

**United States Department of Labor
Employees' Compensation Appeals Board**

P.K., Appellant)	
)	
and)	Docket No. 13-1504
)	Issued: February 18, 2014
DEPARTMENT OF THE INTERIOR, U.S. FISH)	
& WILDLIFE SERVICE, Randlett, UT,)	
Employer)	
)	

Appearances:
Debra A. Kerins, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2013 appellant, through his representative, filed a timely appeal from the January 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its loss of wage-earning capacity (LWEC) determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that the November 20, 2009 LWEC determination should be modified.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On a prior appeal,² the Board found that appellant was entitled to a merit review of OWCP's November 20, 2009 determination that he had the capacity to earn wages in the constructed position of customer service representative.³ The attending Board-certified orthopedic surgeon, Dr. Burk T. Young, found appellant at maximum medical improvement with some limitation, but he neglected to submit a work capacity evaluation describing those limitations. OWCP gave the weight of the medical evidence to the second-opinion physician, Dr. Michael T. Giovanniello, a Board-certified physiatrist specializing in pain medicine, who provided permanent work restrictions on November 6, 2008. By submitting the September 3, 2008 work capacity evaluation from Dr. Young, the Board found that the material constituted relevant and pertinent new evidence not previously considered by OWCP.

In a decision dated January 7, 2013, OWCP reviewed Dr. Young's September 3, 2008 work capacity evaluation and found that he did not offer objective findings or medical rationale to support the work restrictions. It found that Dr. Giovanniello's opinion continued to represent the weight of the medical evidence.

On appeal, appellant argued that he was not directed to see Dr. Giovanniello; he was directed to see his partner and the physician's opinion must be dismissed, leaving Dr. Young's evaluation as the only valid opinion. He stated that he did not obstruct the vocational rehabilitation process and that the LWEC determination was erroneous. Appellant argued that OWCP missed a September 13, 2012 deadline to make its decision and informed his wife that it did not have to follow the law. He outlined the medical documents and stated that, given his most recent imaging study, it should be clear that his condition has deteriorated over the past eight years. Appellant argued that OWCP should authorize Dr. Young's request for revision surgery.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings, if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. If the employee has no actual earnings,

² Docket No. 12-46 (issued May 11, 2012).

³ On July 3, 2004 appellant, a 44-year-old maintenance worker, sustained a traumatic injury in the performance of duty while loading scrap pipe. OWCP accepted his claim for lumbar spinal stenosis and disc protrusion at L4-5 and L5-S1. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

his or her wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his or her injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁶

Once the LWEC 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. The burden of proof is on the party attempting to show modification of the award.⁷

ANALYSIS

In the June 16, 2011 reconsideration request, appellant sought modification of OWCP's November 20, 2009 LWEC determination on two grounds: the original determination was in error and his medical condition had worsened.

Appellant argued that he did not obstruct vocational rehabilitation efforts and that his dispute of the finding should cause OWCP to further develop the evidence. The essential facts, however, are well documented.⁸ The Board has reviewed the evidence submitted with appellant's June 16, 2011 reconsideration request and finds that it does not shift the weight of the evidence.⁹

Appellant argued that his medical condition worsened. He noted that an imaging study showing no objective evidence of worsening was not enough, that a physician, such as Dr. Giovanniello, must evaluate the patient. Dr. Giovanniello, the second-opinion physiatrist specializing in pain medicine, evaluated appellant and provided the permanent work restrictions used to establish the medical suitability of the selected position. Appellant's representative argued, however, that it was appellant's testimony that his pain and functional deficits had worsened and if his subjective complaints were not deemed credible, OWCP should undertake further development of the evidence.

⁶ 5 U.S.C. § 8115(a).

