United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 23-1042**
	)	**Issued: April 8, 2024**
U.S. POSTAL SERVICE, MAIN POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Paul H. Felser, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 2, 2023 appellant, through counsel, filed a timely appeal from a March 27, 2023 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.[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 Board notes that, following the March 27, 2023 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* 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*.

ISSUE

The issue is whether appellant has met her burden of proof to modify an April 1, 1998 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board on different issues.[4] The facts and circumstances of the case as set forth in the Board's prior decision and prior order are incorporated herein by reference. The relevant facts are as follows.

On September 23, 1991 appellant, then a 44-year-old distribution clerk/multi-position letter sorting machine (MPLSM) operator, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 1991, she sustained a pinched nerve in her left shoulder and neck when she pulled mail out of a letter sorting machine while in the performance of duty.[5] She stopped work on September 25, 1991.

OWCP accepted the claim for left shoulder and arm strain; cervical strain; herniated nucleus pulposus at C5-6; and classical migraine.

Appellant accepted the employing establishment's March 20, 1992 offer of a temporary, part-time, limited-duty assignment as a distribution clerk. She returned to work in the limited-duty position, four hours per day on March 23, 1992, and was subsequently released to work six hours per day on June 7, 1992.

By decision dated June 22, 1992, OWCP reduced appellant's wage-loss compensation, effective March 23, 1992, based on its determination that her earnings in the temporary position of modified distribution clerk fairly and reasonably represented her wage-earning capacity.

Appellant subsequently stopped work on February 9, 1995, returned to work in a sedentary modified position as a clerk on July 15, 1996, eight hours per day, patching damaged letters and flats, handling stamping/canceling mail, and distributing it to a manual letter case with no lifting/carrying or pushing/pulling more than 10 pounds, no reaching above shoulders/crawling, alternate sitting/standing intermittently, intermittent walking; and occasional bending/climbing/squatting/kneeling. She worked intermittently and stopped work on August 3, 1996.

In reports dated March 20 and 21, 1997, Dr. Bryant George, Sr., an attending Board-certified neurosurgeon, and Dr. Rand S. Metoyer, Board-certified anesthesiology and pain medicine, respectively, discussed appellant's factual and medical history, and reported findings on physical examination. Dr. George and Dr. Metoyer opined that appellant could initially return to work two hours per day and then work four hours per day in one to two weeks.

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[4] Docket No. 00-1442 (issued May 7, 2002); *Order Remanding Case*, Docket No. 08-817 (issued February 3, 2009).

[5] OWCP assigned the current claim OWCP File No. xxxxxx768. Appellant has a subsequent occupational disease claim (Form CA-2), filed on August 15, 2001, under OWCP File No. xxxxxx050, which was accepted for extrinsic asthma, respiratory complications, asthma not otherwise specified, allergic rhinitis not otherwise specified, other diseases of nasal cavity and sinuses, and acute sinusitis not otherwise specified. OWCP administratively combined OWCP File Nos. xxxxxx768 and OWCP File No. xxxxxx050, with the former designated as the master file.

On April 24, 1997, based on Dr. George's work restrictions, the employing establishment offered appellant a part-time sedentary modified distribution clerk job, handling letter mail. The physical requirements of the position remained exactly the same as in her prior modified-duty clerk position, but the hours of the position changed from eight hours to two hours per day. The offer also noted that appellant would begin the assignment for two hours of work daily for approximately one month, and increase to four hours a day thereafter.

On May 1, 1997 appellant returned to work in the modified-duty position, two hours per day. She worked intermittently until she stopped work on July 4, 1997.

By decision dated April 1, 1998, OWCP reduced appellant's wage-loss compensation, effective May 1, 1997, based on its determination that her actual earnings as a modified distribution clerk fairly and reasonably represented her wage-earning capacity. It explained that the duties of the new position reflected the work tolerance limitations established by the weight of the medical evidence of record. OWCP further found that, as appellant's actual earnings were less than the then-current weekly pay rate of her date-of-injury position, she was entitled to FECA wage-loss compensation based on her LWEC. It found that her LWEC per week was $487.50 and that her net compensation rate each four weeks was $1,398.00.

In reports dated August 3 and September 9, 1999, Dr. Ricardo R. Leoni, an OWCP second opinion physician, specializing in neurosurgery, related that appellant was limited- to light-duty work, based upon her diagnosis of cervical osteoarthritis, which may have been caused by her 1991 employment injury.

