

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

R.S., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Las Vegas, NV, Employer**

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**Docket No. 15-1229
Issued: October 2, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 12, 2015 appellant filed a timely appeal from an April 15, 2015 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 the claim.

ISSUE

The issue is whether appellant met his burden of proof to modify a July 26, 2013 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On August 21, 2006 appellant, then a 56-year-old baggage screener, filed a traumatic injury claim alleging that on that date he sustained a left shoulder and neck condition when he

¹ 5 U.S.C. §§ 8101-8193.

caught a bag of golf clubs with his left hand after it fell when taking it from a passenger. OWCP accepted the claim for neck sprain and left trapezius sprain. The claim was later expanded to include left shoulder adhesive capsulitis and permanent aggravation of multilevel cervical disc degeneration. Appellant returned to work at six hours per day modified duty on August 26, 2006 and worked six hours per day until December 29, 2006, when he returned to full-time modified-duty work. On June 2, 2007 he stopped working full-time modified duty and resumed working four to six hours per day.

Appellant underwent left shoulder surgery on October 12, 2011, performed by Dr. Robert W. Patti, an orthopedic surgeon, and was temporarily totally disabled following surgery. Dr. Patti reported on February 14, 2012 that appellant was four months postoperative, with excellent response. He concluded that appellant could return to his regular work.

On June 15, 2012 appellant underwent a Functional Capacity Evaluation (FCE), conducted by Doug Ellis, physical therapist. Mr. Ellis concluded that appellant was capable of work in a modified medium work classification. Based on the results of the FCE, appellant's treating physician Dr. Patti opined in a June 23, 2012 report that appellant could not return to work in a full capacity. As the employing establishment could not accommodate appellant's injury-related restrictions, he underwent vocational rehabilitation services.

On June 20, 2013 OWCP issued a notice of proposed reduction of compensation on the basis that the factual and medical evidence established that appellant was partially disabled and had the capacity to earn wages as an information clerk, DOT # 237.367-022, at the rate of \$400.00 per week. By decision dated July 26, 2013, it reduced his compensation effective July 28, 2013 based on his capacity to earn wages as an information clerk. OWCP noted that appellant had completed appropriate training for the position and the physical requirements of the position did not exceed the work restrictions provided by Dr. Patti in his February 14, 2012 report.

On July 26, 2013 appellant requested a hearing before OWCP Branch of Hearings and Review.

OWCP thereafter received an August 16, 2013 report from Dr. Joseph J. Schifini, Board-certified in anesthesiology. Dr. Schifini noted that a March 19, 2013 magnetic resonance imaging (MRI) scan of the cervical spine showed congenital spinal stenosis, multilevel cervical disc disease, and disc protrusions. He also noted that an October 27, 2006 cervical MRI scan showed multilevel cervical degenerative disc disease and disc bulges.

A hearing was held on February 18, 2014. Appellant testified that Dr. Patti did not treat his cervical condition, but rather only treated his left shoulder condition. He stated that OWCP had misinterpreted the medical reports of record and that Dr. Schifini had informed appellant that based on MRI scan evidence his cervical condition had worsened. Appellant alleged that he could not work 40 hours a week, given his worsening cervical condition.

By decision dated May 7, 2014, an OWCP hearing representative affirmed the July 26, 2013 decision. The hearing representative found that contrary to appellant's testimony, the recent evidence established that Dr. Patti was treating appellant's cervical spine condition with

referral to Dr. Schifini, a Board-certified anesthesiologist. Additionally, neither Dr. Patti nor Dr. Schifini had explained how the objective evidence established a worsening of appellant's accepted conditions such that he was unable to perform the physical requirements of the information clerk job and it was not apparent that the information clerk position involved extension of the neck. The decision affirmed that the weight of the evidence of record established that appellant had the requisite physical ability, skills, and experience to perform the position of information clerk and that the position was reasonably available within his commuting area.

On January 20, 2015 OWCP received appellant's January 16, 2015 statement requesting reconsideration. Appellant contended that when Dr. Patti was made aware of appellant's accepted neck injury and after he reviewed a report of Dr. Mark B. Kabins, a Board-certified orthopedic surgeon, Dr. Patti revised his opinion on appellant's work requirement of an eight-hour day and reduced him to a four-hour workday. He asserted that the reduction in his work hours was due to the severe injury to his neck and that his neck condition had worsened.

Evidence received in support of appellant's reconsideration request included the following: appellant's June 3, 2014 statement, which noted that he would be undergoing open heart surgery on June 6, 2014 and hospitalized for about a week with another four to six weeks of recovery; an August 21, 2006 statement in which he requested a copy of his file and information on how to submit a reconsideration request; and an October 14, 2014 statement in which he requested a copy of his file.

