

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

R.B., Appellant

and

**ARCHITECT OF THE CAPITOL,
Washington, DC, Employer**

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**Docket No. 17-0299
Issued: April 5, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 23, 2016 appellant, through counsel, filed a timely appeal from an August 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met its burden of proof to modify a loss of wage-earning capacity determination and terminate appellant's wage-loss compensation and medical benefits effective August 21, 2016 as his accepted lumbar injury had ceased without residuals.

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 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on March 16, 1993 appellant, then a 52-year-old plasterer, sustained a lumbar sprain and a temporary aggravation of preexisting lumbar stenosis when he slipped while ascending a ladder. He was followed in 1994 by Dr. Arthur Litofsky, an attending Board-certified neurosurgeon, who diagnosed an L4-5 defect aggravated by the accepted incident.

Following a period of work absence, appellant returned to work in the private sector as a dish washer through September 1996. He again stopped work, and received compensation for total disability. Appellant participated in vocational rehabilitation in 1997, with a vocational goal of Cashier 2 (U.S. Department of Labor, *Dictionary of Occupational Titles* # 211.462-010). He did not obtain employment. Appellant remained off work.

By notice dated March 7, 1997 and finalized June 19, 1997, OWCP reduced appellant's compensation effective June 22, 1997 under sections 8106 and 8115(a)³ of FECA based on his capacity to earn wages in the selected position of cashier. Appellant remained off work.

From September 2008 through September 25, 2013, appellant was examined annually by Dr. Joseph P. Cincinnati, an attending osteopathic physician Board-certified in orthopedic surgery. Dr. Cincinnati diagnosed lumbar degenerative disc disease, diffuse intravertebral skeletal hyperstosis syndrome, and a grade 1 retrolisthesis L4 on L5. He held appellant off work.

On April 28, 2016 OWCP obtained a second opinion from Dr. Robert A. Smith, a Board-certified orthopedic surgeon. Dr. Smith reviewed the medical record and a statement of accepted facts, (SOAF) noting that appellant had not received spinal injections or surgery, but participated briefly in physical therapy. On examination, he observed no spasm, atrophy, trigger points, or deformity in the paraspinal musculature. Dr. Smith noted a "satisfactory and functional" range of spinal motion, with forward flexion to 50 degrees, extension to 20 degrees, and lateral bending to 30 degrees bilaterally. He diagnosed a resolved lumbar strain by history, and idiopathic degenerative disc disease unrelated to the accepted injury. Dr. Smith found appellant at maximum medical improvement, with no further treatment needed. He noted that appellant could return to regular-duty work, although his "advanced age and arthritis probably would limit his return to heavy[-]duty work." In a June 12, 2016 addendum, Dr. Smith reiterated that the March 16, 1993 lumbar sprain had resolved without residuals. He noted on June 16, 2016 that the accepted temporary aggravation of lumbar stenosis had also resolved completely, and that appellant could return to "full-time regular[-]duty work."

By notice dated June 28, 2016, OWCP advised appellant that it proposed to terminate his medical benefits and wage-loss compensation, based on Dr. Smith's opinion that the accepted lumbar strain and temporary aggravation of lumbar stenosis had resolved without residuals. It afforded appellant 30 days to submit additional evidence and argument. Appellant did not respond.

By decision dated August 2, 2016, OWCP terminated appellant's medical and wage-loss compensation benefits effective August 21, 2016, finding that the accepted lumbar strain and temporary aggravation of lumbar stenosis had ceased without residuals. It accorded the weight

³ 5 U.S.C. §§ 8106 and 8115(a).

of the medical evidence to Dr. Smith, who based his opinion on a statement of accepted facts, the complete medical record, and a thorough clinical examination. OWCP further found that Dr. Smith's opinion was also sufficient to meet OWCP's burden of proof in modifying the June 19, 1997 wage-earning capacity determination, based on a "material change in the medical condition."

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

A wage-earning capacity 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. Section 8115(a) of FECA provides that wage-earning capacity is best measured by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. 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, 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 and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁹ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination. Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material

⁴ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁵ *Id.*

⁶ *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁹ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *S.R.*, Docket No. 14-0733 (issued August 18, 2015); *C.K.*, Docket No. 14-0341 (issued April 24, 2014).

¹⁰ *Katherine T. Kreger*, 55 ECAB 633 (2004).

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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS

OWCP accepted that on March 16, 1993, appellant sustained a lumbar strain and a temporary aggravation of preexisting lumbar stenosis. On June 19, 1997 it reduced his entitlement to wage-loss compensation based upon a determination that the selected position of cashier fairly and reasonably represented his wage-earning capacity and adjusted his compensation accordingly.

In a decision dated August 2, 2016, OWCP terminated appellant's entitlement to medical and wage-loss compensation benefits finding that the medical evidence of record established that the accepted lumbar injury had ceased without residuals. Accordingly, it has the burden of proof to establish that the wage-earning capacity determination should be modified.¹³

In support of his entitlement to ongoing wage-loss compensation, appellant had provided annual reports from Dr. Cincinnati, an attending osteopathic physician Board-certified in orthopedic surgery. Dr. Cincinnati provided annual reports from September 2008 through September 2013 diagnosing lumbar degenerative disc disease, an L4 on L5 retrolisthesis, and diffuse intravertebral skeletal hyperostosis. While he held appellant off work, he did not opine that appellant's ongoing lumbar condition continued to be causally related to the accepted March 16, 1993 injury.

On April 28, 2016 OWCP obtained a second opinion from Dr. Smith, a Board-certified orthopedic surgeon. The Board notes that OWCP may refer a claimant for a second opinion at any time.¹⁴ Dr. Smith provided an accurate history of injury and treatment, and noted reviewing the SOAF and the medical record. He determined that there was no medical evidence to support that the accepted lumbar injury was still present, attributing his ongoing presentation to idiopathic arthritis. Dr. Smith found appellant able to perform full-time work.

The Board finds that, based on the opinion of Dr. Smith, appellant's accepted lumbar injury resolved without residuals. Dr. Smith provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He conducted a physical examination and provided medical rationale explaining that appellant's ongoing lumbar condition was due to nonoccupational causes. Thus, OWCP met its burden of proof to modify the June 19, 1997

¹¹ *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.2.b (June 2013).

¹² *Tamra McCauley*, 51 ECAB 375 (2000).

¹³ *Id.*

¹⁴ Federal (FECA) Procedure Manual, *supra* note 11 at *Disability Management*, Chapter 2.600.3(b)(1) (June 2011).

wage-earning capacity determination and terminate appellant's medical and wage-loss compensation benefits on August 25, 2014.¹⁵

On appeal, counsel asserts that OWCP's August 2, 2016 decision is contrary to fact and law. As set forth above, OWCP met its burden of proof to modify the standing loss of wage-earning capacity determination, and to terminate appellant's compensation benefits, based on Dr. Smith's opinion.

CONCLUSION

The Board finds that OWCP met its burden of proof to modify a loss of wage-earning capacity determination and terminate appellant's wage-loss and medical compensation benefits effective August 21, 2016 as his accepted lumbar injury had ceased without residuals.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 2, 2016 is affirmed.

Issued: April 5, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *S.R.*, *supra* note 9; *C.K.*, *supra* note 9.