United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 24-0475**
	)	**Issued: June 7, 2024**
DEPARTMENT OF THE AIR FORCE, HANSCOM AIR FORCE BASE, Bedford, MA, Employer	)	

Appearances:
Marc J. Levy, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On April 3, 2024 appellant, through counsel, filed a timely appeal from a March 28, 2024 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 his burden of proof to modify the March 23, 2020 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

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

On October 1, 2015 appellant, then a 60-year-old powered support systems mechanic, filed a traumatic injury claim (Form CA-1) alleging that, during the weeks prior to July 11, 2015, he experienced throbbing pain in the back of his head and upper and lower back down both sides of his legs as he performed oil and battery changes and daily generator testing, which required lifting several 50-foot copper cables while in the performance of duty. He stopped work on July 13, 2015.

Following initial development of the claim, by decision dated June 2, 2017, appellant's claim was accepted for chronic lumbar strain, lumbar region radiculopathy, and permanent aggravation of preexisting lumbar degenerative disc disease.

On October 3, 2018 OWCP referred appellant along with the case record, a statement of accepted facts (SOAF) and a series of questions, to Dr. Steven A. Silver, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation. It requested that Dr. Silver evaluate appellant's injury-related conditions and assess his ability to return to work.

In a November 20, 2018 report, Dr. Silver found that appellant continued to suffer from residuals of his accepted condition of lumbar radiculopathy. He opined that appellant was unable to return to work at that time and recommended his referral for vocational rehabilitation. In an accompanying work capacity evaluation (Form OWCP-5c) dated November 21, 2018, Dr. Silver advised that appellant could perform part-time sedentary limited-duty work for two to four hours a day, with restrictions of sitting and reaching for four hours per day, walking and standing for one hour per day, reaching above shoulder, operating a motor vehicle at and to and from work, repetitive movements of wrists and elbow for two hours per day, and pushing, pulling, and lifting up to 10 pounds for one hour per day, and no squatting, kneeling, or climbing.

On February 21, 2019 appellant was referred for vocational rehabilitation based on Dr. Silver's reports.

On May 7, 2019 appellant's vocational rehabilitation counselor determined that appellant was capable of earning wages in the selected position of customer service representative (Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 239.362-014). The rehabilitation counselor found that a state labor survey showed that the customer service representative position was reasonably available within appellant's commuting area with an

[3] *Order Remanding Case*, Docket No. 22-0409 (issued July 19, 2022).

average wage of $324.60 to $649.20 per week. The customer service representative position constituted sedentary-duty work and its physical requirements included occasionally lifting up to 10 pounds, no climbing, balancing, stooping, kneeling, crouching, or crawling; occasional reaching, handling, and fingering; and frequent talking. The rehabilitation counselor advised that the position had a specific vocational preparation (SVP) of six months to less than one year and that appellant met the SVP with his prior work experience. The rehabilitation counselor concluded that the position was within the restrictions set forth by Dr. Silver's November 21, 2018 Form OWCP-5c.

Appellant subsequently submitted a June 7, 2019 report from Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon. Dr. Hartunian diagnosed chronic lumbar muscle strain, degenerative disc disease of the lumbar spine permanently aggravated by the July 11, 2015 employment injury, and bilateral lumbosacral radiculopathy. He opined that appellant was totally disabled from work and was incapable of undergoing vocational rehabilitation.

On October 23, 2019 OWCP declared a conflict in medical opinion between Dr. Hartunian and Dr. Silver regarding appellant's work capacity. It referred appellant, along with a SOAF and the case record, to Dr. John H. Chaglassian, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a November 18, 2019 report, Dr. Chaglassian discussed appellant's history of injury and provided his review of the medical evidence. He noted that the statement of accepted facts (SOAF) listed appellant's accepted conditions as chronic low back strain, lumbar radiculopathy, and permanent aggravation of preexisting lumbar degenerative disc disease. Dr. Chaglassian reported appellant's physical examination findings and diagnosed work-related sprain of the lumbosacral spine, and temporary aggravation of significant preexisting chronic degenerative disc disease, low back pain, and radiculopathy. He explained that most sprains heal within a few weeks or months with conservative treatment. Dr. Chaglassian disagreed with Dr. Hartunian's opinion that the July 11, 2015 employment injury caused appellant's total disability. He maintained that appellant did not sustain permanent aggravation and acceleration of his condition as a result of the employment injury and that he was not totally disabled. Rather, Dr. Chaglassian had temporary aggravation of his preexisting symptoms related to a significant past history of low back problems, bilateral leg radiculopathy, and uncontrolled diabetes. He opined that appellant could not perform his regular job, but he could perform a sedentary job, four hours per day, with restrictions of walking and standing one to two hours and sitting two hours per day, and no repetitive bending, lifting more than 5 to 10 pounds, pushing, pulling or twisting, driving more than two hours, or kneeling, squatting, climbing, pulling, and twisting his back. Dr. Chaglassian related that these work restrictions were not causally related to the July 11, 2015 employment injury. Rather, they were related to appellant's significant progressing preexisting medical conditions and failed back surgery. Dr. Chaglassian agreed with the opinion of Dr. Silver that appellant could undergo vocational rehabilitation.

