

FACTUAL HISTORY

In 1974, appellant, a 38-year-old air traffic control specialist, sustained an occupational injury in the performance of duty. OWCP accepted his claim for depressive reaction and hypertension.² Appellant received compensation for total disability and medical benefits.

A November 23, 1998 investigative memorandum from the United States Department of Labor's Office of the Inspector General (OIG) detailed appellant's substantial work as a photographer. As OWCP's statement of accepted facts summarized, from approximately August 1988 to October 1996 appellant operated a home-based photography business called "Donnie's Studio 10." While self-employed in this business, he was known to have performed many different assignments, including group photography, portrait photography and special events photography. Appellant maintained a studio at his home in a converted pool house.³

OWCP's rehabilitation specialist determined that the duties appellant performed as a photographer best fit those of a Still Photographer, from the *Dictionary of Occupational Titles* (DOT), a category that included Studio Cameraman, Wedding Photographer and Commercial Photographer. A labor market survey confirmed the local availability of the selected position on both a part-time and full-time basis and provided relevant salary information.

Notwithstanding the opinion of Dr. William H. Biggers, the attending Board-certified psychiatrist, that appellant had neither the skills nor the physical capacity to work as a professional photographer, on July 30, 1999 OWCP issued a LWEC determination that reduced his wage-loss compensation to reflect his capacity to earn some wages as a Studio Cameraman and Wedding Photographer.⁴ Appellant continued to receive compensation for the partial LWEC caused by his employment injury.⁵

OWCP denied modification of its LWEC determination on several occasions. On April 24, 2012 appellant again requested modification. In support thereof, he submitted a

² Beginning in 2005, OWCP modified and expanded its acceptance of appellant's claim: major depression, recurrent episode, in partial or unspecified remission; malignant hypertension; hypertensive retinopathy; anxiety state, unspecified; post-traumatic stress disorder; coronary atherosclerosis; atrial fibrillation; erectile dysfunction/impotence of organic origin.

³ One witness stated that the studio had automated drop scenes and lighting that could be moved by a control panel. This witness, who knew appellant for more than 36 years and was himself an air traffic controller, estimated in 1996 that appellant had been engaged in commercial photography for 12 to 15 years.

⁴ An OWCP hearing representative found that appellant had demonstrated his functional capacity to work as a Studio Cameraman. But as there was no evidence to support the presumption that appellant could earn additional wages as a Wedding Photographer, the hearing representative set aside that part of the LWEC determination.

⁵ The Board would later determine that appellant forfeited his compensation for certain periods because he knowingly failed to report his work as a photographer. The Board found that appellant's defense -- it was only a hobby that involved family and friends and that payments covered only expenses without a profit -- was clearly inconsistent with the evidence. Further, the Board found that he was at fault in creating the resulting overpayment of compensation because he failed to provide information that he knew or should have known was material and because he made statements as to a material fact which he knew or should have known were incorrect. Docket No. 02-506 (issued July 7, 2003).

number of medical reports. Two of them, from Dr. Glenn K. Harris, a Board-certified cardiovascular medicine specialist, supported appellant's referral to a dentist and speculated that it was possible his history of hypertension may be a contributing factor to his valvular heart disease.

Dr. Roger A. Marrero, a Board-certified family physician treating appellant for hypertension and related conditions, explained that hypertension tends to worsen over time and that he was at risk for stroke or heart attack. He noted that there were no medical reports indicating that appellant had recovered from his employment injury to the point that he could return to any gainful employment. "In the past [appellant] has taken pictures of friends as a hobby and has not received any wages."⁶ Dr. Marrero added that appellant's depression had been an aggravating factor for his hypertension and was a factor that has prevented him from being gainfully employed. He believed that it was a mistake to classify appellant as suitable for professional photography. "[Appellant] has a history since 1974 of his hypertension getting out of control and a factor for atrial fibrillation and coronary atherosclerosis; now his hypertension is a contributing factor for mild aortic valve stenosis and mild-to-moderate mitral regurgitation...."

Dr. Biggers explained that during the period 1988 to 1996, when it was "alleged" that appellant was conducting a photography business, he was seeing appellant for psychotherapy every other week for the same disabling anxiety, depression and suicidal ideation that was reported in 1974. These conditions contributed to bizarre and inappropriate behavior, problems staying focused, clinical depression and hypersomnolence, all resulting in a sedentary lifestyle that continued to date. Dr. Biggers observed that, if appellant had continued as an air traffic controller, it was not unlikely that he would have suffered further complications with his hypertension and that his suicidality would have become a more significant factor. Further, if appellant had been self-employed in photography, it was likely the same issues would have been present.

Dr. Biggers indicated that he did not know from appellant or from appellant's close friend, another air traffic controller whom Dr. Bigger treated, that appellant had been engaged in professional photography. He acknowledged that appellant had photography business cards but did not have a photography business and did not have training in photography. Dr. Biggers described appellant's involvement in courtesy photography as occasional, less than two to three hours a week with weeks and months of activities that did not include photography.