In a May 27, 2014 report, Dr. Patti noted that appellant's left shoulder surgery was two and a half years ago and he was doing well until about eight weeks ago when he started to catch in his shoulder with quick or elevated maneuver or both, however, his range of motion remained good. He noted that appellant never received Dr. Kabins' evaluation.² Dr. Patti noted orthopedic examination findings of the shoulders and provided a clinical impression of postoperative left shoulder with some mechanical findings. He opined that, from a shoulder standpoint, appellant could work eight hours with restrictions of pushing, pulling, lifting, and elevated use. Appellant had a restriction of 50 pounds total body maximum lifting to the waist level.

In a September 23, 2014 report, Dr. Patti noted that appellant was three full years postoperative of the left shoulder and he continued to do reasonably well. Appellant had 90 percent full range of motion with trouble with elevated or any weighted activities with elevation. He was at a plateau and has been for a while. Dr. Patti noted that appellant stated that the original claim involved the cervical spine which was worsening and that was evaluated by Dr. Schifini and Dr. Kabins. Apparently, surgery was considered by Dr. Kabins at two different levels, but Dr. Patti had no data on that. Dr. Patti stated that appellant had cervical spine pain with stiffness and pain and limited rotations especially on the left. There was left hand vague numbness and tingling that may be related to that. Approximately, three months ago, appellant had open heart bypass operation. Examination findings were provided and a clinical impression of advancing cervical syndrome and stable left shoulder syndrome was provided. Dr. Patti

² The Board notes that Dr. Patti erroneously refers to Dr. Kabins, a Board-certified orthopedic surgeon, as Dr. Cavins in his reports.

opined that, with regard to the shoulder, appellant needed no additional care, but had some permanent weightlifting and weighted elevated activity limitations. He noted that appellant should be referred back to Dr. Kabins. Dr. Patti noted that appellant had seen Dr. Schifini and has a stable situation with moderate restrictions.

In a November 4, 2014 report, Dr. Patti noted that Dr. Kabins was going to proceed with a likely cervical surgery once appellant's cardiac rehabilitation finished. He noted Dr. Kabins informed appellant that he could work four hours a day with restrictions and that he would concur with that opinion as Dr. Kabins' had the most recent data. Dr. Patti presented examination findings, which showed moderate restricted rotation to the right, mid neck, and upper neck more so than the left, with both sides restricted. Scapular movement was good and shoulder movement was good bilaterally. Appellant needed more strength. There was no significant weakness of the proximal or distal muscles, except decreased grip strength on the left, but not his ulnar nerve function or wrist dorsiflexion function. Biceps and triceps were okay. Dr. Patti noted that appellant was undergoing active rehabilitation for his cardiac problems. He opined that although appellant has not returned to work, he could work for four hours a day and he concurred with Dr. Kabins with the lifting restrictions. Dr. Patti noted that appellant was mildly better in the shoulder, but a bit worse in the cervical syndrome than his last visit two months ago.

Dr. Kabins noted in his October 31, 2014 report that appellant's active problems, which included intervertebral disc disorder cervical with displacement mid cervical multilevel spondylosis with neck pain and upper extremity symptoms (industrial aggravation); and left joint derangement shoulder region (industrial) status post surgical reconstruction. He noted that appellant was being seen for neck pain due to an August 21, 2006 work injury and described the history of injury and his surgeries. Dr. Kabins stated x-rays of the cervical spine demonstrated cervical spondylosis a C5-6 and C6-7 and that the scapular view of the left shoulder demonstrated severe arthrosis and degenerative changes. He found the March 19, 2013 cervical MRI scan demonstrated congenital stenosis superimposed on multilevel degenerative disc disease with disc bulging at C4-5 and C5-6 and C6-7 foraminal stenosis with associated impingement of the canal from C4 to C7. Dr. Kabins noted that appellant has a positive impingement sign and positive apprehension sign left shoulder, but was able to circumduct his arm, but was limited with flexing and abduction to left shoulder to approximately 140 degrees. Appellant had 4/5 for shoulder abduction and elevation and biceps on the left with all motor groups 5/5. He has 2+ and symmetrical biceps, triceps, and brachioradialis reflexes with no clonus, negative Babinski. Appellant could forward flex his neck 30 degrees, extend 15 degrees and rotate 45 degrees bilaterally. He had negative Lhermitte sign, negative Hoffman sign and positive Spurling sign. There was no evidence of atrophy other than the left shoulder with a well-healed incision.

