United States Department of Labor
Employees' Compensation Appeals Board

J.I., Appellant	)	
and	)	**Docket No. 15-0516**
	)	**Issued: September 21, 2015**
DEPARTMENT OF THE NAVY, NAVAL RESEARCH LABORATORY, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2015 appellant filed a timely appeal from a July 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 OWCP properly denied modification of a November 22, 2000 loss of wage-earning capacity determination.

[1] Appellant timely requested oral argument before the Board. By order dated July 10, 2015, the Board denied the request as the issue on appeal could be adequately addressed based on a review of the case record. Thus, the Board concluded that an oral argument would serve no useful purpose. *See Order Denying Request for Oral Argument*, Docket No. 15-0516 (issued July 10, 2015).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case has been before the Board on two prior appeals. OWCP accepted that appellant sustained a lumbar strain, herniated nucleus pulposus L4-5, and L5 nerve root damage, causally related to lifting at work on July 11, 1989. By decision dated November 22, 2000, it reduced his compensation finding he had the capacity to earn wages in the selected position of taxicab starter/dispatcher. The Board affirmed the loss of wage-earning capacity (LWEC) determination by decision dated July 23, 2002.[3]

The second appeal to the Board was resolved by an order remanding case dated April 4, 2014.[4] The appeal is discussed later in this decision.

Appellant continued to receive compensation based on his loss of wage-earning capacity. In a report dated June 9, 2010, Dr. Daniel Ignacio, a Board-certified physiatrist, reported that an electromyogram (EMG) showed chronic denervation in selected muscles of the legs. He diagnosed chronic bilateral L5, left S1 radiculopathy. In a report dated November 22, 2010, Dr. Ignacio noted that appellant had worked as a taxicab driver, which involved prolonged sitting, as well as lifting and bending while carrying luggage, and this had aggravated appellant's back condition. He provided results on examination and he opined that appellant was totally and permanent disabled due to his work condition.

In a report dated January 5, 2011, Dr. Ignacio opined that appellant was totally disabled for work. He noted that appellant had continuing chronic back pain since July 11, 1989. Dr. Ignacio provided results on examination, and he diagnosed chronic lumbar disc syndrome with chronic lumbar radiculopathy, post-traumatic lumbar spinal stenosis, bilateral hip bursitis, and complex regional pain syndrome (CRPS).

By letter dated February 3, 2011, OWCP advised appellant that he was being referred for a second opinion examination. According to a statement of accepted facts (SOAF) dated February 3, 2011, appellant had worked as a taxi driver from 2004 to 2006, and as a pizza delivery driver from 2006 to 2010. OWCP also confirmed in the SOAF that he had an accepted bilateral carpal tunnel syndrome (CTS) from another claim.

The second opinion physician, Dr. Robert Smith, a Board-certified orthopedic surgeon, provided a report dated March 29, 2011. He provided a history and results on examination. Dr. Smith noted that the back examination showed no spasm, atrophy, trigger points, or deformity, with no objective evidence of radiculopathy. He found that based on his examination, and review of magnetic resonance imaging (MRI) scan dated June 30, 2010, it did not appear that appellant had any continuing employment-related residuals. Dr. Smith reported that there was no evidence of an L4-5 herniated disc on the MRI scan, and the scan indicated that appellant had degenerative changes consistent with his age. He also reported that there was no evidence of carpal tunnel syndrome. Dr. Smith opined that appellant could perform the position of taxicab starter/dispatcher.

[3] Docket No. 02-179 (issued July 23, 2002).

[4] Docket No. 13-1414 (issued April 4, 2014).

OWCP found that there was a conflict in the medical evidence between Dr. Ignacio and Dr. Smith. It selected Dr. Mark Levitsky, a Board-certified orthopedic surgeon, as a referee physician to resolve the conflict. In a report dated June 1, 2011, Dr. Levitsky provided a history and results on physical examination. He reviewed medical evidence of record, noting that appellant had a June 30, 2010 MRI scan and June 9, 2010 electromyogram (EMG), and nerve conduction velocity (NCV) studies performed by Dr. Ignacio. Dr. Levitsky opined that appellant did have residuals of the July 11, 1989 injury. He stated that appellant had pain that had progressively worsened over the years and the MRI scan showed significant deterioration of the spine. Dr. Levitsky noted the examination for CTS was negative. According to Dr. Levitsky, appellant's current treatment of physical therapy and injections was related more to the degenerative condition than the original injury. Dr. Levitsky concluded that appellant was capable of performing the taxicab dispatcher position, but he would not be able to drive taxis for any prolonged period.

By decision dated July 12, 2011, OWCP denied modification of the November 22, 2000 LWEC determination. It found the medical evidence was represented by Dr. Levitsky and not sufficient to warrant modification.