In a notice dated February 3, 2020, OWCP advised appellant that, under 5 U.S.C. § 8106 and 5 U.S.C. § 8115, it proposed to adjust his wage-loss compensation based on his ability to earn wages in the constructed position of customer service representative. It noted that position had been selected by appellant's vocational rehabilitation counselor and that a state labor market survey demonstrated that it was reasonably available in appellant's commuting area with an

average weekly wage of $324.60. OWCP informed appellant that the duties of the position were within the work restrictions recommended by Dr. Chaglassian, the impartial medical examiner (IME). It afforded him 30 days to submit evidence and argument challenging the proposed reduction.

Appellant, through counsel, responded by letter dated March 2, 2020. He contended that the weight of the medical evidence did not rest with the opinion of Dr. Chaglassian, as there was no conflict in the medical opinion evidence regarding appellant's ability to return to work at the time appellant was referred for an impartial medical evaluation. Counsel also alleged that Dr. Chaglassian did not properly evaluate all of appellant's medical conditions, and that his report was flawed as he disputed the statement of accepted facts (SOAF).

By decision dated March 23, 2020, OWCP reduced appellant's wage-loss compensation, effective March 29, 2020, based on its determination that he was capable of earning wages in the constructed position of customer service representative. It found that the constructed position of customer service representative had part-time wages of $324.60 per week and had been shown by a labor market survey to have been reasonably available in appellant's commuting area. OWCP applied the principles set forth in the *Albert C. Shadrick*,[4] decision to determine the percentage of appellant's LWEC.

Appellant, through counsel, submitted additional evidence. In a February 8, 2018 letter, Dr. Hartunian reiterated his prior diagnoses of chronic lumbar muscle strain, degenerative disease of the lumbar spine permanently aggravated by trauma of the July 11, 2015 employment injury, and bilateral lumbar/sacral radiculopathy. He also opined that appellant remained permanently disabled from work.

OWCP also continued to receive medical progress reports regarding appellant's nonwork-related medical conditions.

In a January 25, 2019 progress note, Dr. Thomas Kesman, a Board-certified orthopedic surgeon, provided impressions of low back pain of over three months duration; foraminal stenosis of lumbar region, disc degeneration, lumbar; neck pain; facet arthritis of lumbar region; spinal stenosis, unspecified spinal region; and epidural lipomatosis. He advised that appellant could consider interventional pain treatment with a spinal cord stimulator.

A January 7, 2021 vocational assessment report, from Erin S. Bailey, a certified rehabilitation counselor, determined that appellant was unemployable with no earning capacity at the present time and into the foreseeable future.

On October 20, 2021 appellant, through counsel, requested reconsideration of the March 23, 2020 LWEC decision.

OWCP, by decision dated January 18, 2022, denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

[4] 5 ECAB 376 (1953). *See also* 20 C.F.R. § 10.403(d).

Appellant, through counsel, appealed to the Board. By order dated July 19, 2022,[5] the Board set aside OWCP's January 18, 2022 decision, finding that appellant's October 20, 2021 request for reconsideration was a request for modification of the March 23, 2020 LWEC determination. The Board remanded the case to OWCP to apply the proper standard of review for modification of LWEC determinations, to be followed by a *de novo* decision.

Appellant, through counsel, submitted additional medical evidence. OWCP received diagnostic studies dating from July 18, 2014.

Dr. Celina M. Crisman, a neurologist, in a March 2, 2021 report, provided an assessment of low back pain eccentric to the right, degenerative disc disease with endplate changes at L4-5.

In a July 7, 2022 attending physician's report (Form CA-20), Dr. Kara Hoisington, a Board-certified osteopath specializing in internal medicine and endocrinology, noted appellant's history of injury on July 11, 2015. She diagnosed chronic back pain, cervicalgia, lumbar disc degeneration, spinal stenosis, foraminal stenosis/lumbar region, and facet arthritis. Dr. Hoisington checked a box marked "Yes" indicating that the diagnoses were caused or aggravated by an employment activity. She advised that appellant was permanently disabled from work commencing July 11, 2015.

In a letter dated January 3, 2023, appellant, through counsel, contended that the March 23, 2020 LWEC determination was clearly erroneous. Counsel maintained that OWCP failed to review and address all the evidence of record, the evidence relied upon by OWCP was not based on a complete and accurate picture of appellant's total medical conditions, his actual work capacity, or availability of the constructed position. Counsel concluded that Dr. Chaglassian's report was not based on a full and complete medical history, was flawed, and could not be assigned the weight of the medical evidence.

By decision dated March 28, 2024, OWCP denied modification of the March 23, 2020 LWEC determination.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[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]

If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to

[5] *Supra* note 3.

[6] 5 U.S.C. § 8115(a); *see O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[7] *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances, which may affect the wage-earning capacity in his or her disabled condition.[8] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.[9]

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

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[12] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that appellant has met his burden of proof to modify the March 23, 2020 LWEC determination.

The evidence of record establishes that the March 23, 2020 LWEC determination was erroneously issued, as the report from Dr. Chaglassian was not of probative medical value, and therefore, did not establish appellant's capacity to perform the constructed position of customer service representative.

[8] *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

[9] *Id*.

[10] *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).

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

[12] 5 U.S.C. § 8123(a).

[13] *K.B.*, Docket No. 20-0358 (issued December 10, 2020); *T.D.*, Docket No. 16-0028 (issued November 28, 2016); *R.H.*, 59 ECAB 382 (2008); *Gary R. Sieber*, 46 ECAB 215, 225 (1994); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP determined that a conflict of medical evidence existed between appellant's treating physician Dr. Hartunian, who in a report dated June 7, 2019, opined that appellant was totally disabled, and Dr. Silver, an OWCP second opinion physician. It thereafter selected Dr. Chaglassian as an impartial medical examiner to resolve the conflict of medical opinion. In his November 20, 2018 report, however, Dr. Silver found that appellant continued to suffer from residuals of his accepted condition of lumbar radiculopathy and he opined that appellant was unable to return to work at that time. His opinion did not create a conflict of medical opinion with Dr. Hartunian. Even though the report from Dr. Chaglassian was not entitled to special weight afforded to the opinion of an impartial medical examiner resolving a conflict in medical opinion, his report can still be considered for its own intrinsic value and can still constitute the weight of the medical evidence.[14]

The Board finds however that the report from Dr. Chaglassian was of no probative value as it was not based on a proper factual background.[15] In his report dated November 18, 2019, Dr. Chaglassian noted that the statement of accepted facts (SOAF) listed appellant's accepted conditions as chronic low back strain, lumbar radiculopathy, and permanent aggravation of preexisting lumbar degenerative disc disease. However, he maintained that appellant did not sustain permanent aggravation and acceleration of his condition as a result of the employment injury. Rather, Dr. Chaglassian opined that appellant had a temporary aggravation of his preexisting symptoms related to a significant past history of low back problems, bilateral leg radiculopathy, and uncontrolled diabetes and appellant was not totally disabled.

The Board finds that Dr. Chaglassian's opinion contradicts the SOAF, which makes clear that OWCP had accepted, as employment related, a permanent aggravation of preexisting degenerative disc disease. The Board has previously explained that if a physician selected by OWCP renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[16] Dr. Chaglassian disregarded the accepted condition noted in the SOAF and opined that appellant's temporary aggravation of his preexisting degenerative disc disease was unrelated to his federal employment. The Board has found that, if a physician does not base his opinion on the SOAF, his opinion lacks a proper factual background, and is not properly rationalized.[17]

OWCP based its finding that appellant could perform the constructed position of customer service representative on the improper opinion provided by Dr. Chaglassian. Appellant has therefore established the original determination was, in fact, erroneous.[18]

[14] *C.C.*, Docket No. 20-1497 (issued August 8, 2023); *A.P.*, Docket No. 22-1054 (issued January 6, 2023); *Y.J.*, Docket No. 20-1337 (issued February 7, 2022).

[15] *See D.O.*, Docket No. 17-0911 (issued February 2, 2018).

[16] *Id*.

[17] *V.H.* Docket No. 17-0439 (issued December 13, 2017).

[18] *Supra* note 14.

Accordingly, appellant has established a basis for modifying the LWEC determination. Upon return of the case record, OWCP shall determine his entitlement to compensation benefits.

CONCLUSION

The Board finds that appellant has met his burden of proof to modify the July 29, 2021 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 7, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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