Dr. Biggers noted that appellant's suicidal ideation had become more pronounced over the years. He stated that he had been appellant's treating physician for anxiety, depression and suicidal ideation since 1977, which was stress related and disabling and indicated that appellant was not suitable for gainful employment or to be self-employed in photography.

In a later report, Dr. Biggers repeated that appellant's condition was disabling in 1974 and remained a disabling factor to date "as it continues to worsen as indicated by [post-traumatic stress disorder]." He continued to argue that appellant's amateur activities could hardly be

⁶ The OIG's investigative memorandum provided copies of invoices, bank records and canceled checks showing that appellant did receive money for his services. In 1991, for example, he earned \$974.13 from Bellwether, Inc., a business in Hampton, Georgia, which hired appellant several times.

classified as a full-time commercial photographer and that his swimming pool bath house was hardly suitable for a commercial photography studio. Dr. Biggers repeated that appellant had no training and earned no money from photography or any other gainful employment since the date of injury.⁷

Dr. Biggers noted that in any case appellant stopped any involvement in photography in 1996 because his depressive condition, accepted in 1974, had worsened, as indicated by post-traumatic stress disorder and more intense thoughts of suicidal ideation. “If [appellant] did photography after 1996, it is likely the stress could have contributed to his suicide.” Dr. Biggers repeated that the same psychiatric conditions reported in 1974 have continued without interruption, preventing appellant from being gainfully employed.

Dr. Biggers made many of these same points in later reports, noting that he had never reported appellant’s condition improved to the point that he could be gainfully employed. He stated that appellant did not spend enough time in photography to consider it a hobby.⁸ Finally, Dr. Biggers stated that had OWCP requested a psychiatric examination of appellant on July 30, 1999, the examination would have indicated that he was not suitable for gainful employment since his date of injury because of his low tolerance for stress and a change in these conditions had not taken place. He repeated that appellant was classified in error as a professional photographer or studio cameraman or as otherwise gainfully employed.

On July 2, 2012 OWCP denied modification of its LWEC determination. Citing medical reports from 1997 to 1999, including reports from Dr. Biggers, OWCP observed that appellant’s hypertension in 1999 became uncontrolled secondary to severe pain with rising sympathetic tone associated with progressive osteoarthritis pain, unrelated to his employment injury and requiring bilateral hip replacements, following which his pain improved and his hypertension once again became manageable. Thus, OWCP noted, it appeared that the worsening of appellant’s disability after July 1999 was unrelated to his injury claim. “In your case, you have not shown that the disability after the LWEC determination of July 30, 1999 was a result of the natural consequence/progression of your accepted [injury]-related conditions but rather was caused and due to an intervening nonwork[-]related medical condition, namely, osteoarthritis of the hips, which resulted in a total replacement of the hips.”

OWCP reminded appellant that the OIG investigation was thorough and convincing and presented overwhelming evidence (invoices, canceled checks, brochures, witness statements) supporting that he operated a business taking photographs for weddings and birthdays, among other things. Yet appellant continued to submit the same medical reports from physicians claiming that he did not work as a photographer and had been totally disabled as a result of his

⁷ The record indicates that after his date of injury appellant ran for and served as a City Councilman and later ran for Mayor. He also served as a campaign manager in the 1992 race for Henry County Sheriff.

⁸ As the OIG investigative memorandum in 1998 reflects: “[Appellant] maintains that his photography was merely a ‘hobby’ of his ... and that he did not consider it self-employment, or a business.” Appellant stated that he had convinced people that he was operating a photography business so that it would not appear that he, being such a young person, was not working. As the Board indicated earlier, Dr. Marrero reported that appellant had engaged in photography as a hobby but received no wages.

federal employment since 1974. OWCP found that these reports were not based on a complete and accurate factual and medical background.

Appellant argues on appeal that the medical reports from Dr. Biggers and Dr. Marrero indicate the original rating was in error and that his condition had clearly worsened.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.⁹ “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.¹⁰

Section 8115(a) of FECA provides that 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 actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, 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.¹¹

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.¹²

ANALYSIS

To support his most recent request for modification of OWCP’s July 30, 1999 LWEC determination, appellant submitted a number of medical reports. Those from Dr. Harris, the cardiologist, supporting appellant’s referral to a dentist and the possibility of a connection between hypertension and valvular heart disease, do not appear to be directly relevant to the 1999 LWEC determination. The physician did not address whether appellant was medically disabled from taking photographs.

⁹ 5 U.S.C. § 8102(a).

¹⁰ 20 C.F.R. § 10.5(f).

¹¹ 5 U.S.C. § 8115(a)

¹² *Daniel J. Boesen*, 38 ECAB 556 (1987).

