United States Department of Labor
Employees' Compensation Appeals Board

K.D., widow of L.D., Appellant	)	
and	)	**Docket No. 22-0485**
	)	**Issued: December 6, 2022**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Aurora, IL, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 16, 2022 appellant, through counsel, filed a timely appeal from a January 10, 2022 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 has met her burden of proof to modify the employee's December 16, 1998 loss of wage-earning capacity (LWEC).

FACTUAL HISTORY

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

In October 1972 OWCP accepted that the employee, then a 31-year-old air traffic controller, sustained an unspecified anxiety state due to factors of his federal employment, including a September 2, 1972 incident in the air traffic controller tower. It paid him wage-loss compensation for periods of disability from work.

Through a vocational rehabilitation program sponsored by OWCP, the employee graduated from Palmer College of Chiropractic on June 14, 1985. He passed his board examination in Iowa on February 2, 1986 and opened his office in Eldridge, Iowa, as a self-employed chiropractor on August 17, 1986.

By decision dated December 16, 1998, OWCP adjusted the employee's compensation based on its determination that he was capable of earning wages in the constructed position of associate chiropractor. It found that the constructed position of associate chiropractor had wages of $36,644.69 per year and had been shown by a labor market survey to have been reasonably available in the employee's commuting area. OWCP determined that the position represented the employee's wage-earning capacity as of January 1, 1992.[4]

The employee appealed to the Board and, by decision dated May 23, 2001,[5] the Board affirmed OWCP's December 16, 1998 LWEC determination.

In a letter dated October 21, 2004, the employee requested reconsideration. He argued that OWCP had not taken into consideration factors enumerated under 5 U.S.C. § 8115(a). The employee submitted an October 9, 2002 report from Dr. Sofia Donskaya, a Board-certified psychiatrist, in which she diagnosed major depressive disorder and chronic post-traumatic stress disorder (PTSD). In a report dated November 23, 2003, Dr. Michael Jones, a clinical psychologist, noted that the employee was first evaluated in 1997 with a long history of

[3] Docket No. 90-540 (issued September 27, 1990); Docket No. 93-92 (issued November 5, 1993); Docket No. 96-1843 (issued September 9, 1998); Docket No. 99-1454 (issued May 23, 2001); Docket No. 09-1057 (issued May 24, 2010).

[4] The associate chiropractor position required lifting up to 50 pounds maximum with frequent lifting and/or carrying of objects weighing up to 25 pounds. It also required the ability to reach, handle, finger, and/or feel.

[5] Docket No. 99-1454 (issued May 23, 2001).

intermittent depressive episodes and PTSD. He concluded that, based on treatment and psychological testing, the employee remained vocationally disabled.

By decision dated March 8, 2006, OWCP denied modification of the December 16, 1998 LWEC determination.

On February 14, 2007 the employee requested reconsideration. He argued that OWCP did not take into account the factors listed at 5 U.S.C. § 8115 and did not properly calculate his wage-earning capacity. In a report dated February 5, 2006, Dr. Jones noted that the employee "continues to exhibit symptoms of [p]ost[-]traumatic [s]tress when exposed to cues related to air traffic controlling. [The employee's] symptoms are generally much improved, but show a tendency to wax and wane relative to psychosocial stressors. He [has] been placed on permanent disability since the 1980s."

By decision dated February 7, 2008, OWCP denied modification of the December 16, 1998 LWEC determination.

The employee again requested reconsideration on August 20, 2008. He submitted a May 19, 2008 report from Dr. Jones who reiterated his opinion that the employee remained disabled.

By decision dated January 23, 2009, OWCP denied modification of the December 16, 1998 LWEC determination. The employee appealed to the Board and, by decision dated May 24, 2010,[6] the Board affirmed OWCP's January 23, 2009 decision.

Appellant, the employee's widow, contacted OWCP on March 14, 2018 to advise that the employee passed away on March 8, 2018.

In a March 9, 2020 notice of recurrence (Form CA-2a), appellant claimed that the employee sustained a recurrence of disability on April 30, 2012 due to his accepted employment injury. She asserted that the employee's work-related condition had worsened by April 30, 2012 such that he was no longer able to work. In two accompanying statements, appellant discussed the employee's psychological problems since the early-1970's, including PTSD and anxiety, which she related to his work as an air traffic controller. She also discussed the employee's treatment for leukemia since 1983 and indicated that he last worked as a self-employed chiropractor in 1996. Appellant also submitted a November 20, 2019 e-mail statement in which the employee's son discussed the employee's progressively declining psychological condition, particularly after 2010, which he related to PTSD caused by his work as an air traffic controller. In a September 23, 2019 statement and an undated statement, two friends of the employee also discussed the employee's psychological condition.

