United States Department of Labor
Employees' Compensation Appeals Board

A.K., Appellant	)	
and	)	**Docket No. 16-1919**
	)	**Issued: December 12, 2017**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, OLYMPIC NATIONAL PARK, Port Angeles, 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 September 29, 2016 appellant, through counsel, filed a timely appeal from an April 4, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the claim.

[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.*

ISSUE

The issue is whether OWCP met its burden of proof to modify a June 7, 2007 loss of wage-earning capacity (LWEC) determination, and reduce appellant's compensation to zero effective May 7, 2015.

FACTUAL HISTORY

On June 8, 2005 appellant, then a 48-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging lower back and bilateral hip conditions arose in the performance of duty on or about May 31, 2005.[3] He stopped work on June 17, 2005. On September 7, 2005 OWCP initially accepted appellant's claim for lumbar strain. It subsequently expanded the accepted conditions to include lumbosacral spondylosis.

On October 30, 2005 appellant returned to work in a temporary, light-duty assignment. However, the employing establishment was only able to accommodate his restrictions through December 3, 2005. OWCP paid appellant wage-loss compensation for temporary total disability beginning February 19, 2006. Appellant continued to receive disability compensation through October 31, 2006. Effective November 2, 2006, he began work in the private sector (GoWireless) as a cellular telephone service salesperson. OWCP later terminated appellant's wage-loss compensation, but continued to compensate him based on the difference between his actual earnings and his date-of-injury earnings as a maintenance mechanic.

On June 6, 2007 OWCP issued a formal LWEC determination. It found that appellant's actual weekly wages ($462.24) as a salesman for GoWireless, effective November 2, 2006, fairly and reasonably represented his wage-earning capacity. OWCP further found that, because appellant demonstrated his ability to perform the position for more than two months, the sales position was considered suitable to his partially disabled condition. Consequently, it formally adjusted his 28-day compensation payments to reflect his approximate 56 percent loss in wage-earning capacity.[4]

Appellant subsequently advised OWCP that he no longer worked for GoWirless and that in December 2007 he began working part time as a bus driver. He continued to work as a part-time bus driver for several years thereafter. OWCP paid appellant wage-loss compensation based on the June 6, 2007 LWEC determination.

Dr. Jennifer Carl, a Board-certified physiatrist and appellant's treating physician, last examined him on August 17, 2009. At the time, she noted that she had not seen appellant in over two years. Dr. Carl diagnosed work-related lumbar strain, lumbar spondylosis, and low back

[3] Appellant indicated that he had worked as a maintenance mechanic since 1999. His responsibilities included performing plumbing and electrical installation/repair work utilizing a variety of hand and power tools. Appellant worked indoor and outdoor, in open spaces, as well as confined areas such as attics and crawl spaces. He also performed building/carpentry trade work, such as roof repair, painting, cabinet installation, repairing overhead doors, and pouring/forming concrete. Additional duties included operating various types of off-road and on-road equipment, including front-end loaders, backhoes, and dump trucks.

[4] OWCP noted that the current weekly pay rate of appellant's date-of-injury position was $1,055.54.

degenerative disc and joint problems. She noted that appellant could not perform his usual job and she imposed work restrictions, including a 30- to 35-pound weight limitation with respect to pushing/pulling/lifting. Dr. Carl characterized them as "Lifetime" restrictions.

In a January 13, 2012 report, Dr. Michael J. Battaglia, a Board-certified orthopedic surgeon and OWCP referral physician, noted the history of injury, reviewed the statement of accepted facts (SOAF) and the medical record, and provided examination findings. He reported that appellant had been working as a school bus driver since 2007 and currently was not undergoing active treatment. Dr. Battaglia diagnosed lumbar spondylosis, which in his opinion was unrelated to the employment injury. He also noted that appellant had permanent aggravation secondary to the employment injury and the type of work he did for many years. Dr. Battaglia noted that appellant's work-related conditions had not resolved given his objective findings and the fact that this was a permanent aggravation. He indicated that appellant was at maximum medical improvement and was unable to perform his prior duties as a maintenance mechanic. Dr. Battaglia explained that appellant's inability to perform his date-of-injury position was due to the industrial injury, as this was a "permanent aggravation." No further treatment was recommended. Dr. Battaglia also opined that appellant had permanent work-related restrictions, noting in a separate work capacity evaluation (Form OWCP-5c) that appellant had a 35-pound weight restriction with respect to pulling and lifting. He also precluded squatting and kneeling.

