



## **FACTUAL HISTORY**

This case has previously been before the Board regarding appellant's LWEC determination.<sup>2</sup> On the prior appeal,<sup>3</sup> the Board found that he did not meet his burden to establish that modification of OWCP's July 30, 1999 LWEC determination was warranted.<sup>4</sup> While receiving compensation for being totally disabled for work, appellant operated a business called "Donnie's Studio 10" from August 1988 until at least October 1996. He held himself out to be a self-employed photographer. Appellant established a studio, printed brochures advertising his services and took pictures for families, wedding, schools and various businesses. On the basis of this information, OWCP found that he demonstrated over a period of time his functional capacity to work as a Studio Cameraman at the rate of \$6.00 an hour and therefore reduced his compensation for total disability. Appellant continued to receive compensation for the partial disability caused by his employment injury, but he forfeited his entitlement to all compensation from August 7, 1987 to November 18, 1989 and from December 22, 1989 to October 9, 1995 because he knowingly failed to report his earnings as a photographer.<sup>5</sup> He was also found at fault in creating the resulting \$372,390.32 overpayment of compensation because he made statements as to a material fact which he knew or should have known to be incorrect.<sup>6</sup>

The Board found that, although Dr. William H. Biggers, the attending Board-certified psychiatrist, had zealously supported appellant's attempt to modify the 1999 LWEC determination, his opinion was weakened by an inaccurate and noncredible factual history, a history that he had long related and one that this Board found to be inconsistent with the record. Dr. Biggers' opinion was also of reduced probative value by the lack of convincing medical rationale. He did not appear to accept that appellant operated a photography business during the period 1988 to 1996. Dr. Biggers dismissed 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. Dr. Biggers believed if appellant had been

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<sup>2</sup> By order dated November 23, 2009, the Board remanded the case to OWCP to adjudicate the proper issue as to whether modification of appellant's LWEC was warranted as appellant had filed a recurrence claim for more than a limited period of disability while his LWEC was in place. Docket No. 09-966 (issued November 23, 2009). By decision dated March 7, 2011, the Board again remanded the case finding that OWCP improperly adjudicated appellant's request for modification of his LWEC as a request for reconsideration. Docket No. 10-1727 (issued March 7, 2011).

<sup>3</sup> Docket No. 12-1825 (issued March 14, 2013).

<sup>4</sup> In 1974 appellant, then a 38-year-old air traffic control specialist, sustained an occupational injury in the performance of duty. OWCP accepted his compensation for depressive reaction and hypertension. Beginning in 2005, it 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 (PTSD); coronary atherosclerosis; atrial fibrillation; and erectile dysfunction/impotence of organic origin.

<sup>5</sup> The Board, on July 7, 2003, affirmed the finding of forfeiture, fact of overpayment and denial of waiver. It remanded the case for recalculation of the overpayment, which at that time was \$427,540.26. Docket No. 02-506 (issued July 7, 2003).

<sup>6</sup> The Board affirmed the calculation of the \$372,390.32 overpayment of compensation on February 11, 2005. Docket No. 04-379 (issued February 11, 2005).

engaged in such activity, his close friend, who was also a patient, would have mentioned it to him. Dr. Biggers appeared to accept appellant's longstanding story that he had some photography business cards made up as a charade but the Board found that such a history was inconsistent with the record and critically undermined his psychiatric opinion.<sup>7</sup>

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. He did not adequately explain how the stress of being an air traffic controller compared to the stress, if any, of being a still photographer. The Board noted, 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 appellant experienced as an air traffic controller, it seemed counter-intuitive that he would have chosen to engage in such activity. The Board found that Dr. Biggers did not rationally explain his opinion in this regard.

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 PTSD. Dr. Biggers did not explain how this prevented appellant from working in the field of photography. He asserted that, if appellant performed photography after 1996, the stress likely could have contributed to suicide. Dr. Biggers 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 kind of activity. The Board affirmed OWCP's July 2, 2012 decision to deny modification of its 1999 LWEC determination. The facts of this case, as set forth in the Board's prior decision, are hereby incorporated by reference.

Following the most recent appeal, Dr. Biggers submitted a May 20, 2013 report. He acknowledged that appellant engaged in photography as a limited, part-time hobby between 1988 and 1996 with his spouse, but not as an occupation. Dr. Biggers encouraged the hobby, as he felt it would be beneficial for appellant's depression to get him out of the house doing an activity he enjoyed with his spouse. He related that it was appellant's opinion that the duties of a professional photographer, such as a studio cameraman, were similar to the duties of an air traffic controller. They both required attention to details, scheduling, meeting deadlines, working closely with others and making technical adjustments to camera and lighting equipment similar to radio and radar controls. They both required prompt, correct decisions giving directions to complete the task. It was appellant's opinion that the photography factors would be so overwhelming that he would be unable to function, as happened when he was an air traffic controller. It was Dr. Biggers' opinion that appellant was not suitable for any gainful employment.