⁷ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁸ The rehabilitation counselor documented that appellant did not appear at scheduled meetings and delayed or failed to carry out agreed upon actions. The rehabilitation specialist reported that appellant did not cooperate to develop and sign a return-to-work rehabilitation plan, notwithstanding a July 1, 2009 letter warning him of possible sanctions. In addition, the rehabilitation counselor reported that appellant confessed to informing his claims examiner that he could find her in Denver, if necessary. She responded that he could not get into the federal building. Appellant replied that he was still a federal employee and could gain access. He added that he could even send her a box of flowers and she would not know whether the box contained flowers or a shotgun.

⁹ Appellant admitted telling the rehabilitation counselor how a coworker took a shotgun and killed two claims adjusters before taking his own life. "These adjusters mess around with their lives and the people are in pain and agony and wind up doing something like that." He did not explain his reason for telling such a violent story to the rehabilitation counselor or how this version of the story was any less chilling.

The June 16, 2011 reconsideration request disputed the prior findings and argues that OWCP should reinstate his wage-loss compensation before further developing the evidence. The burden of proof falls on appellant to produce evidence that modification of the November 20, 2009 LWEC determination is warranted. Whether there has been a material change in the nature and extent of the injury-related condition, such that appellant is not able to meet the physical demands of the selected position, is a medical question that must be addressed by rationalized medical opinion evidence. Appellant's lay opinion is not competent on this issue.

Appellant submitted the September 3, 2008 work capacity evaluation of Dr. Young, the attending orthopedic surgeon, who found appellant to be at maximum medical improvement. He had seen multiple neurosurgeons and none of them recommended further surgery. The fusion was considered stable. Dr. Young indicated that appellant could not work eight hours a day, but he did not address how many hours appellant could work.¹⁰ He indicated that appellant could sit for 30 minutes before having to move and would require breaks during the day. Dr. Young also noted that appellant was unable to lift any weight whatsoever.

The question is whether this evidence establishes that appellant was not capable of meeting the physical demands of the selected position. The vocational rehabilitation counselor noted that the position would allow alternate sitting and standing as needed, which was consistent with Dr. Young's evaluation. The position required occasional minimal lifting, from 0 to 10 pounds. If appellant could not occasionally lift such weight, then the physical demands of the selected position would be beyond his capabilities. Dr. Young, however, offered no reason for this limitation. He did not identify what clinical or examination findings warranted such a restriction or otherwise offer medical rationale to support his conclusion. Medical conclusions unsupported by rationale are of diminished probative value.¹¹ Dr. Young indicated that appellant could not work eight hours a day, but he did not say why. He failed to address just how many hours appellant could work. This diminishes the probative value of Dr. Young's opinion on appellant's work restrictions.

The Board finds that Dr. Young's September 3, 2008 work capacity evaluation is incomplete and unrationalized. It fails to establish that the selected position was medically unsuitable. Appellant has failed to establish a material change in the nature and extent of his injury-related condition or that the November 20, 2009 LWEC determination was, in fact, erroneous. The Board finds that he has not met his burden of proof. The Board will therefore affirm OWCP's January 7, 2013 decision.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

Appellant alleges on appeal that he was not directed to see Dr. Giovanniello; however, the record shows correspondence dated October 16, 2008 from OWCP to appellant notifying him of the date and time of his appointment with Dr. Giovanniello. He also alleges that the Board's

¹⁰ Dr. Young left the following question blank: "If less than eight hours per workday, how many can he/she work?"

¹¹ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

prior decision stated that he had submitted “genuine proof” that he did not obstruct. The prior decision noted in the factual history of the case that appellant’s representative had submitted a timeline to show that there was a “genuine dispute” of material fact as to whether appellant tried to cooperate or obstructed. It was the contention of his representative, not the opinion of the Board, that the timeline created a genuine dispute.

The issue of authorizing surgery is not presently before the Board, nor are appellant’s allegations of unlawful and felonious conduct on the part of OWCP or its vocational rehabilitation counselor. The issue of obstruction and whether the original determination was, in fact, erroneous has been previously reviewed.

CONCLUSION

The Board finds that appellant has not met his burden to establish that the November 20, 2009 LWEC determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2013 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: February 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees’ Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees’ Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees’ Compensation Appeals Board