OWCP continued to pay wage-loss compensation based on the June 6, 2007 LWEC determination.

In July 2014, OWCP again referred appellant for a second opinion examination. In an August 9, 2014 report, Dr. Aleksandar Curcin, an orthopedic surgeon, noted the history of injury and reviewed the SOAF and the medical record, including diagnostic testing and second opinion reports. He noted that appellant currently worked as a school bus driver. Dr. Curcin opined that the accepted lumbar sprain/strain had resolved, but appellant's lumbosacral spondylosis was still present and appeared to be causing subjective symptoms. He explained that a sprain/strain-type injury would be expected to resolve within a 10- to 12-week timeframe, but the condition of lumbosacral spondylosis would never completely resolve. Dr. Curcin further noted that appellant appeared to be at baseline status with mechanical back pain. There were no symptoms of radiculopathy and appellant did not have constant, daily pain. Dr. Curcin further commented that there did not appear to be any medical impediments hindering recovery and that no further medical care was warranted to address appellant's work-related conditions. He noted that there were no clear cut physical limitations resulting from the accepted conditions, but felt that a functional capacity evaluation (FCE) would be helpful prior to completing a work capacity evaluation (OWCP-5c). As to appellant's ability to resume his date-of-injury maintenance mechanic position, Dr. Curcin indicated that appellant was capable of returning to the position full time, but cautioned that resuming that line of heavy manual labor more than likely would result in exacerbating appellant's back pain complaints.

A September 23, 2014 FCE revealed that appellant was capable of performing medium to heavy physical demand work on a full-time basis.

In an addendum to his August 9, 2014 report, Dr. Curcin advised that he reviewed the maintenance mechanic position description, as well as the recent FCE, and it appeared appellant

could perform the described duties without restriction. He also provided a separate work capacity evaluation (Form OWCP-5c) which indicated that appellant was capable of performing his usual job.

By notice dated October 30, 2014, OWCP advised appellant that it proposed to modify the June 6, 2007 LWEC determination based on a "material change" in the extent/nature of his injury-related condition(s). It explained that the evidence of record showed that appellant's accepted conditions had resolved/improved such that he was capable of performing his date-of-injury maintenance mechanic position on a full-time basis. Consequently, appellant currently had no LWEC and his periodic (28-day) compensation payments would be reduced to zero. OWCP provided copies of Dr. Curcin's August 9, 2014 report and addendum. Appellant was afforded at least 30 days to submit additional evidence and/or argument should he disagree with the proposed action.

In a November 25, 2014 letter, counsel argued that OWCP could not base its proposed action on Dr. Curcin's report because the second opinion examiner relied on an incomplete and inaccurate SOAF. She noted that appellant wore corrective shoes and had mild scoliosis, information she believed was not shared with Dr. Curcin. Counsel also argued that there was an unresolved conflict in medical opinion between Dr. Curcin and Drs. Battaglia and Carl, and therefore, the case should have been sent to an impartial medical examiner. She essentially argued that OWCP had not met its burden of proof to modify or terminate appellant's wage-loss compensation determination.

OWCP prepared a March 4, 2015 amended SOAF, to include that appellant wore corrective shoes and had preexisting scoliosis. It forwarded the latest SOAF to Dr. Curcin and asked whether this additional information altered his prior opinion.

In a March 10, 2015 addendum, Dr. Curcin indicated that he had reviewed the updated SOAF, but it did not alter his prior opinions.

By decision dated May 7, 2015, OWCP informed appellant that it was reducing his wage-loss compensation to zero effective immediately. It addressed counsel's arguments and determined that Dr. Curcin's opinion established that appellant was capable of performing his date-of-injury maintenance mechanic position on a full-time basis. OWCP further noted that the claim would remain open for medical care of appellant's accepted lumbosacral spondylosis.

Appellant timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was conducted *via* telephone on February 10, 2016. Counsel argued that, while appellant was capable of working as a bus driver, appellant was unable to resume his prior duties as a maintenance mechanic. At the hearing and in subsequent correspondence, she continued to challenge OWCP's reliance on Dr. Curcin's opinion as a basis for modifying the prior LWEC determination. Counsel also submitted additional medical evidence.