Dr. Kabins opined in his October 31, 2014 report that appellant's multilevel cervical discogenic pathology, preexisting, asymptomatic, involved in a work-related injury with marked and significant aggravation of the underlying neck as a result of the August 21, 2006 work event and appellant remained symptomatic. Appellant also had underlying pathology in the left shoulder and was status post left shoulder acromioclavicular joint resection/distal clavicle resection with residual sequela. He also had residual degenerative disease of the left shoulder and cervical spondylosis with associated stenosis. Dr. Kabins opined that appellant was capable

of working four hours a day with no repetitive bending, stooping, or twisting and no repetitive lifting weight greater than 20 pounds and change of positions as needed.

In an October 31, 2014 work capacity evaluation, Dr. Kabins opined that appellant could work 4 hours a day or 20 hours a week with permanent restrictions. He noted that appellant had a significant neck condition.

In an April 15, 2015 decision, OWCP denied modification of the July 26, 2013 LWEC decision.

LEGAL PRECEDENT

A LWEC decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

ANALYSIS

OWCP accepted the conditions of neck sprain, left trapezius sprain, left shoulder adhesive capsulitis, and permanent aggravation of multilevel cervical disc degeneration and paid benefits, including authorization of left shoulder surgery. On July 26, 2013 it determined that appellant could perform the duties of an information clerk and reduced his monetary compensation to reflect his wage-earning capacity in the constructed position. By decision dated May 7, 2014, an OWCP hearing representative affirmed the July 26, 2013 LWEC decision. The issue is whether appellant has established that the July 26, 2013 LWEC decision should be modified.

Appellant did not allege that the initial wage-earning capacity determination was issued in error or that he had been retrained or otherwise vocationally rehabilitated. The issue is

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁴ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁶ *Id.*

whether there has been a material change in his work-related condition that rendered him unable to perform the duties of the constructed position. This is primarily a medical question.⁷

In his report dated August 16, 2013, Dr. Schifini reported that appellant's March 19, 2013 MRI scan now showed congenital spinal stenosis, in addition to the prior conditions shown on the October 27, 2006 MRI scan of multilevel cervical disc disease, and disc bulge. He offered no explanation, however, as to whether appellant's accepted condition had worsened, but merely noted the additional diagnosis of congenital spinal stenosis. Lacking an opinion regarding the cause of this condition, his opinion is of limited probative value.⁸

Appellant submitted several letters before OWCP and on appeal in which he argued that his neck condition worsened and his doctor reduced his work hours from 8 hours per day to 4 hours per day. The issue of whether there has been a material change in his work-related condition is a medical determination and may only be resolved by probative medical evidence.⁹

Dr. Patti examined appellant on May 27, September 30 and November 4, 2014 and opined that his left shoulder condition and bilateral shoulder range of motion was good. In his November 4, 2014 report, Dr. Patti opined that appellant's cervical condition had worsened. However, he did not offer an opinion or provide sufficient explanation or objective findings to explain the change in appellant's disability status or how his accepted cervical condition had materially changed. Dr. Patti instead concurred with Dr. Kabins' opinion of a four-hour workday with restrictions as he noted Dr. Kabins had the most recent data. As such, his reports are insufficient to establish modification of the LWEC determination.

Appellant's accepted cervical conditions were neck sprain and permanent aggravation of multilevel cervical disc degeneration. In his October 31, 2014 report, Dr. Kabins noted the history of injury and additional conditions of cervical spondylosis at C5-6, C6-7, left shoulder arthrosis, cervical disc bulging at C4-5, C5-6, and C6-7, and cervical foraminal stenosis. While he opined that appellant was capable of working only four hours a day with restrictions, Dr. Kabins did not explain how or whether those conditions were caused by the accepted August 21, 2006 work injury. Furthermore, that the additional conditions were the reason why Dr. Kabins opined that appellant was capable of working four hours per day with restrictions, to which Dr. Patti concurred. Thus, the change in appellant's work conditions appear due to the additionally diagnosed left shoulder and cervical conditions, which have not been established as causally related to the accepted work injury. As such, Dr. Kabins' report is insufficient to establish a basis for modification of the LWEC determination.

Appellant did not meet his burden of proof to establish a material change in the nature and extent of his injury-related condition, that the original determination was in fact erroneous, or that he was vocationally rehabilitated. He failed to establish that the July 26, 2013 LWEC decision should be modified.

⁷ *F.B.*, Docket No. 10-99 (issued July 21, 2010); *Selden H. Swartz*, 55 ECAB 272 (2004); *Phillip S. Deering*, 47 ECAB 692 (1996).

⁸ *See generally, L.M.*, Docket No. 13-855 (issued September 12, 2013).

⁹ *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

On appeal, appellant argues the current medical evidence of file supports that he can only work four hours a day and that his neck condition has worsened. For the reasons noted, the Board finds that he did not meet his burden of proof. 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 failed to meet his burden of proof to modify the July 26, 2013 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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