

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

L.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rochester, NY, Employer**

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**Docket No. 13-1744
Issued: June 26, 2014**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument May 29, 2014

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2013 appellant, through his attorney, filed a timely appeal from a June 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 modification of the August 20, 1998 wage-earning capacity determination is warranted.

FACTUAL HISTORY

The case was before the Board on prior appeals. In a decision dated July 12, 2001, the Board affirmed an August 20, 1998 wage-earning capacity determination based on the selected position of automobile salesperson.² The Board noted that OWCP had accepted bilateral mild

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 99-1799 (issued July 12, 2001).

distal peripheral neuropathy and left mild ulnar neuropathy.³ With respect to the medical evidence, the Board noted that Dr. James Love, an attending neurologist, opined that appellant could perform the selected job in a May 2, 1997 report, and in a January 28, 1998 report the physician did not change his opinion. In a decision dated May 31, 2007, the Board affirmed a July 12, 2006 OWCP decision, finding that appellant's reconsideration request was insufficient to warrant merit review of the claim.⁴ By decision dated March 4, 2011, the Board set aside an October 1, 2009 OWCP decision that found that his application for reconsideration was untimely and failed to establish clear evidence of error.⁵ The Board held that appellant was requesting modification of the wage-earning capacity and the case was remanded for a decision under the appropriate legal standard.

In a decision dated February 6, 2012, the Board affirmed a May 10, 2011 OWCP decision denying modification of the August 20, 1998 wage-earning capacity determination.⁶ The Board found that the evidence did not establish an error in the original determination or a material change in the nature and extent of an employment-related condition. It was noted that the evidence did not establish that his post-traumatic stress disorder (PTSD) was employment related. The history of the case as contained in the Board's prior decisions is incorporated herein by reference.

On June 30, 2011 OWCP referred appellant to Dr. William Somers, a Board-certified orthopedic surgeon, for an opinion as to whether the accepted conditions had resolved and whether appellant could return to his date-of-injury position as a mail carrier. In a report dated July 26, 2011, Dr. Somers provided a history and results on examination. He diagnosed lumbar disc disease/facet arthrosis, lumbar radiculopathy, cervical disc disease, cervical radiculopathy and PTSD. Dr. Somers stated that each of the conditions was aggravated by the employment injury. He also diagnosed ulnar neuritis, stating that this appeared to have clinically resolved and degenerative disease in the knees. Dr. Somers stated that appellant had "multiple" problems that keep him from working, primarily the PTSD, as well as degenerative arthritis in the right knee. The second opinion physician also noted that appellant was 75 years old, had not worked in 18 years and would not be able to perform any jobs at the employing establishment. According to Dr. Somers, the conditions of cervical disc disease, cervical radiculopathy, facet arthrosis and lumbar radiculopathy should probably have been the diagnoses "from the beginning."

In a letter dated June 4, 2012, appellant's representative argued that the original wage-earning capacity determination was issued in error. Appellant argued that OWCP had failed to consider the preexisting conditions that disabled appellant for the selected position.

By decision dated July 26, 2012, OWCP denied modification of the wage-earning capacity determination. It found that Dr. Somers did not explain how the aggravations occurred or persisted.

³ Appellant had filed an occupational claim dated November 23, 1992 and identified the job duties of carrying a mailbag since 1981 as contributing to his injury.

⁴ Docket No. 06-1928 (issued May 31, 2007).

⁵ Docket No. 10-827 (issued March 4, 2011).

⁶ Docket No. 11-1587 (issued February 6, 2012).

By letter dated March 12, 2013, appellant requested reconsideration. He argued that the wage-earning capacity determination was erroneous as OWCP did not consider limitations imposed by the preexisting PTSD. Appellant also argued that, since the medical evidence was not clear and unequivocal, OWCP should have sought additional evidence. In addition, he argued that OWCP should accept his additional conditions as employment related.

In a decision dated June 11, 2013, OWCP denied modification of the wage-earning capacity determination. It stated that the weight of the medical evidence remained with the attending physician, Dr. Love, who opined in May 1997 that appellant could perform the selected position. OWCP also found PTSD was not an accepted condition.

LEGAL PRECEDENT

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

In the present case, OWCP issued a wage-earning capacity determination on August 20, 1998. Appellant seeks modification of the wage-earning capacity determination. It is his burden of proof to establish either that there was a material change in the nature and extent of an employment-related condition or that the original determination was erroneous.

OWCP further developed the medical evidence in 2011 and referred appellant to Dr. Somers for a second opinion examination. Although Dr. Somers was not specifically asked to provide evidence with respect to the wage-earning capacity determination, his July 26, 2011 report addressed various medical conditions, indicating a material change. This evidence is relevant to the wage-earning capacity issue and requires clarification. When OWCP refers a claimant for a second opinion evaluation, it is the responsibility of OWCP to secure an appropriate report on the relevant issues.⁹

With respect to orthopedic conditions, Dr. Somers opined that the conditions of lumbar disc disease/facet arthrosis, lumbar radiculopathy, cervical disc disease, cervical radiculopathy were aggravated by the employment injury. This raises an issue of whether there are additional employment-related conditions, whether these conditions were present at the time of the wage-earning capacity determination and caused disability for the selected position,¹⁰ or whether there

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ *Id.*

⁹ See *Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

¹⁰ As the Board noted in its February 6, 2012 decision, OWCP must consider employment-related and preexisting conditions with respect to whether the selected position was medically suitable. See *T.M.*, Docket No. 11-78 (issued October 7, 2011).

was a material change in an employment-related condition after August 20, 1998. In addition, Dr. Somers found that appellant's PTSD was aggravated by the employment injury. While Dr. Somers is not a psychiatrist, OWCP should have further developed the evidence to determine if appellant's PTSD was an employment-related condition, and whether this represented a material change sufficient to warrant a modification of the wage-earning capacity determination.

The case will be remanded to OWCP for further development of the evidence with respect to modification of the wage-earning capacity determination. After such further development as is necessary to resolve the modification of wage-earning capacity issues, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 11, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 26, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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