On August 24, 2011 appellant submitted a request for reconsideration. He submitted an August 3, 2011 report from Dr. Ignacio providing results on examination. Dr. Ignacio noted that he had been shown a letter stating that "the patient's taxicab starter-dispatcher" position represented his wage-earning capacity, and this was an incorrect decision. He stated that appellant had performed the taxicab starter-dispatcher position and this would aggravate his condition. According to Dr. Ignacio, "I believe forcing [appellant] to continue to perform his job does aggravate his medical conditions and have contributed to the progressions of the lumbar spinal stenosis." He noted that appellant's condition was not only degenerative, but related to the employment injury and going back to work would aggravate his condition.

Appellant also submitted an August 17, 2011 report from Dr. Ignacio, which noted, after an examination, that appellant continued to have chronic back pain and was disabled for work.

By decision dated September 29, 2011, OWCP denied modification of the November 22, 2000 LWEC determination. It found that the evidence was insufficient to warrant modification. The appeal rights to the decision indicated that appellant could request reconsideration or review by the Board.

Appellant continued to submit reports from Dr. Ignacio. In a report dated November 2, 2011, Dr. Ignacio provided results on examination. He noted that he disagreed with Dr. Levitsky's opinion that appellant's condition was more related to the degenerative condition. Dr. Ignacio reported that he agreed with Dr. Levitsky that appellant could not drive for prolonged periods, and he opined that appellant was totally disabled.

By reports dated December 21, 2011, January 18 and February 22, 2012, Dr. Ignacio provided results on examination and found that appellant remained totally disabled. By report dated April 9, 2012, he diagnosed chronic progressive lumbar disc syndrome with radiculopathy, post-traumatic lumbar spinal stenosis, chronic hip bursitis, and chronic pain syndrome. Dr. Ignacio noted that appellant's spinal injury was getting worse, appellant had significant

neurosurgical dysfunction, and he may need surgery. In a report dated June 18, 2012, he specifically reported that appellant may need spinal compression surgery. Dr. Ignacio opined that appellant's lumbar conditions and the spinal injury were all casually related to the July 11, 1989 work injury. By report dated September 5 and 20, and November 1, 2012, Dr. Ignacio again noted that appellant continued to have an employment-related condition and was disabled.

On November 20, 2012 appellant requested a hearing before an OWCP hearing representative. By decision dated November 30, 2012, OWCP denied the request for a hearing. It stated that since appellant had previously requested reconsideration, he was not entitled to a hearing as a matter of right.

In a report dated July 7, 2013, Dr. Leonid Selya, a Board-certified orthopedic surgeon, provided a history and results on examination. He diagnosed bilateral hip arthritis, end-stage disease on the right, flexion contracture, low back pain, bilateral L5 pars defect with instability, and chronic low back pain with intermittent radiculopathies. Dr. Selya opined that appellant's condition "is due to injury sustained at work on July 11, 1989, which resulted in aggravation of previously irrelevant pars defect at L5 and aggravation of irrelevant at that time degenerative hip arthritis which progressed to the end-stage disease." He opined that appellant was disabled and could benefit from hip surgery and lumbosacral fusion.

The Board reviewed the November 30, 2012 OWCP decision and issued an order remanding the case on April 4, 2014.[5] The Board found that the September 29, 2011 decision denying modification of the LWEC determination should have provided full appeal rights, including the right to request a hearing. It was not a request for reconsideration of the July 12, 2011 OWCP decision, but a request for modification of the November 22, 2000 LWEC determination. The case was remanded to properly issue a decision with full appeal rights.

Dr. Ignacio prepared a report dated January 22, 2014 and opined that appellant continued to have chronic back pain, severe right hip pain, and advanced degenerative joint disease.

OWCP referred appellant for a second opinion examination by Dr. Willie Thompson, a Board-certified orthopedic surgeon. In a report dated June 11, 2014, Dr. Thompson provided a history and results on examination. He noted that a May 1, 2013 MRI scan showed degenerative changes. Dr. Thompson opined that appellant could not perform heavy lifting or fine manipulation. As to the selected position, he opined that appellant was capable of performing the taxicab dispatcher position, a sedentary position with no more than 10 pounds lifting.

By decision dated July 7, 2014, OWCP denied modification of the LWEC determination. It found the evidence was insufficient to warrant modification.

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

[5] *Id*.

rehabilitated, or the original determination was, in fact, erroneous.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the basis for the opinion.[8] Medical rationale is a medically sound explanation for the opinion offered.[9]

ANALYSIS

In the present case, OWCP issued a LWEC determination on November 22, 2000, finding that the selected position of taxicab starter/dispatcher fairly and reasonably represented appellant's wage-earning capacity. The position was sedentary with no lifting of more than 10 pounds. The Board affirmed the LWEC determination by decision dated July 23, 2002.