On December 22, 1999 appellant accepted a modified assignment for six hours per day, and returned to work on that date. The modified job offer listed the physical requirements of the position and indicated that the duties to be performed would require handling letter mail. The modified job offer was based on Dr. Leoni's medical reports. On January 2, 2000 OWCP adjusted appellant's compensation to reflect an LWEC amount of $162.50 based on the 30-hour-per-week work schedule effective January 2, 2000, and a net four-week compensation rate of $486.00. It continued to pay her compensation based on that rate.

On September 30, 2012 appellant retired from the employing establishment.

On April 27, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability on October 7, 2016 causally related to her accepted September 21, 1991 employment injury. She noted that her condition had gradually worsened over the years since her accepted injury. Appellant suffered from arthritis and lower back problems.

In a May 4, 2017 development letter, OWCP informed appellant that, because a formal LWEC was previously issued in her case on April 1, 1998, her claim for recurrence of disability was being treated as a request for modification of her formal LWEC determination. It requested that she submit additional argument or medical evidence to support modification of the April 1, 1998 LWEC determination. OWCP afforded her 30 days to submit the necessary evidence. No response was received.

By decision dated June 16, 2017, OWCP denied modification of the April 1, 1998 LWEC determination. It noted that appellant had not responded to its May 4, 2017 development letter.

On June 26, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 26, 2017 letter, appellant requested modification of the LWEC determination based on a material change in the nature and extent of her accepted employment-related conditions. She contended that she was unable to work and that diagnostic test results demonstrated arthritis in her back and neck pain for which she received injections. Appellant also noted that her wage-loss benefits under OWCP File No. xxxxxx050 had been terminated.

In support of her request, appellant submitted a progress note and return-to-work form, both dated May 8, 2017 from Dr. James R. Gosey, Jr., a Board-certified orthopedic surgeon. Dr. Gosey discussed his examination findings and provided assessments of cervical disc disease, primary; primary osteoarthritis of right shoulder; primary osteoarthritis of left shoulder; lumbar degenerative disc disease; and degenerative lumbar spinal stenosis. He opined that appellant was permanently unable to work.

OWCP also received a number of reports from Dr. Jonathan D. Thompson, Board-certified in physiatry and pain medicine, and Dr. Victor A. McCoy, a Board-certified diagnostic radiology and neuroradiology specialist, and Dr. Chad Domangue, Board-certified in neurology and pain medicine, which noted appellant's cervical, thoracic and lumbar diagnoses.

A telephonic hearing was held on January 25, 2018.

In a February 2, 2018 letter, Dr. Gosey noted his history regarding appellant's medical treatment. He noted that she had an old injury dating back as far as about 1991 and chronic spine pain, and that a functional capacity examination (FCE) had placed limits on her ability to work in 1991. Dr. Gosey reiterated his prior diagnosis of cervical and lumbar degenerative disc disease. Additionally, he noted that appellant had thoracic disc disease. Dr. Gosey related that when he saw her in 2017, she had back pain and neck pain, multiple degenerative cervical disc disease, and was not fit for duty of any kind. He further related that it appeared from some records he had from 2009 that her overall spine disability was worsening and her ability to work was now less than it had been in the past. Dr. Gosey opined that appellant was permanently unfit for duty for all kinds of work, noting that her current evaluation was more incapacitating than prior evaluations.

By decision dated April 2, 2018, an OWCP hearing representative, denied modification of the April 1, 1998 LWEC determination, finding that the medical evidence of record was insufficient to establish a material worsening of appellant's accepted conditions or consequential lower back, thoracic, and arthritis conditions.

On April 18, 2018 appellant requested reconsideration.

Thereafter, OWCP received a February 19, 2018 report by Dr. Martinez, who discussed her examination findings and diagnosed other spondylosis, cervical region.

In a May 8, 2018 decision, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On September 25, 2020 appellant, through counsel, again requested modification of the April 1, 1998 LWEC determination as appellant was totally disabled from her date-of-injury job, as well as any other gainful employment. Counsel argued that the original LWEC determination

was in error as OWCP did not consider appellant's post developing pulmonary conditions accepted under OWCP File No. xxxxxx050. He noted that Dr. Gosey opined that appellant was permanently not fit for duty as her accepted conditions of sprain of left shoulder, cervical strain, displacement of intervertebral disc at C5-6, and migraine had substantially worsened since the LWEC determination in 1998. Counsel also noted that Dr. Gosey had prescribed narcotics which had documented side effects and residual complications, further impairing her ability to work. He further argued that the other claims of extrinsic asthma and allergic rhinitis remained open for medical benefits and needed to be considered with regard to her work ability. Counsel also noted that appellant had received different offers of employment since the original LWEC was issued and had experienced a worsening of her accepted conditions.