In a November 26, 2014 report, Dr. Justin L. Esterberg, a Board-certified orthopedic surgeon, reported that appellant had right-sided predominant low back pain at the lumbosacral junction and upper buttock region/lateral sacral region, which had been ongoing for years. He

noted that appellant had a couple of severe episodes of pain in the past and also had a history of work injury to his low back. Dr. Esterberg provided an assessment of chronic low back pain, which he opined was likely due to the underlying arthritis present in the areas of L4-5, potentially L5-S1. He noted that appellant seemed to be managing all of his symptoms quite well. Dr. Esterberg indicated that he agreed with appellant that it was best to avoid any significant manual labor or a lot of heavy lifting. He reasoned that being a mechanic at this point would probably not work out very well for appellant's low back and that he could have an increase in his low back pain, particularly with the bending, lifting, and twisting done in that type of work. Dr. Esterberg noted that he reviewed a magnetic resonance imaging (MRI) scan from 2005, which showed some disc degenerative changes at L4-5, L5-S1 without any stenosis.[5]

In a May 28, 2015 report, Dr. Roger Olsen, a family practitioner, noted the history of injury and appellant's work and medical history thereafter.[6] He opined that appellant was totally disabled due to a January 28, 2015 cerebrovascular accident and that a back examination was not done due to appellant's severe handicap secondary to stroke and inability to cooperate physically with the examination. Dr. Olsen noted that the stroke left appellant with residuals of impaired gait and that he used a cane and had severe right arm weakness, but that there had been some improvement with speech. He diagnosed chronic back pain and indicated that appellant has had "chronic impairment of functions including sitting, walking, reaching, twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling, climbing." Dr. Olsen noted that, prior to his stroke, appellant had permanent disability from performing his previous maintenance mechanic occupational duties due to work-related stresses and injuries aggravating his underlying degenerative disc disease. In a May 29, 2015 work capacity evaluation (Form OWCP-5c), he opined that appellant could not perform his usual job and that he was totally disabled from any work.

By decision dated April 4, 2016, an OWCP hearing representative affirmed the May 7, 2015 decision. He found that Dr. Curcin's opinion supported the modification/reduction of appellant's wage-loss compensation and that the reports of Drs. Esterberg and Olsen did not reflect sufficient consideration of the September 23, 2014 FCE, which revealed appellant's ability to work at the medium to heavy job classification level. Consequently, the hearing representative affirmed OWCP's prior decision.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on LWEC.[7] A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings

[5] A June 16, 2005 lumbar MRI scan, interpreted by Dr. Michael Fishman, a radiologist, revealed mild disc degeneration at L4-5 and L5-S1. It also showed minimal retrolisthesis of L5 on S1 and no impingement on neural elements at these or other lumbar spine levels.

[6] On May 27, 2015 appellant advised OWCP that Dr. Carl had retired and that Dr. Olsen was his new treating physician.

[7] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

from a selected/constructed position, represents a claimant's ability to earn wages.[8] Generally, an employee's actual earnings best reflect his or her wage-earning capacity.[9] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[10]

Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.[11] Modification of an LWEC determination is unwarranted 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 erroneous.[12] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[13]

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain and lumbosacral spondylosis as a result of his employment activities as a maintenance mechanic. On June 6, 2007 it reduced his entitlement to wage-loss compensation based upon a determination that his salesman position for GoWireless fairly and reasonably represented his wage-earning capacity. For several years, OWCP paid wage-loss compensation based on the June 6, 2007 LWEC determination. On May 7, 2015 it reduced appellant's entitlement to wage-loss compensation benefits to zero as the medical evidence of record established a material change in condition and appellant was able to return to his maintenance mechanic position without restrictions. By decision dated April 4, 2016, an OWCP hearing representative affirmed the May 7, 2015 decision. Accordingly, OWCP has the burden of proof to establish that the June 6, 2007 wage-earning capacity determination should be modified.[14]

The issue of whether there has been a material change in appellant's work-related condition is a medical determination and may only be resolved by probative medical evidence.[15] OWCP accorded weight of the medical evidence to Dr. Curcin, a Board-certified orthopedic surgeon and second opinion physician, who opined in August 9, 2014 and March 10, 2015 reports that appellant was capable of resuming full-time work with no restrictions as a

[8] *See Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[9] *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

[10] *Id.*

[11] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[12] 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

[13] 20 C.F.R. § 10.511.

[14] *See Tamra McCauley*, *supra* note 12.

[15] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

maintenance mechanic. Specifically, Dr. Curcin found that the accepted lumbar sprain/strain was no longer active and that the lumbosacral spondylosis condition was at baseline.

In his August 9, 2014 report, Dr. Curcin noted the history of injury, and reviewed the statement of accepted facts and the medical record. He also presented examination findings. Dr. Curcin opined that the accepted sprain/strain of the lumbar region was no longer present. He explained that the pathophysiology of a sprain/strain injury was expected to resolve within a 10- to 12-week period of time. Dr. Curcin also found that, while the lumbosacral spondylosis was still present and appeared to be causing subjective symptoms, appellant had reached/returned to baseline status. He explained that appellant's lumbosacral spondylosis would never completely resolve and that appellant had mechanical back pain with no symptoms of radiculopathy or constant daily pain. Dr. Curcin cautioned that in returning appellant to heavy manual labor, appellant may experience an exacerbation of his back pain complaints. In a March 10, 2015 addendum, he reviewed the updated March 4, 2015 SOAF, which reflected that appellant wore corrective shoes and had preexisting scoliosis. Dr. Curcin also reviewed appellant's position description and the September 23, 2014 physical capacity evaluation. He indicated that his prior opinion, that appellant could resume his maintenance mechanic position without restriction, had not changed.

The Board finds that, based on the opinion of Dr. Curcin, OWCP established that appellant was no longer disabled as a result of his May 13, 2005 employment injury. He concluded that appellant had recovered from the work-related conditions and was capable of returning to full-time work as a maintenance mechanic. Dr. Curcin provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He conducted a physical examination and opined that the lumbar sprain had resolved and the lumbosacral spondylosis condition was at baseline. He also reviewed the position description and the September 23, 2014 physical capacity evaluation and opined that appellant could resume his date-of-injury position. Thus, OWCP met its burden of proof to modify the June 7, 2007 LWEC determination, and reduce appellant's compensation to zero effective May 7, 2015.

The opinions of Dr. Esterberg and Dr. Olsen regarding appellant's disability are insufficient to overcome the weight afforded Dr. Curcin's opinion.

In his November 26, 2014 report, Dr. Esterberg provided an assessment of chronic low back pain, which he opined was likely due to the underlying arthritis at L4-5 and potentially L5-S1. Dr. Esterberg's recommendation that appellant should avoid any significant manual labor or a lot of heavy lifting are prophylactic in nature and does not establish ongoing employment-related disability. The possibility of future injury does not constitute a basis for the payment of compensation under FECA.[16] Moreover, Dr. Esterberg did not consider the results of the September 23, 2014 FCE.

In his May 29, 2015 report, Dr. Olsen diagnosed chronic back pain and indicated that appellant has had chronic impairment of several functions. However, Dr. Olsen did not perform a back examination due to appellant's severe handicap secondary to a January 28, 2015 cerebrovascular accident. While Dr. Olsen opined that appellant was permanently disabled from

[16] *See S.N.*, Docket No. 13-2069 (issued February 21, 2014).

performing his maintenance mechanic position prior to his stroke, he failed to provide a reasoned explanation as to why he believed that appellant was disabled. He also failed to consider the results of the September 23, 2014 physical capacity evaluation. The Board has found that medical evidence that offers a conclusion, but does not offer any rationalized medical explanation is of limited probative value.[17]

On appeal, counsel asserts that OWCP had not followed the process for modifying an LWEC determination given the inaccurate SOAF and the inadequate job description provided Dr. Curcin. He also argues that the new medical evidence was inconsistent with OWCP's determination. As noted, OWCP amended the SOAF and provided Dr. Curcin a copy of appellant's maintenance mechanic position description. Moreover, the reports of Dr. Esterberg and Dr. Olsen are of diminished probative value and are insufficient to create a conflict of medical opinion with Dr. Curcin. For the reasons noted above, OWCP met its burden of proof in modifying the June 7, 2007 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 OWCP met its burden of proof to modify the June 7, 2007 LWEC determination, and reduce appellant's compensation to zero effective May 7, 2015.

[17] *T.M.*, Docket No. 08-975 (February 6, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.[18]

Issued: December 12, 2017
Washington, DC

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

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

[18] Colleen Duffy Kiko, Judge, participated in the original decision but was no longer a member of the Board effective December 11, 2017.