

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

N.M., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Indianapolis, IN, Employer

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**Docket No. 16-1858
Issued: February 8, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 20, 2016 appellant filed a timely appeal from a May 4, 2016 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to modify an April 25, 1996 loss of wage-earning capacity determination.

FACTUAL HISTORY

The case has previously been before the Board.² The facts of the case as presented in the prior decision are incorporated herein by reference. To reiterate the relevant facts, on June 1,

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 14-0348 (issued May 2, 2014).

1992 appellant, then a 39-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on May 27, 1992 she sustained back and leg injuries when she was struck by a cart while in the performance of duty. OWCP accepted a low back strain, herniated L4-5 disc, enthesopathy of the hip region, and sciatica. By decision dated April 25, 1996, it determined that actual earnings in a part-time mail handler position effective January 20, 1996 represented her wage-earning capacity. Appellant's compensation was reduced to reflect her wage-earning capacity.³

Appellant underwent a lumbar interbody fusion surgery on January 29, 2009. According to the evidence of record, appellant continued to receive compensation based on a loss of wage-earning capacity through January 29, 2009. She then began to receive compensation on the periodic rolls for total disability.

By letter dated September 13, 2011, appellant indicated that she was confused as to how her wage-earning capacity had been calculated. She stated that her condition had worsened since 1997 and she continued to have problems in the back, legs, neck, shoulders, and arms. Appellant asked for assistance in retracing her work history, comparing it with the physician's notes and being reimbursed for time she did not receive proper compensation. By letter dated April 19, 2012, OWCP advised appellant that the April 25, 1996 loss of wage-earning capacity determination explained the reduction in compensation.

In a letter to OWCP dated June 18, 2012, appellant again discussed her claim and stated that from 2000 to 2007 her case was "in limbo" with OWCP. She stated that she did not understand how her compensation was computed. Appellant discussed the medical evidence with respect to disability for work. In a Form CA-110 (memorandum of telephone call) dated October 19, 2012, OWCP indicated that appellant was trying to appeal the April 25, 1996 decision. By letter dated February 18, 2013, appellant again discussed her claim and stated that she had not been properly compensated from 2000 to 2007. A Form CA-110 from an April 9, 2013 telephone call stated that appellant was "appealing the LWEC decision."

In a decision dated June 18, 2013, OWCP found appellant had submitted an untimely application for reconsideration of either the April 25 or July 9, 1996 decisions. It further found that appellant's statement failed to indicate which decision she was appealing and failed to show that the decisions were improper.

On December 2, 2013 appellant filed an appeal with the Board of the June 18, 2013 OWCP decision. The Board set aside the June 18, 2013 OWCP decision.⁴ The Board found that appellant was requesting a modification of her loss of wage-earning capacity determination prior to January 30, 2009, and was entitled to a merit review.

³ In a decision dated July 9, 1996, OWCP denied appellant's claim for a recurrence of disability commencing March 31, 1996. By decision dated December 31, 1998, OWCP denied appellant's claim for a recurrence of disability commencing May 16, 1998. In a decision dated May 19, 1999, OWCP denied modification of the December 31, 1998 decision. By decision dated February 25, 2000, OWCP denied merit review of the claim. The record also contains an August 26, 2008 decision denying a request for hearing before an OWCP hearing representative.

⁴ *Id.*

The record indicates that OWCP received evidence on May 10 and 24, 2007, including medical reports from Dr. Robert Cravens, an orthopedic surgeon, from May 30, 1996 to November 16, 1999. Dr. Cravens reported on May 30, 1996 that appellant was working part time. In a November 13, 1996 report, Dr. Cravens indicated that appellant had increasing sciatica pain and he recommended she be off work for 10 days. He indicated in an August 13, 1997 note that appellant reported increased right hip and leg pain. On June 3, 1998 Dr. Cravens reported that she complained of back pain and had not worked since May 8, 1998. He wrote that appellant had spondylosis at L5-S1, with mild degenerative changes in the hip. Dr. Cravens opined that she could not ever work full time and it was doubtful if she could return to part-time work.

In a report dated January 27, 1999, Dr. Cravens reported that appellant continued to have back pain and radicular pain into the legs. He asserted that the pain was caused by bulging L4-5 discs, and opined that she was totally disabled.

Appellant also submitted reports from Dr. John Cummings, Jr., a Board-certified neurosurgeon. In a report dated February 11, 2000, Dr. Cummings reported that appellant continued to have back problems and he did not believe she could return to work. In an April 17, 2000 report, he indicated that conservative measures had failed and recommended a lumbar fusion surgery.

In a report dated July 30, 2007, Dr. Cummings reported that a lumbar magnetic resonance imaging (MRI) scan showed progression in degenerative changes at L5-S1 and L4-5. He indicated that appellant had “a few accidents” after her original complaints, and had seen a physician who recommended surgery but did not believe it was related to the work injury. Dr. Cummings indicated that she had put off surgery, but was experiencing pain in her legs and was interested in pursuing surgery. In a November 8, 2008 report, he reported that appellant was having anterior thigh pain, and an MRI scan showed advanced degenerative lumbar changes. Dr. Cummings indicated in a January 19, 2009 report that lumbar fusion surgery would be performed.⁵

In a report dated June 11, 2007, Dr. Lisa Miller, a family practitioner, provided a history of injury and treatment. Dr. Miller reported that appellant had been totally disabled since her May 27, 1992 employment injury, due to pain and multiple problems. Dr. Miller noted appellant had been in two motor vehicle accidents, but treating physicians had indicated these had not contributed to a permanent injury.

