United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 16-0206**
	)	**Issued: November 22, 2016**
DEPARTMENT OF HOMELAND SECURITY, Bothell, WA, Employer	)	

Appearances:
Stephanie N. Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 10, 2015 appellant, through counsel, filed a timely appeal from a September 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] Although the Board also has jurisdiction over OWCP's May 14, 2014 nonmerit decision, OWCP considered the merits of appellant's case in its September 18, 2015 decision. Accordingly, the Board will not address the decision of May 14, 2015 wherein OWCP denied merit review, as this issue is moot.

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to modify OWCP's loss of wage-earning capacity (LWEC) determination.

On appeal, counsel argues that reconsideration of the LWEC determination was improperly denied. She also alleges that appellant was never able to perform the duties of the constructed security guard position. Counsel alleges that appellant's other medical conditions, including hearing loss, were not properly considered in determining appellant's LWEC.

FACTUAL HISTORY

On March 4, 2004 appellant, then a 55-year-old diesel automobile mechanic filed a traumatic injury claim (Form CA-1) alleging that on that date he was removing wheels from a truck and the socket slipped and the belt came lose "jerking me." He alleged that his stomach and "insides" were extremely sore from the shock of the sudden release of pressure. OWCP accepted appellant's claim for abdominal strain, hematuria, and inguinal hernia. Appellant received supplemental roll benefits from June 25 through August 5, 2004.

Appellant had a history of three inguinal hernia repairs. After the employment injury, he was treated for an abdominal strain and released to light work with time loss from work limited to his physician's visits. Surgical repair was performed on June 25, 2004 and appellant took off work for recovery. He returned to full-time regular-duty work on August 9, 2004. On February 28, 2008 appellant's attending physician placed him under work restrictions, and he worked under these restrictions until he stopped work on January 29, 2009. OWCP accepted a recurrence of injury dated January 29, 2009, in a decision dated March 23, 2009. Appellant received periodic rolls benefits as of January 30, 2009.

On May 6, 2008 appellant filed a separate claim for a hearing loss caused by the noise exposure in his federal employment. He claimed March 11, 2008 as the date of injury. OWCP assigned this case File No. xxxxxx900. By decision dated October 30, 2008, it accepted appellant's claim for bilateral hearing loss due to noise exposure. On March 17, 2009 OWCP found that he sustained 39 percent bilateral hearing loss. It denied reconsideration of this decision on September 9, 2014 as appellant had not timely filed his reconsideration request and had failed to demonstrate clear evidence of error.

The first report in appellant's current claim noting hearing loss is a July 17, 2008 report wherein Dr. Michael G. Florence, a Board-certified surgeon, listed his impression as recurrent right inguinal hernia with bilateral chronic inguinal pain. In stating appellant's history, he noted major illnesses of gastroesophageal reflux disease (GERD), left atrial nerve branch blockage, disc disease, tobacco use, back pain, and hearing loss.

On September 23, 2009 OWCP referred appellant to a vocational rehabilitation counselor for the development of a vocational rehabilitation plan. At the time he was referred to rehabilitation, the employing establishment indicated that it had no job to offer him. After short-term computer training, sufficient transferable skills were identified to justify a direct placement rehabilitation plan. The vocational counselor assisted appellant with his job search, but these

efforts proved unsuccessful, and the vocational rehabilitation counselor issued a final report dated March 23, 2011.

In a March 1, 2011 report, Dr. Robert B. Handel, appellant's treating osteopath and Board-certified physiatrist, noted a diagnosis of remote ulnar nerve transposition with residual borderline neuropathy, which became more symptomatic with repetitive computer keyboarding during his retraining. He noted that appellant was unable to return to work as a diesel mechanic due to residuals from the hernia repair. Dr. Handel also noted mild-to-borderline left ulnar neuropathy at the left elbow, carpal tunnel syndrome, and insomnia secondary to hernia repair related pain. He related that appellant had chronic abdominal pain residual due to increased scar tissue. Dr. Handel concluded that appellant had a 10-pound lifting restriction, that he could push/pull a maximum of 25 pounds for two hours. He restricted appellant to walking four hours a day, climbing two hours a day, and his kneeling was limited to one hour per day. Dr. Handel limited appellant to four hours per day bending/stooping and six hours twisting. He concluded that appellant could continue looking into job possibilities for security guard with a modification of substituting bending for squatting or kneeling.

