United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 22-0412**
	)	**Issued: January 21, 2025**
U.S. POSTAL SERVICE, CLEVELAND HEIGHTS POST OFFICE, Cleveland Heights, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 26, 2022 appellant, through counsel, filed a timely appeal from a January 4, 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 to consider 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 January 4, 2022 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.*

ISSUE

The issue is whether appellant has met his burden of proof to modify OWCP's July 1, 2016 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

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

On October 24, 2011 appellant then a 60-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 21, 2011 he injured his right knee when he lost his balance as he was stepping off of a rubber floor mat while in the performance of duty.[5] OWCP accepted the claim for right knee sprain. It subsequently expanded the acceptance of appellant's claim to include right knee medial meniscus tear, right knee anterior cruciate ligament tear, deep vein thrombosis of the right lower extremity, pulmonary embolism, and compartment syndrome of the right thigh.[6] OWCP paid him wage-loss compensation on the supplemental rolls, effective December 7, 2011, and on the periodic rolls, effective May 6, 2012.

In a work capacity evaluation (Form OWCP-5c) dated August 13, 2015, Dr. Todd Hochman, a Board-certified physiatrist, noted that appellant was unable to return to his usual position without restriction, but could perform light-duty work for four hours a day with restrictions of sitting up to four hours of day, walking/standing up to two hours a day, twisting/bending/stooping up to two hours a day, operating a motor vehicle at work two to three hours a day, repetitive movements of the wrists and elbows up to two hours a day, pushing and pulling up to 30 pounds, squatting up to 20 pounds, kneeling up to two hours a day, and climbing up to two hours a day, with breaks as needed.

In a Form OWCP-5c dated August 20, 2015, Dr. Hochman noted restrictions related to appellant's claim under OWCP File No. xxxxxx710. He also identified OWCP File No. xxxxxx710, accepted for osteoarthrosis of the hand bilaterally; OWCP File No. xxxxxx911

[4] Docket No. 21-0148 (issued June 7, 2021).

[5] OWCP assigned the present claim OWCP File No. xxxxxx232. It previously accepted that, on September 3, 2008, appellant sustained a right rotator cuff tear under OWCP File No. xxxxxx745. He also has a claim for a back injury that occurred on September 24, 2008 which OWCP accepted for closed dislocation of the lumbar vertebra, under OWCP File No. xxxxxx222. Appellant filed a claim for a traumatic injury on February 6, 2010, that was accepted for lumbar sprain, post-traumatic headaches, and coccyx fracture, under OWCP File No. xxxxxx911. On August 29, 2011 he filed a claim for bilateral hand pain that was accepted for bilateral hand osteoarthritis, under OWCP File No. xxxxxx710. OWCP accepted that, on July 8, 2016, under OWCP File No. xxxxxx980, appellant sustained an aggravation of other spondylosis with radiculopathy of the cervical region; aggravation of radiculopathy of the cervical region; and lesions of the ulnar nerves of the right and left upper limbs. It accepted that, on June 2, 2018, under OWCP File No. xxxxxx882, he sustained left shoulder and synovitis and tenosynovitis of the left shoulder. On January 8, 2021 OWCP accepted that under OWCP File No. xxxxxx511, appellant sustained right and left cubital tunnel syndrome causally related to factors of his federal employment. OWCP administratively combined all of the foregoing files, with OWCP File No. xxxxxx222 designated as the master file.

[6] On May 4, 2012 appellant underwent a right knee arthroscopy and partial medial meniscectomy. Dr. John Wilber, a Board-certified orthopedist, diagnosed right knee medial meniscal tear and partial anterior cruciate ligament tear.

accepted for coccyx fracture, lumbar strain, and post-traumatic headaches; OWCP File No. xxxxxx222 accepted for closed dislocation of the lumbar vertebrae; OWCP File No. xxxxxx745 accepted for right rotator cuff; and OWCP File No. xxxxxx232 accepted for right knee medial meniscus tear, and right knee anterior cruciate tear. Dr. Hochman noted that appellant was not capable of returning to his usual position without restrictions, but could work in a light-duty job, four hours a day, with restrictions of two and a half hours of fine hand manipulations per day, sitting up to four hours of day, walking up to two hours a day, operating a motor vehicle at work two to three hours a day, repetitive movements of the wrists and elbows up to two hours a day, pushing and pulling up to 30 pounds, squatting up to 20 pounds, no kneeling, and climbing up to two hours a day, with breaks as needed.

On August 27, 2015 the employing establishment offered appellant a permanent part-time limited-duty sales and service associate position working four hours a day from 2:00 p.m. to 6:00 p.m. The nonscheduled days were Sunday and Thursday. The duties of the position were performing sales and customer service duties at a retail window, retail sales, maintaining inventory, accepting packages and accountable mail, issuing and cashing foreign and domestic postal money orders, issuing stamps by mail, performing back office paperwork, accepting and responding to customer claims and inquiries, providing information regarding postal regulations, renting post office boxes, receiving rental payments, conducting reference checks, completing related forms, conducting product inventories, attaching and removing security devices, accounting for items on display, and verifying and recording sales floor inventory and shrinkage. The position was in conformance with Dr. Hochman's restrictions dated August 13 and 20, 2015 of sitting up to four hours, walking/standing/repetitive movements up to two hours; pushing/pulling up to 30 pounds, squatting up to 20 pounds, operating a motor vehicle up to three hours, and climbing up to two hours per day. Appellant accepted the job offer on August 27, 2015.

Appellant returned to the part-time limited-duty position on November 14, 2015.