The record also contains a May 3, 2007 report from Dr. Don Jardine, a Board-certified orthopedic surgeon. Dr. Jardine reported that he had seen appellant on December 20, 2000, April 10, 2002, and October 13, 2004.⁶ He provided a history of medical treatment. Dr. Jardine noted appellant had been involved in two motor vehicle accidents since the work injury, including one in November 1997. He wrote that both he and Dr. Cravens felt that the motor

⁵ As noted above, appellant underwent lumbar surgery on January 29, 2009.

⁶ A memorandum Dated May 17, 2014 from an OWCP claims examiner indicated that it appeared Dr. Jardine was originally selected as an impartial medical examiner on the issue of back surgery. The claims examiner wrote that Dr. Jardine had lost the case file, but when clearing out his office in January 2007 he had found evidence and submitted it on May 10, 2007.

vehicle accidents had not contributed to a permanent injury other than a left rotator cuff injury. As to surgery, he indicated that Dr. Cummings had recommended surgery but appellant had decided to postpone surgery. He opined that appellant had sustained an eight percent permanent impairment due to the employment injury.

By decision dated August 7, 2014, OWCP denied modification of the April 25, 1996 loss of wage-earning capacity determination. It found the evidence failed to establish that modification was warranted.

On July 7, 2015 appellant submitted evidence and argued that the loss of wage-earning capacity determination should have been modified due to her medical condition. She asserted that her condition had worsened and she had not been able to continue the light-duty job. Appellant resubmitted medical evidence from Dr. Cravens and Dr. Cummings, as well as the May 3, 2007 report from Dr. Jardine and the June 11, 2007 report from Dr. Miller.

By decision dated May 4, 2016, OWCP denied modification of the April 25, 1996 loss of wage-earning capacity determination. It found the medical evidence was insufficient to warrant modification based on a material change in the employment-related condition.

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 rehabilitated, or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.⁸

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹ Medical rationale is a medically sound explanation for the opinion offered.¹⁰

ANALYSIS

In the present case, OWCP issued an April 25, 1996 loss of wage-earning capacity determination, based on a part-time mail handler position appellant had performed since January 20, 1996. It modified the loss of wage-earning capacity determination as of January 30, 2009, after appellant underwent lumbar surgery. The issue is whether the loss of wage-earning

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ *Id.*

⁹ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

¹⁰ 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).

capacity determination should have been modified prior to January 30, 2009. Appellant has not argued that the original determination was error. She has argued that there was a material change in her employment-related condition.

The Board has reviewed the medical evidence and finds it is not of sufficient probative value to warrant modification of the April 25, 1996 loss of wage-earning capacity determination. Appellant has submitted numerous medical reports, but it is not clear what specific date she believed there was a material change in her accepted conditions. In his reports from May 30, 1996 to November 16, 1999, Dr. Cravens refers to appellant's complaints of pain. Describing complaints of pain does not constitute a rationalized medical opinion establishing a material change in an employment-related condition.¹¹ On June 3, 2008 Dr. Cravens reported that appellant complained of back pain, and he opined it was doubtful if she could return to part-time work. He does not explain his opinion, discuss the light-duty job, or clearly indicate whether there has been a material change in an employment-related condition, and if so, provide a description of the material change.

Dr. Cummings reported on February 11, 2000 that appellant had back problems and he felt appellant was disabled. He failed to provide a complete history or a rationalized medical opinion establishing a material change in appellant's condition. In reports dated July 30, 2007 and November 12, 2008, Dr. Cummings noted appellant's complaints of pain and MRI scan results showing lumber degenerative changes. As noted above, pain does not establish a material change in an employment-related condition. Moreover, Dr. Cummings does not discuss causal relationship between any degenerative changes and the May 27, 1992 employment injury. He briefly refers to "a few accidents" after the employment injury without further explanation. Dr. Cummings failed to provide a rationalized medical opinion that establishes a material change in an employment-related condition.

Dr. Miller indicated in her June 11, 2007 report that appellant had been involved in two motor vehicle accidents. She opined that appellant was disabled, but did not discuss the motor vehicle accidents other than to briefly indicate that other physicians had not found they caused a permanent injury. Dr. Miller did not provide a rationalized medical opinion, based on a complete background, showing a material change in an employment-related condition.¹²

Dr. Jardine provided a report dated May 3, 2007, and indicated that he had seen appellant on three occasions from 2000 to 2004. He did not describe a material change in appellant's employment-related condition. According to Dr. Jardine, the motor vehicle accidents did not contribute to a permanent injury other than a left rotator cuff injury. This did not address the issue of a material change in appellant's employment-related condition prior to the 2009 surgery.

It is appellant's burden of proof to establish that modification of the April 25, 1996 loss of wage-earning capacity determination was warranted prior to January 30, 2009. The Board finds that appellant has failed to submit a rationalized medical opinion, based on a complete background, establishing a material change in her employment-related condition which

¹¹ *P.C.*, Docket No. 13-0939 (issued August 27, 2013).

¹² *See R.N.*, Docket Nos. 12-1194, 12-1204 (issued December 5, 2012).

prevented her from performing the light-duty mail handler position. Appellant therefore did not meet her burden of proof in this case.¹³

On appeal, appellant submitted evidence previously of record and argues that she is still disabled, and the medical evidence shows a material change. The Board has reviewed the relevant evidence of record with respect to appellant's condition prior to January 30, 2009. For the reasons discussed, the Board finds that appellant has not established a material change in an employment-related condition.

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

CONCLUSION

The Board finds that appellant has not established a modification of an April 25, 1996 loss of wage-earning capacity determination was warranted prior to January 30, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2016 is affirmed.

Issued: February 8, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹³ *Id.*