011.

[5] 20 C.F.R. § 10.511; *see C.H.*, Docket No. 19-1114 (issued April 30, 2020); *A.S.*, Docket No. 18-0370 (issued March 5, 2019); *Tamra McCauley*, 51 ECAB 375 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

[6] *Id*.

claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous.[7]

The Board has held that when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.[8]

As OWCP improperly reviewed the case under the standard for timely reconsideration requests, the case must therefore be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met her burden of proof to establish modification of the LWEC determination.[9] Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the September 10, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this decision of the Board.

Issued: August 4, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[7] *Id*. at § 10.511; *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

[8] *See L.P.*, Docket No. 18-1429 (March 8, 2019).

[9] *See L.P.*, Docket No. 20-0154 (issued April 7, 2021). *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).