In an October 31, 2018 return-to-work form, Dr. Gosey provided impressions of degenerative cervical and lumbar disc disease. He advised that appellant was unable to work.

In a November 19, 2018 report, Dr. Thompson diagnosed cervicalgia, other spondylosis, cervical; spondylosis with radiculopathy, cervical; other spondylosis lumbar; and spondylosis with radiculopathy, lumbar. He noted that appellant underwent a left cervical medial branch on ablation on February 26, 2018, and recommended radiofrequency ablation as she had positive results previously.

In a letter dated October 29, 2020, OWCP noted receipt of appellant's request for modification of the LWEC determination. It advised counsel that the file would be reviewed in an effort to determine whether the request for modification would be granted.

In a response letter dated April 12, 2021, counsel reiterated appellant's request for modification of the April 1, 1998 LWEC determination.

In response, OWCP, by development letter dated May 11, 2021, advised counsel of the deficiencies in appellant's request for modification of the previously issued LWEC determination and informed him of the type of medical evidence necessary to support modification of the LWEC determination.

In a July 2, 2021 report, Dr. Thompson noted that he had reviewed the request from OWCP for an updated medical status on appellant. He noted the history of injury and treatment and related that he had been treating appellant since April 2016 for cervical and lumbar radiculopathy/ myelopathy and cervical and lumbar facet syndrome. Dr. Thompson explained that many MRI scans had been done throughout treatment which showed a steady progression of facet joint arthropathy, foraminal stenosis, and progressive worsening of disc bulging/protrusions, which had caused neurologic injury and a steady decline of function to the point of total disability. He opined that appellant's current diagnoses were related to her spinal injuries and included cervical myelopathy, cervical facet syndrome, cervical disc herniation, cervical radiculopathy, lumbar facet syndrome, lumbar disc herniation, and lumbar radiculopathy. Dr. Thompson further opined that this progression of the original injury led to increasing pain and dysfunction of her cervical and lumbar spines and due to these progressive deficits, appellant had become unable to perform work, even on a part-time basis. He opined that appellant's progressive decline was related to the original work injury in 1991, and but for this injury, appellant would not have suffered the progressive decline to disability.

By letter dated October 25, 2021, OWCP requested that Dr. Thompson clarify appellant's current medical status and disability. No response was received.

By decision dated January 27, 2022, OWCP again denied appellant's request for modification of the April 1, 1998 LWEC determination, finding that she had not met the three criteria sufficient to warrant modification of a formal LWEC determination.

On February 24, 2022 appellant, through counsel, disagreed with the January 27, 2022 decision and requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated April 27, 2022, an OWCP hearing representative conducted a preliminary review and determined that the case was not in posture for a hearing. The hearing representative remanded the case to OWCP to request that the employing establishment address in writing whether the position that was the basis of the April 1, 1998 LWEC determination was a classified, permanent position, to be followed by a *de novo* decision.

By letter dated May 5, 2022, OWCP requested that the employing establishment comment on whether the modified distribution clerk position, on which the April 1, 1998 LWEC determination was based, was a classified, permanent, actual position and, if so, to provide a SF-50 or other documentation to verify this fact. In a response dated May 20, 2022, the employing establishment advised that the modified distribution clerk position was an indefinite classified job with duties consistent with appellant's regular position. It submitted a report of termination of disability and/or payment (Form CA-3) dated May 1, 1997 indicating that appellant returned to work in the modified distribution clerk position on that date. The employing establishment also submitted a copy of the modified job offer and position description, both dated April 24, 1997.

By decision dated July 20, 2022, OWCP denied modification of the April 1, 1998 LWEC determination, again finding that appellant had not met the three criteria sufficient to warrant modification of a formal LWEC determination.

On August 12, 2022 appellant, through counsel, disagreed with the July 20, 2022 decision and requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 14, 2022. Counsel argued that appellant was totally disabled and that the position relied upon in the April 1, 1998 LWEC determination was make-shift and odd lot, did not have a clear official title, and was called an indefinite classified job, which was "a fancy" way to say that the job was temporary. He further argued that appellant did not work 60 days in the assigned position prior to her work stoppage. Counsel explained that she did not work for a full 60 days from the start date on May 1, 1997, until she stopped work on July 3, 1997, because she did not work May 11 through 18, May 22 through June 4, 1997, and June 18 and 19, 1997.

OWCP received additional medical evidence dated March 17, 2021 through January 4, 2023 from Dr. Thompson. In a report dated March 17, 2021, Dr. Thompson related that appellant sustained a cervical and lumbar spine injury while on the job around September 1991. He reiterated that she suffered from cervical myelopathy, cervical facet syndrome, cervical disc herniation, cervical radiculopathy, lumbar facet syndrome, lumbar disc herniation, and lumbar radiculopathy. Dr. Thompson opined that appellant was unable to perform work even on a part-

time basis. In a report dated January 4, 2023, he opined that appellant continued to suffer from work injury-related residuals.

By decision dated March 27, 2023, an OWCP hearing representative affirmed the July 20, 2022 decision, finding that the additional evidence and argument did not establish that the April 1, 1998 LWEC determination should be modified.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.[6] Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[7] A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.[8] Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.[9] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[10]

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.[11] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[12]

[6] 5 U.S.C. § 8115(a); *see E.S.*, Docket No. 21-1172 (issued July 14, 2023); *V.H.*, Docket No. 20-1012 (issued August 10, 2021); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[7] *See D.A.*, Docket No. 21-0267 (issued November 19, 2021); *M.J.*, Docket No. 21-0036 (issued August 23, 2021); *K.B.*, Docket No. 20-0358 (issued December 10, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

[9] *See M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

[10] *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

[11] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3a (June 2013).

[12] *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

With respect to modification of wage-earning capacity, OWCP's procedures provide:

> "Vocationally Rehabilitated. It may be appropriate to modify the LWEC rating on the grounds that the claimant has been vocationally rehabilitated if the claimant is employed in a new job (a job different from the job for which he or she was rated) obtained with additional training which pays at least 25 percent more than the current pay of the job for which the claimant was rated."[13]

ANALYSIS

The Board finds that appellant has met her burden of proof to modify an April 1, 1998 LWEC determination.

As OWCP issued a formal LWEC determination, the decision will remain in place unless there is a material change in the nature and extent of the injury-related position, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.[14]

The Board finds that appellant has established that the April 1, 1998 determination was in error.

Counsel contended that the LWEC determination was erroneous as it was based on a makeshift and odd-lot position that did not have a clear official title and was called an "indefinite classified job" which was "a fancy" way to say that the job was temporary.

OWCP based its April 1, 1998 LWEC determination on the modified position of distribution clerk which required appellant to work two hours per day with restrictions. There was no indication that the position was temporary or permanent. On May 20, 2022 in response to an OWCP inquiry, the employing establishment related that the modified distribution clerk position was an "indefinite classified job" that involved duties consistent with appellant's regular position. At the time of her September 21, 1991 employment injury, the record indicates that appellant was a permanent employee who worked in the position of distribution clerk/MPLSM operator. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, OWCP may not consider the work appropriate when the job is temporary and the employee's previously held job was permanent.[15] Based on the employing establishment's response, the Board finds that the record does not establish that the modified distribution clerk position was formally classified as permanent.[16]

[13] *Supra* note 11 at Chapter 2.1501.5c (June 2013); *J.C.*, Docket No. 16-1217 (issued October 11, 2017).

[14] Federal (FECA) Procedure Manual, *supra* note 11.

[15] Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.815.5.2d (June 2013); *see M.I.*, Docket No. 14-1784 (issued August 21, 2015); *see also J.D.*, Docket No. 12-1026 (issued October 18, 2012).

[16] Federal (FECA) Procedure Manual, *supra* note 11; *see A.J.*, Docket No. 16-1892 (issued October 27, 2017); *M.I., id., J.V.*, Docket No. 11-1956 (issued July 3, 2012).

A basis for modifying an LWEC determination is to establish that the original decision was in error.[17] The Board finds that the April 1, 1998 LWEC determination was erroneous and did not fairly and reasonably represent appellant's wage-earning capacity. Thus, appellant met her burden of proof to establish that the April 1, 1998 LWEC determination should be modified.

CONCLUSION

The Board finds that appellant has met her burden of proof to modify an April 1, 1998 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2023 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 8, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[17] Federal (FECA) Procedure Manual, *supra* note 11; *see D.M.*, Docket No. 16-0244 (issued April 5, 2016); *P.G.*, Docket No. 14-1797 (issued September 16, 2015).