On August 20, 2013 Dr. Biggers reviewed the file again concerning the period 1988 to 1996. He had treated appellant every other week for his accepted condition of depression,

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<sup>7</sup> An OWCP hearing representative found appellant's argument to be nonsense.

anxiety and PTSD, “all being factors that would have prevented him from being self-employed in photography as it did an Air Traffic Controller in 1974.” Dr. Biggers found that appellant had not been suitable for gainful employment since he was disqualified as an air traffic controller in 1974. He noted that appellant’s condition since 1974 had worsened with fatigue, anger, intense ideation of suicide, uncontrolled obesity and PTSD, “all of which means that he had been unable to seek gainful employment since the date of his injury.”

Dr. Biggers noted that appellant also suffered from osteoarthritis in the spine and hip, which required the assistance of a cane. Appellant complained of difficulty walking, standing and bending and he elected to have bilateral hip replacement surgery in 1999. “This condition would have prevented [appellant] from doing any ‘cameraman’ duties as the duties would mean that he would have to walk and stand for long periods of time.” It was Dr. Biggers’ understanding that appellant was doing a little photography as a leisurely part-time hobby, “which I encouraged him to do in order to help with his depression and to get him connected with the ‘outside world.’”

Dr. Biggers provided several updated reports. He noted no changes in appellant’s condition since August 2013 and he quoted from some of his previous reports. Dr. Biggers again stated that he had been treating appellant since 1977 for PTSD, depression and anxiety, conditions that would have prevented him from performing the duties of a studio cameraman. He added that appellant’s conditions worsened, as indicated by OWCP’s update of accepted conditions.

Appellant asked OWCP to consider Dr. Biggers’ reports and return him to his previous level of compensation.

Dr. Roger A. Marrero, the attending Board-certified family physician treating appellant for hypertension, submitted several reports that related Dr. Biggers’ conclusion.

In a decision dated April 16, 2014, OWCP denied modification of its 1999 LWEC determination. It found that Dr. Biggers’ conclusion was again based on inaccurate factual evidence. Dr. Marrero supported the stance of Dr. Biggers, but OWCP found that he did not have a correct factual history of appellant’s work activities as a photographer. OWCP noted that the OIG’s investigation was thorough and presented overwhelming evidence that appellant was employed as a photographer during the period 1988 to 1996.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>8</sup> “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.<sup>9</sup>

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<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> 20 C.F.R. § 10.5(f).

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.<sup>10</sup>

Once the loss of wage-earning capacity 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.<sup>11</sup>

### ANALYSIS

To support his request for modification of OWCP's 1999 LWEC determination, appellant submitted additional reports from Dr. Biggers, an attending psychiatrist. The Board finds that these reports are largely repetitive of the opinion he previously provided and was considered. OWCP was aware that appellant engaged in photography as a part-time hobby. It knew that, although he had enjoyed being engaged in this activity for at least eight years, it was now his argument that the duties of a studio cameraman were similar to those of an air traffic controller, which could be so overwhelming that he would be unable to function. OWCP was also aware that Dr. Biggers had treated appellant every other week for his accepted depression, anxiety and PTSD. Dr. Biggers was of the opinion these conditions would have prevented appellant from being self-employed in photography. As OWCP found, the OIG investigation presented overwhelming evidence that appellant engaged in work as a photographer from 1988 to 1996. Dr. Biggers repeated his opinion that appellant was unable to seek gainful employment since 1974.

The Board finds that the evidence of record is not sufficient to modify the 1999 LWEC determination. The evidence submitted on reconsideration essentially reiterates the opinion of Dr. Biggers. The Board again finds that OWCP properly denied modification. Appellant has not shown that the original determination was, in fact, erroneous and he has not shown a material change in the nature and extent of the injury-related condition such that he can no longer perform the duties of the selected position. In this regard, the Board notes that Dr. Biggers, a psychiatrist, addressed whether the selected position was suitable to appellant's osteoarthritis. Dr. Marrero, the attending Board-certified family physician treating appellant for hypertension, did little more than reiterate Dr. Biggers' stated conclusion.

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<sup>10</sup> 5 U.S.C. § 8115(a).

<sup>11</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

Accordingly, the Board finds that appellant has not met his burden of proof. The Board will affirm OWCP's April 16, 2014 decision denying modification of its 1999 LWEC determination.

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

**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 April 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 2014  
Washington, DC

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

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

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