On April 22, 2011 OWCP proposed reducing appellant's wage-loss compensation, finding that the medical and factual evidence now established that appellant was no longer totally disabled, but rather partially disabled, and that he had the capacity to earn wages as a security guard at the rate of $458.40 per week, *Dictionary of Occupational Titles* (DOT) No. 372.667.034.

Effective June 15, 2011, OWCP reduced appellant's compensation benefits after determining his LWEC based on his ability to perform the duties of a security guard.

On July 5, 2011 appellant requested a telephonic hearing before an OWCP hearing representative. In a decision dated December 19, 2011, the hearing representative affirmed the June 15, 2011 LWEC determination.

On August 29, 2012 appellant requested reconsideration. He alleged that he could not perform the duties of a security guard due to his accepted hearing loss.

In a decision dated November 26, 2012, OWCP denied modification of the December 19, 2011 decision as appellant failed to present sufficient medical evidence to establish that he could not perform the job of security guard. It found that he had not established that his hearing loss kept him from performing the selected position of a security guard.

In August 22, 2012 and August 26, 2013 reports, Dr. Handel diagnosed status post inguinal bilateral hernia repair. He described appellant's medical history and the results of his examination. Dr. Handel noted that he had previously "signed off" indicating that appellant could perform the security guard job. However, he noted that he had now signed a letter indicating that appellant could not work as a security guard based on objective findings on an audiology evaluation, which concluded that appellant had significant hearing loss. Dr. Handel opined that placing appellant as a security guard would be unsafe for him and for whomever he would be providing security.

On November 5, 2013 OWCP received appellant's October 28, 2013 request for reconsideration of the decision of November 26, 2012. He argued, *inter alia*, that his hearing loss precluded him from working as a security guard and that the earlier decision had been based on information that was now almost three years old. Appellant contended that all of the current evidence established that he could not safely perform the duties of the security guard job position.

OWCP received another request for reconsideration on November 5, 2013.

By decision dated November 8, 2013, OWCP found that appellant had not established a consequential injury for aggravation of the preexisting left ulnar neuritis. A separate decision of the same date denied his claim for a consequential cardiac condition (heart attack).

On November 13, 2013 OWCP received a July 10, 2012 report from Dr. Lori Olson Caldwell, an audiologist, wherein she noted that appellant has a mild low frequency dropping to severe mid-to-high-frequency sensorineural hearing loss in each ear. Dr. Olson opined that this hearing loss made hearing normal conversation speech difficult and that the permanent damage to his hearing system would not allow him to hear certain sounds. She also noted that appellant sustained a discrimination hearing loss, which is defined as a decreased ability to understand spoken communication, even with appropriate amplification. Dr. Olson noted that, although he was fit with binaural hearing aids that were appropriate for his hearing loss, it was her professional opinion that the job requirements of a security guard could be jeopardized due to his hearing handicap. She noted that examples of situations that could pose a problem under the security guard job description would include understanding conversation on a telephone or radio, hearing fire alarms and security alerting systems, and hearing sounds while on patrol. Dr. Olson noted that appellant was diagnosed in 2009 with a binaural hearing impairment of 39.1 percent.

In a November 20, 2013 decision, OWCP denied modification of its decision, finding that appellant's physician had not provided sufficient rationale to support that appellant could not work as a security guard.

On March 18, 2014 appellant requested reconsideration. He argued that his last appeal was denied due to misinterpretation of medical evidence and refusal to consider medical statements from the last three years. Appellant stated that he was appealing the decision regarding his compensation payments with new evidence. He noted that his latest hearing test objectively and scientifically documented his inability to understand spoken words without visual clues and that this precluded him from having dependable verbal communication in telephone conversations, radio communications, etc. Appellant requested that he be granted total disability compensation retroactive to the date that his compensation was reduced.

In a January 14, 2014 report, Dr. A. Nichole Kingham, an audiologist, noted that appellant was seen on January 7, 2014. She noted that he had a significant difficulty understanding conversational speech in the presence of background noise and in quiet. Dr. Kingham noted that appellant could be expected to understand 30 percent of speech with a male voice in quiet without visual cues or context.