Appellant submitted a January 16, 2020 report from Dr. Vincent Ruscelli, a clinical psychologist, who indicated that he had reviewed the employee's medical file, as well as statements from his family members and friends. Dr. Ruscelli indicated that it was clear that severe symptoms had persisted for years and were indicative of PTSD. He opined that the numerous

[6] Docket No. 09-1057 (issued May 24, 2010).

PTSD symptoms were related to an incident that occurred while the employee was an air traffic controller. Dr. Ruscelli noted that, at the time, the employee was directing multiple aircraft and two of the aircraft nearly collided. At the time of this near tragedy, the employee experienced intense fear and feelings of helplessness and felt horror in realizing he came so close to being responsible for the deaths of up to 800 people. Dr. Ruscelli indicated that, following this incident, the employee was unable to perform his duties as an air traffic controller without experiencing extreme anxiety and panic. He opined that these classic PTSD symptoms persisted throughout the rest of the employee's life and that his detachment and estrangement from others, along with a chronic irritability and frequent emotional outbursts, made it impossible for him to work with others in any capacity. Clinical evidence, including testing between 1997 and 2003, indicated that the employee showed no improvement over a period of many years. Dr. Ruscelli noted that Dr. Jones indicated in 2008 that the employee remained on disability status and had not demonstrated an ability to return to his former wage-earning capacity.

Dr. Ruscelli asserted that it was clear from statements of the employee's family members and friends that there was a dramatic change in his personality, mood, and functioning after the near miss of the airplanes. He indicated that the statements demonstrated a worsening of appellant's psychological conditions in 2010. Dr. Ruscelli noted that the statements showed that the employee never fully recovered and the dramatic change in his personality left him incapable of functioning effectively in any occupation. He summarized the statements, noting that they demonstrated the employee's increasing irritability and inability to solve problems. Dr. Ruscelli indicated that, even after 2010, the employee would dream and appellant would be awakened by his instructions on which "sector" to take, as though he were directing a pilot. He indicated that there was no question that the employee's dramatic personality change persisted until his death, and was the result of continued PTSD. Dr. Ruscelli indicated:

> "[A]fter reviewing the psychometric data, clinical interviews, psychotherapy notes, and letters from family and friends, there is consensual validation that [the employee] continued throughout his life to demonstrate classic signs of PTSD, as well as debilitating depression and anxiety, which would have made it impossible for him to function effectively in any career."

Dr. Ruscelli noted that the depression and anxiety were secondary to the PTSD and related to continued failures to function because of the PTSD.

In a September 21, 2020 letter, counsel argued that appellant's recurrence of disability claim effectively constituted a request to modify the December 16, 1998 LWEC determination. In a February 23, 2021 development letter, OWCP advised appellant that she had not submitted sufficient evidence to modify the December 16, 1998 LWEC determination. It requested that she submit additional factual and medical evidence in support of her claim and afforded her 30 days to submit such evidence.

Appellant resubmitted a copy of the January 16, 2020 report of Dr. Ruscelli, as well as copies of the previously submitted factual statements. She submitted a May 7, 2021 statement in which she further discussed the employee's psychological condition, as well as numerous medical reports from attending physicians, dated between 2009 and 2014, which primarily concerned the employee's treatment for leukemia, cardiac, and pulmonary conditions.

In a February 19, 2009 report, Dr. Nancy D. Hanna, a Board-certified psychiatrist, noted that the employee visited for follow-up of his depression and PTSD that was in remission. She indicated that the employee was not on any psychiatric medication and noted that he advised that his mood was good, that he had been going out with friends, that he had been doing chores and enjoying family. The employee also advised that he had no passive or active suicidal thoughts. Dr. Hanna indicated that the employee reported that as an air traffic controller he saw two airplanes about to hit each other, thereby creating a situation in which 800 people could have died. She noted that the employee also reported that, although he used to have nightmares about the incident, he did not have them anymore. Dr. Hanna advised that the employee did not have intrusive thoughts about the incident and could talk about it, although he could get emotional when doing so. Moreover, the employee did not startle easily. Dr. Hanna indicated that the employee's wife noted that the employee had been diagnosed with depression and PTSD for a prolonged period of time, and that he had seen 22 psychiatrists over the years. She diagnosed depressive disorder and partial PTSD.