Appellant seeks to modify the LWEC determination. As noted above, a modification may be established by a material change in the nature and extent of the employment-related condition. In reviewing the medical evidence, however, the Board finds appellant has failed to provide sufficient evidence to establish that a modification is warranted.

The attending physician, Dr. Ignacio, opined in a January 5, 2011 report that appellant was totally disabled. A second opinion physician, Dr. Smith, opined that appellant could still perform the selected position in a March 29, 2011 report. OWCP selected Dr. Levitsky as a referee physician under 5 U.S.C. § 8123(a) to resolve a conflict on the issue.[10] Dr. Levitsky provided an unequivocal opinion in a June 1, 2011 report that appellant could perform the selected position. This report resolved the conflict and does not support modification of a LWEC determination as of June 1, 2011.[11]

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[6] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[7] *Id.*

[8] *Jennifer Atkerson,* 55 ECAB 317, 319 (2004).

[9] *See Ronald D. James, Sr.,* Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman,* 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound and logical).

[10] FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321.

[11] It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

The current medical evidence discussing appellant's ability to perform the duties of the selected position of taxicab starter/dispatcher was provided by a second opinion physician, Dr. Thompson. In a report dated June 11, 2014, Dr. Thompson opined that appellant was capable of performing the duties of the selected position. He provided a complete report and an unequivocal opinion on the issue presented. The June 11, 2014 report does not support appellant's claim that a modification of the November 22, 2000 LWEC determination was warranted.

With respect to evidence from appellant's attending physicians, appellant submitted reports from Dr. Ignacio. These reports are of diminished probative value on the specific issue of whether there was a material change in an employment-related condition that rendered appellant unable to perform the duties of the selected position of taxicab starter/dispatcher. In an August 3, 2011 report, Dr. Ignacio asserts an opinion that the taxicab starter/dispatcher position did not represent appellant's wage-earning capacity. His rationale for his opinion was that appellant had performed the position and it had aggravated his condition. The record indicated that appellant had worked as a taxicab driver, and a pizza delivery driver, not as a taxicab starter/dispatcher. The selected position for the LWEC determination was not a position that involved prolonged periods of driving or lifting luggage. Dr. Ignacio did not demonstrate an understanding of the actual duties of the selected position. In his November 2, 2011 report, he noted that he agreed with Dr. Levitsky that appellant could not drive for prolonged periods. Again, this is not the issue with respect to modification of the existing LWEC determination in this case.

The continuing reports from Dr. Ignacio do not establish a material worsening of an employment-related condition. In his April 9, 2012 report, Dr. Ignacio refers to appellant's spinal injury as getting worse. He does not clearly explain how the condition has worsened or why he believes it is related to the July 11, 1989 employment injury. Dr. Ignacio does not discuss the actual duties of the selected position and explain why appellant was unable to perform the position due to an employment injury. Furthermore, Dr. Ignacio was on one side of the conflict in medical opinion that Dr. Levitsky resolved and the continuing reports of Dr. Ignacio are insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.[12]

Dr. Selya provided a number of diagnoses in his July 7, 2013 report, including bilateral hip arthritis, bilateral L5 pars defect with instability and chronic low back pain with intermittent radiculopathies. He stated that all of these conditions were related to the July 11, 1989 injury, without providing a sound medical explanation as to causal relationship. OWCP has not accepted a hip condition or L5 pars defect, and Dr. Selya would have to provide a clear medical explanation, based on an accurate factual and medical background, as to how the conditions were causally related to lifting on July 11, 1989 at work. Simply stating that it aggravated an underlying condition does not constitute a sound medical explanation. Moreover, Dr. Selya does not discuss the selected position or establish a material worsening in an employment-related condition that precluded appellant from performing the selected position.

[12] *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

It is, as noted above, appellant's burden of proof to establish a modification of the wage-earning capacity determination. The medical evidence of record is not sufficient to meet appellant's burden of proof in this case.

On appeal, appellant states that he disagrees with OWCP's decision and that OWCP failed to properly consider Dr. Ignacio's reports. He stated that he still needs medical treatment and surgery, and he resubmitted medical evidence. The issue in the case is whether the medical evidence is sufficient to warrant a modification of the November 22, 2000 LWEC determination. The Board has reviewed the evidence of record and finds, for the reasons noted above, that appellant did not meet his burden of proof in this case.

Appellant may request modification of the November 22, 2000 loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not established that a modification of the November 22, 2000 wage-earning capacity determination was warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2014 is affirmed.

Issued: September 21, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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