In a March 12, 2014 report, Dr. Handel again indicated that he no longer believed that appellant could perform the position of security guard because his significant hearing loss would create a safety risk. He noted that appellant's significant word recognition deficits with or without hearing aids would interfere with his work as a security guard.

By decision dated July 25, 2014, OWCP denied modification of its November 26, 2012 decision after conducting a merit review.

On January 27, 2015 appellant requested reconsideration of the July 25, 2014 decision. Counsel argued in a January 8, 2015 letter that the decision should be reversed as it was in error due to an incomplete statement of accepted facts (SOAF), and unreasonably outdated medical reports. He also alleged that the position of security guard was outside of appellant's physical restrictions from his other workers' compensation cases, and that appellant's preexisting medical conditions had not been fully considered. Counsel contended that an LWEC determination should never have been made. In the alternative, he argued that the LWEC determination should be modified due to a material change in the nature and extent of appellant's injury-related condition.

By decision dated May 14, 2015, OWCP denied appellant's reconsideration request. It found that his instant claim preceded his hearing loss claim. OWCP therefore found that appellant's medical condition subsequent to the work injury in the instant claim should not be considered in the LWEC determination.

On May 26, 2015 appellant filed an appeal with the Board.

In a note from a June 17, 2015 office visit, Dr. Handel reviewed appellant's physical examination findings. He noted that appellant had chronic low abdominal pain attributed to the mesh repair of his hernia. Dr. Handel noted that pain was controlled by Vicodin and Gabpentin, Lidoderm patches, and low doses of Ibuprofen. He indicated that appellant could not drive until 72 hours after taking Vicodin. Dr. Handel noted that a hearing and balance examination on January 14, 2014 noted significant hearing deficits. He noted remote history of left ulnar nerve transposition with residual borderline neuropathy, which became symptomatic with repetitive computer keyboarding. Dr. Handel also found mid-to-borderline left ulnar neuropathy at the left elbow, mild carpal tunnel syndrome, insomnia secondary to hernia repair-related pain, GERD possibly related to medication, abdominal pain requiring Vicodin from the mesh hernia repair, recent diagnosis of myocardial infarction, and noted that a recent echocardiogram found that a heart clot returned. He noted that he continued to believe that appellant could not perform the job of security guard based on the objective findings on the audiology evaluation and that placing appellant in the particular field would be unsafe for appellant and for whomever he was providing security.

On July 14, 2015 appellant, through counsel, requested reconsideration and again set forth arguments regarding an incomplete SOAF and unreasonably outdated medical reports. Counsel also alleged that the position of security guard was outside of appellant's restrictions, that his additional medical restrictions from other workers' compensation cases were not taken into account, and that preexisting medical conditions were not considered and that appellant's hearing loss was not properly considered. He argued that the LWEC should be modified due to a

material change in the nature and extent of the injury-related condition and because the original LWEC determination as in error.

Appellant submitted a June 21, 2015 letter from Dr. Handel who opined that appellant had significant hearing loss that would impact his ability to work safely. Dr. Handel again noted that appellant lacked the ability to work safely as a security guard based on his updated audiology reports. In a June 25, 2015 letter, he noted that appellant's hearing loss was caused by his March 11, 2008 work injury, that repetitive exposure to loud noise at work caused the hearing loss, and that due to significant hearing loss he could not work in the security guard positions. Dr. Handel also noted that these restrictions existed since appellant's March 11, 2008 diagnosis. He acknowledged that he did not consider appellant's hearing loss when he initially reviewed appellant's ability to work as a security guard, but that the hearing loss was an accepted work injury at the time of his review of the security guard position, and it was a contraindication to work as a security guard. In a July 15, 2015 report, Dr. Handel discussed appellant's follow-up visit and reiterated his prior conclusions.

On July 29, 2015 the Board dismissed the appeal at appellant's request.[4]

In an August 19, 2015 functional capacity evaluation, a physical therapist determined that appellant fell into a sedentary to light physical demand level on at least a part-time basis.

By decision dated September 18, 2015, OWCP determined that the evidence presented was not of sufficient probative value to modify the prior decision. It found that the evidence did not establish that appellant's wage-earning capacity determination was issued in error on June 15, 2011, and that no other issue regarding modification of the wage-earning capacity determination was properly before OWCP.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represent a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.[6] OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.[7] The relevant part provides that a formal loss of wage-earning capacity

[4] Docket No. 15-1323 (issued July 29, 2015).