By decision dated July 14, 2021, OWCP determined that appellant failed to meet her burden of proof to modify the December 16, 1998 LWEC determination. It found that she failed to show that the December 16, 1998 LWEC determination was erroneous; that the employee had been retrained or otherwise been vocationally rehabilitated; or that the employee's employment-related medical condition materially changed such that he ceased to be able to work in the constructed position of associate chiropractor.

On August 6, 2021 appellant, through counsel, requested reconsideration of the July 14, 2021 decision.

By decision dated January 10, 2022, OWCP denied modification of its July 14, 2021 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.[7] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.[8] An employee's actual earnings generally best reflect his or her wage-earning capacity.[9] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[10] But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is

[7] *T.D.,* Docket No. 20-1088 (issued June 14, 2021); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[8] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see T.D., id.*; *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[9] *T.D., id.*; *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

[10] *S.J.*, Docket No. 19-0186 (issued August 2, 2019); *Hayden C. Ross, id.*

determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.[11]

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.[12] The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.[13] Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to post-injury or subsequently-acquired conditions.[14]

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* (DOT) or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.[15] Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[16] Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.[17]

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

[11] 5 U.S.C. § 8115(a); *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[12] *L.M., id.*; *M.A.*, 59 ECAB 624, 631 (2008).

[13] *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

[14] *L.M., supra* note 11; *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, *id.* at Chapter 2.816.4c (June 2013).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

[16] The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *L.M., supra* note 11; *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.816.6 (June 2013).

[17] 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

rehabilitated, or the original determination was, in fact, erroneous.[18] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[19]

ANALYSIS

The Board finds that appellant has not met her burden of proof to modify the employee's December 16, 1998 LWEC.

The Board preliminarily notes that it is unnecessary to consider the evidence submitted prior to the issuance of OWCP's January 23, 2009 decision, which was considered by the Board in its May 24, 2010 decision affirming OWCP's determination that appellant had not established that the December 16, 1998 LWEC determination should be modified. Findings made in prior Board decisions are *res judicata* and cannot be considered absent further merit review by OWCP under section 8128 of FECA.[20]

This newly submitted medical evidence of record, however, does not show that appellant was incapable of performing the requirements of the position from a physical or psychological standpoint. The Board thus finds that this appellant has not shown that OWCP's original December 16, 1998 LWEC determination was, in fact, erroneous.[21]

Furthermore, this newly submitted medical evidence does not show that there was a material change in the nature and extent of the employee's injury-related condition such that he could no longer work as an associate chiropractor.

Dr. Ruscelli did not provide any discussion of the accepted work-related condition, unspecified anxiety state, or explain how it worsened to the extent that the employee could not work in the constructed position of associate chiropractor. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause.[22]

Appellant also submitted a February 19, 2009 report from Dr. Hanna who noted that the employee visited for follow-up of his depression and PTSD that was in remission. However, the report did not provide any discussion of the accepted work-related condition, unspecified anxiety state, or explain how it worsened to the extent that the employee could not work in the constructed position of associate chiropractor. As noted, a report is of limited probative value regarding causal

[18] *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

[19] *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

[20] *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

[21] *See supra* note 18.

[22] *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause.[23]

Appellant also submitted statements produced by herself, as well as by family members and friends, which discussed the psychological state of the employee. However, lay persons are not competent to render medical opinion and, therefore, have no probative value on a medical issue.[24]

Thus, the Board finds that this newly submitted evidence does not show that there was a material change in the nature and extent of the employee's injury-related condition such that he could no longer work as an associate chiropractor.[25]

The Board further finds that the newly submitted evidence of record does not show that the employee was vocationally rehabilitated after OWCP adjusted his compensation per its December 16, 1998 LWEC determination.[26] Therefore, appellant has not met her burden of proof to modify the December 16, 1998 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 her burden of proof to modify the employee's December 16, 1998 LWEC.

[23] *Id*.

[24] *See R.P.*, Docket No. 22-0686 (issued September 30, 2022); *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *James A. Long*, 40 ECAB 538 (1989).

[25] *Supra* note 18.

[26] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2022
Washington, DC

Alec J. Koromilas, 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