By decision dated July 1, 2016, OWCP found that appellant's actual earnings as a part-time sales and service associate, effective November 14, 2015, fairly and reasonably represented his wage-earning capacity. It noted that he had performed the position for more than 60 days. By decision dated July 1, 2016, OWCP reduced appellant's compensation effective November 14, 2015, based on his actual earnings as a sales and service associate, which represented a 50 percent LWEC, or 50 percent wage-earning capacity.

OWCP received additional evidence. In a duty status report (Form CA-17) dated October 18, 2018, Dr. Sami Moufawad, a Board-certified physiatrist, diagnosed bilateral ulnar neuropathy and cervical radiculopathy. He advised that appellant could return to work four hours per day October 26, 2018 with restrictions on lifting/carrying intermittently up to 20 pounds four hours a day, sitting, standing, walking, climbing continuously up to four hours a day, kneeling, bending/stooping, twisting, pulling/pushing intermittently up to four hours a day, simple grasping and fine manipulation continuously up to four hours a day, and reaching above the shoulder intermittently up to four hours a day.

In a Form CA-17 dated March 27, 2020, Dr. Dominic Haynesworth, Board-certified in emergency medicine, noted clinical findings of right wrist weakness and advised that appellant could return to work four hours a day lifting/carrying up to 10 pounds four hours a day, pulling/pushing up to 5 pounds four hours a day, and performing simple grasping and fine manipulation up to 30 minutes four hours a day.

On April 3, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period March 14 through 27, 2020 as a result of his employment injury.

OWCP received additional evidence. In a letter dated March 5, 2020, Dr. Lyudmila Ryaboy, a Board-certified internist, noted that appellant had significant bilateral carpal tunnel syndrome, which was made worse by typing and repetitive work. She provided work restrictions limiting him to typing and other repetitive work up to 30 minutes per day.

By decision dated May 7, 2020, OWCP denied appellant's claim for compensation for disability from work commencing March 27, 2020. It found that the medical evidence of record was insufficient to establish that he was disabled from work due to his accepted employment injury.

On May 13, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 13, 2020.

By decision dated October 28, 2020, OWCP's hearing representative set aside the May 7, 2020 decision and remanded the case for further development. She instructed OWCP to evaluate whether modification of the July 1, 2016 LWEC determination was appropriate.

In a letter dated October 30, 2020, L.S., an employing establishment health and resource management specialist, indicated that the permanent modified position as a sales and service associate upon which the LWEC determination was based was not withdrawn. Additionally, L.S. indicated that a limited-duty job offer was not appropriate because this condition was not considered work related and that "[w]ork was available under the accepted conditions of this claim."

On November 4, 2020 appellant filed a notice of recurrence (Form CA-2a) alleging a work stoppage on March 24, 2020 caused by the employing establishment's withdrawal of a medically-suitable job.

By decision dated November 9, 2020, OWCP denied modification of the July 1, 2016 LWEC determination.

On November 19, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearing and Review. A hearing was held on March 9, 2021.[7]

By decision dated April 23, 2021, OWCP's hearing representative affirmed the November 9, 2020 decision.

On October 19, 2021 appellant requested reconsideration.

By decision dated January 4, 2022, OWCP denied modification of the April 23, 2021 decision.

[7] Appellant retired from the employing establishment, effective November 30, 2020.

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 eam wages.[8] 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.[9] 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.[10] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[11]

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 conditions, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[12] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the July 1, 2016 LWEC determination.

Appellant has not alleged that he was retrained or otherwise vocationally rehabilitated. Rather, he alleged that the LWEC determination was in error and that his accepted medical conditions had worsened.[14]

The record reveals that appellant demonstrated his ability to perform the duties of the accepted sales and service associate position for more than 60 days. Appellant began working in that position on November 14, 2015 and continued to work in that capacity until he stopped work in March 2020. Therefore, the Boards finds that the position fairly and reasonably represented his

[8] 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).

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

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

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

[12] *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 supra* note 10 at Chapter 2.1501.3a (June 2013).

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

[14] *C.S.*, Docket No. 16-1784 (issued May 7, 2018).

wage-earning capacity.[15] As such, the evidence of record is insufficient to establish that the LWEC determination, which became effective on July 1, 2016, was erroneous.[16]

Appellant also argued that his accepted medical conditions worsened such that he is now totally disabled from work. In order to substantiate a worsening of a medical condition the evidence must demonstrate that either there was a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability or that his disability has decreased due to an improvement of his accepted conditions.[17] On October 18, 2018 Dr. Moufawad diagnosed bilateral ulnar neuropathy and cervical radiculopathy and provided work restrictions for these conditions. On March 5, 2020 Dr. Ryaboy diagnosed bilateral carpal tunnel syndrome, which was made worse by typing and repetitive work and provided work restrictions. Additionally, on March 27, 2020 Dr. Haynesworth diagnosed right wrist weakness and provided work restrictions for this condition. However, none of these physicians provided an opinion on causal relationship between appellant's disability and any accepted employment-related condition. Thus, they are of no probative value.[18]

As the medical evidence of record is insufficient to establish a material change in the nature and extent of his injury-related conditions, the Board finds that appellant has not met his burden of proof to modify the July 1, 2016 LWEC determination.[19]

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 his burden of proof to modify the July 1, 2016 LWEC determination.

[15] *See L.L.*, Docket No. 21-1234 (issued July 14, 2023).

[16] *Supra* note 14.

[17] *See G.B.*, Docket No. 17-0002 (issued June 12, 2017); *S.M.*, 58 ECAB 166 (2006). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5b (June 2013).

[18] *P.L.*, Docket No. 22-0337 (issued September 9, 2022); *K.F.*, Docket No.19-1846 (issued November 3, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[19] *G.B.*, Docket No. 17-0002 (issued June 12, 2017).

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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