Dr. Marrero, the attending family physician, observed as a general matter that hypertension tends to worsen over time and that appellant was at risk for stroke or heart attack. He noted that appellant had a history since 1974 of his hypertension getting out of control, being a factor for atrial fibrillation and coronary atherosclerosis and now contributing to mild aortic valve stenosis and mild-to-moderate mitral regurgitation. But Dr. Marrero did not explain how any of this prevented appellant from taking photographs or otherwise meeting the light physical demands of a Still Photographer, as described in the DOT. Medical conclusions unsupported by rationale are of little probative value.¹³

Further, it does not appear that Dr. Marrero reviewed the OIG's investigative memorandum and attachments. It appears that he based his opinion instead on the history that appellant provided: taking pictures of friends as a hobby, not receiving any wages. As the Board found in 2003, such a history is clearly inconsistent with the evidence. Appellant was not entirely forthcoming to OWCP and apparently has not been entirely forthcoming to his physicians, about the nature and extent or even the existence of his photography-related activities. This critically undermines the opinion his physicians are offering that he had no capacity to earn wages after 1974. Medical conclusions based on inaccurate or incomplete histories are of little probative value.¹⁴

The opinion of Dr. Biggers, the attending psychiatrist, suffers the same deficiencies. He does not appear to accept that appellant operated a photography business during the period 1988 to 1996. Dr. Biggers dismisses the idea as an allegation: he saw appellant in psychotherapy every other week during this period for the same disabling anxiety, depression and suicidal ideation that was recorded in 1974 and if appellant had been engaged in such activity, he or his close friend, who was also a patient, would have mentioned this to him. He appears to accept appellant's long-standing story that he had some photography business cards made up as a charade, but such a history is inconsistent with the record and critically undermines his psychiatric opinion.

Dr. Biggers explained that, if appellant had continued as an air traffic controller, it was not unlikely he would have suffered further complications with his hypertension and more significant suicidal ideations and if appellant had been self-employed in photography, he likely would have had the same issues.

First, appellant was self-employed in photography. Second, it is not apparent how the stress of being an air traffic controller can be compared to the stress of being a Still Photographer. One might assume that photography was in some way a beneficial activity for appellant, something he found sufficiently interesting or productive or enjoyable or relaxing that he willingly engaged in it for a period of some years. If photography would likely cause the same issues he experienced as an air traffic controller, it seems counter-intuitive that he would

¹³ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

¹⁴ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

choose to engage in such activity. Dr. Biggers did not rationally explain his opinion in this regard.

To be clear, it was not necessary for OWCP to establish that appellant had worked as a full-time Studio Cameraman prior to 1999, nor was it necessary for OWCP to establish that he profited from each transaction. It was sufficient that he had demonstrated his capacity to perform that kind of work over a period of time and that such work was reasonably available in the local labor market. This showed that appellant was no longer totally disabled for all work as a result of his work injury and that he had the capacity to earn at least some wages as a photographer, for which OWCP adjusted his compensation for wage loss.

Dr. Biggers noted that appellant's suicidal ideation had become more pronounced over the years. He stated that appellant's condition continued to worsen, as indicated by post-traumatic stress disorder, but he did not explain how this prevented appellant from taking photographs. Dr. Biggers asserted that if appellant performed photography after 1996, the stress likely could have contributed to suicide. He did not identify this stress or attempt to reconcile it with appellant's choice to pursue photography in such a meaningful way over a period of years, nor did he explain why appellant could no longer perform that activity.¹⁵

Dr. Marrero and Dr. Biggers have zealously supported appellant's attempt to modify the 1999 LWEC determination, but their opinions are weakened by an inaccurate and noncredible factual history, a history that appellant has long related and one that this Board has found to be inconsistent with the record. Their opinions are also weakened by insufficient medical rationale. It is not necessary that the medical opinion evidence be so conclusive as to remove all doubt. The evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical.¹⁶ Neither physician has supported his opinion with a convincing medical explanation.

Accordingly, the Board finds that appellant has not met his burden to show that modification of OWCP's 1999 LWEC determination is warranted. Appellant has not shown that a material change in the nature and extent of his injury-related condition has medically disqualified him from being a Still Photographer, as described in the DOT. He has not shown that the 1999 LWEC determination was, in fact, erroneous.¹⁷ The Board will therefore affirm OWCP's July 2, 2012 decision denying modification.

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

¹⁵ If Dr. Biggers meant to state that appellant did not suffer from post-traumatic stress disorder in 1974 or shortly thereafter, but only developed the condition many, many years later, he needs to explain that phenomenon in greater psychiatric detail.

¹⁶ *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein.

¹⁷ The third criterion, showing that the employee has been retrained or otherwise vocationally rehabilitated, is a burden usually carried by OWCP in its attempt to modify a LWEC determination.

CONCLUSION

The Board finds that appellant has not met his burden to show that modification of OWCP's July 30, 1999 LWEC determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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