[5] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[6] *Sue A. Sedwick*, 45 ECAB 211 (1993); *see also J.H.*, Docket No. 16-0314 (issued May 12, 2016).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.[8]

The burden of proof is on the party attempting to show modification.[9] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[10]

ANALYSIS

OWCP accepted appellant's claim in OWCP File No. xxxxxx938 for abdominal strain, hematuria, and inguinal hernia. In a June 15, 2011 decision, it reduced his compensation benefits after determining that he was capable of working as a security guard, and this decision was affirmed by a hearing representative. OWCP has upheld this determination multiple times. It last denied modification of its LWEC decision on September 18, 2015.

The burden of proof is on the party attempting to show a modification of the wage-earning capacity.[11] In this case, appellant has not established that the original LWEC decision of June 15, 2011 was in error. Contrary to appellant's allegation that it was based on stale medical evidence, OWCP based its decision on the March 1, 2011 report of appellant's treating physiatrist, who indicated that appellant could return to work with restrictions. These restrictions included a 10-pound lifting restriction, a prohibition against pushing or pulling over 25 pounds for two hours, walking limited to four hours a day, climbing limited to two hours a day, and kneeling limited to one hour a day He also limited appellant to four hours per day bending/stooping and six hours twisting. Dr. Handel specifically concluded that appellant could continue looking into job possibilities for security guard with a modification of substituting bending for squatting or kneeling. Based on Dr. Handel's restrictions, in a June 15, 2011 decision, OWCP properly determined that the position of security guard was suitable.

A material change in the nature and extent of a work-related condition is however one of the grounds on which a claimant may seek modification of a wage-earning capacity determination.[12] OWCP therefore must consider subsequently submitted medical evidence to determine whether the case record supports a material change in the nature and extent of the work-related condition.

While OWCP seemed to imply in its September 18, 2015 decision that only the status of the employment injury accepted under OWCP file number xxxxxx938, as of June 15, 2011, would determine appellant's wage-earning capacity, and that conditions accepted after the initial

[8] *Id.* at § 2.1501.3(a).

[9] *Darletha Coleman*, 55 ECAB 143 (2003).

[10] *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

[11] *Supra* note 9.

[12] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501.3(a) (June 2013).

injury and new medical evidence would be irrelevant, this subverts the intention of a wage-earning capacity determination. Rather, the intent of wage-earning capacity determinations are to determine appellant's capacity to earn wages given all of appellant's work-related conditions and provides a right to seek modification of a wage-earning capacity determination. Under section 8115(a) of FECA if the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, his or her 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 and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.[13]

Clearly, the fact that appellant has other accepted employment-related conditions which affect his disability status is a circumstance which must be considered in determining his actual wage-earning capacity. This principle is evident in OWCP procedures which instruct that the claims examiner is "responsible for determining whether the medical evidence establishes that the claimant is able to perform the selected jobs, taking into consideration medical conditions due to the accepted work-related injury or disease (including those accepted under other claims which may or may not have been doubled/combined with the instant case file), and any preexisting medical conditions."[14]

After the June 15, 2011 LWEC determination, appellant submitted evidence that his accepted hearing loss in OWCP file number xxxxxx900 also affected his wage-earning capacity. Dr. Handel subsequently revised his conclusion that appellant could perform the duties of the security guard position based on his accepted hearing loss. He opined that appellant's hearing loss would make it inadvisable for him to work as a security guard. OWCP found that this evidence was new evidence, regarding a claim filed after the initial injury, and therefore could not affect the June 15, 2011 LWEC determination. However the Board finds that OWCP should have evaluated whether this evidence establishes a worsening of an accepted employment-related condition, such that appellant's wage-earning capacity should be modified.[15]

In the instant case, OWCP has not properly evaluated whether appellant's accepted hearing loss condition, under his second claim in OWCP file number xxxxxx900, affected his ability to perform the constructed duties of a security guard. This case must therefore be remanded to OWCP for further findings in this regard. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[13] 5 U.S.C. § 8115(a).

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4(b) (June 2013).

[15] *See supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2015 is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: November 22, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board