United States Department of Labor
Employees' Compensation Appeals Board

N.A., Appellant	)	
and	)	**Docket No. 16-1155**
	)	**Issued: January 30, 2017**
DEPARTMENT OF VETERANS AFFAIRS, NORTH TEXAS HEALTH CARE SYSTEM, Dallas, TX, Employer	)	

Appearances:
Michael E. Woods, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 11, 2016 appellant, through her representative, filed a timely appeal from a March 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 appellant established a basis for modification of an October 24, 2014 loss of wage-earning capacity determination.

FACTUAL HISTORY

OWCP accepted that on May 21, 2012 appellant, then a 29-year-old nursing assistant, sustained herniated cervical and lumbar discs and cervical and lumbar sprains while repositioning a patient.[3] The employing establishment issued an authorization for medical treatment on May 12, 2012. Following a brief absence, appellant returned to light-duty work in early June 2012. She continued to have intermittent work absences, for which she received compensation.

In a July 16, 2012 report, Dr. Ronnie D. Shade, an attending Board-certified orthopedic surgeon, diagnosed a cervical strain and a lumbar strain related to the May 21, 2012 injuries. He restricted appellant to working six hours a day through October 2012. Appellant received compensation for the remaining two hours a day.[4]

In a November 13, 2012 report, Dr. Paul A. Vaughan, an attending Board-certified orthopedic surgeon, noted appellant's complaints of severe neck pain since the accepted work injury. He attributed her symptoms to possible instability at C5-6. As November 20, 2012 x-rays showed C5-6 instability, Dr. Vaughan recommended an anterior discectomy and fusion. He held appellant off work as of November 26, 2012. OWCP issued compensation for temporary total disability through March 9, 2013.[5] Appellant continued to claim wage-loss compensation (Forms CA-7).

On April 5, 2013 OWCP obtained a second opinion from Dr. James Butler, a Board-certified orthopedic surgeon, regarding the necessity of the proposed cervical fusion, and whether appellant's lumbar condition continued to be related to the accepted injury. Dr. Butler reviewed the medical record and statement of accepted facts (SOAF) provided by OWCP. On examination, he observed normal cervical and lumbar ranges of motion, normal strength in both upper extremities, and weakness of right hand grip. Dr. Butler diagnosed thoracic outlet syndrome, right greater than left, resolved cervical and lumbar strain/sprain without evidence of cervical or lumbar disc disease, and obesity. He opined that appellant's lumbar condition was

[3] June 8, 2012 magnetic resonance imaging scans showed disc bulges at C4-5 and C6-7, a central shallow disc protrusion at C5-6, and low grade disc bulging at L4-5 and L5-S1. August 27, 2012 electromyography and nerve conduction velocity testing showed acute multilevel cervical root denervation consistent with radiculopathy, greatest at C5-6, without evidence of lumbar radiculopathy.

[4] In an October 22, 2012 report, Dr. Ed Wolski, an attending Board-certified family practitioner, diagnosed cervical and lumbar disc displacement, cervical radiculopathy, and lumbar radiculitis related to the accepted May 12, 2012 work injury. He limited appellant to working four hours a day.

[5] Appellant underwent a series of cervical epidural steroid injections from January to March 2013. On March 7, 2013 she received lumbar facet injections from L2 through S1 on the right, bilateral sacroiliac injections. On April 25, 2013 appellant underwent medial facet branch rhizotomies at L2, L3, L4, L5, S1, S2, and S3 on the right.

due to obesity rather than the accepted injury, and that the recommended discectomy and fusion was unrelated to the accepted work injury. Dr. Butler noted work restrictions.

By decision dated May 21, 2013, OWCP denied appellant's claim for wage-loss compensation from March 10 to May 10, 2013, based on Dr. Butler's opinion that the accepted injuries ceased without residuals. In a May 28, 2013 letter, through appellant's representative, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On May 30, 2013 OWCP determined that there was a conflict of medical opinion between Dr. Butler, for the government, and Dr. Vaughan for appellant, regarding her work capacity and whether the claim should be expanded to accept thoracic outlet syndrome. On August 7, 2013 it selected Dr. Phillip Williams, Jr., a Board-certified neurosurgeon, as impartial medical examiner.[6]

By decision dated August 12, 2013, an OWCP hearing representative reversed OWCP's May 21, 2013 decision, finding that the case was not in posture for decision.[7] The hearing representative remanded the case to obtain a supplemental report from Dr. Butler regarding the etiology of the diagnosed thoracic outlet syndrome.

In a September 5, 2013 report, Dr. Williams reviewed the medical record and SOAF. On examination, he found a good range of cervical spine motion, questionable weakness in grip strength on the right, and 4+/5 weakness in the right arm. Dr. Williams diagnosed aggravation of displacement of cervical and lumbar intervertebral discs, lumbar spine sprain, and cervical spine sprain. He found no evidence of herniated discs. Dr. Williams found that appellant did not have thoracic outlet syndrome. He provided work restrictions limiting her to working four hours a day, with pushing, pulling, and lifting restricted to 20 pounds or less.

Dr. Shade provided periodic reports holding appellant off work through October 10, 2013. He opined that she had thoracic outlet syndrome,[8] but that the accepted cervical and lumbar strains had resolved.

On October 18, 2013 the employing establishment offered appellant a permanent modified position as a nursing assistant working four hours a day, five days a week. Duties included obtaining patient vital signs using a rolling machine, conducting finger prick blood glucose checks, obtaining the weight of patients who were able to stand independently, entering vital signs into a computer, and feeding residents. Tasks could be completed sitting or standing within the restrictions given by Dr. Williams against pushing, pulling, or lifting more than 20 pounds. Appellant accepted the position on October 22, 2013. She returned to work on

[6] The record contains a bypass search log and a (Form ME023) appointment schedule notification dated August 7, 2013.

[7] OWCP issued appellant wage-loss compensation retroactive to May 21, 2013.

[8] In an October 2, 2013 report, Dr. Samuel S. Ahn, an attending Board-certified vascular surgeon, diagnosed venous compression and thoracic outlet syndrome based on positive photoplethysmography testing. He recommended a right supraclavicular total scalenectomy.

October 28, 2013 for four hours a day. Following her return to work, OWCP issued compensation for the remaining 20 hours a week.

Dr. Shade submitted progress notes through October 2014 finding appellant able to perform the modified-duty position, with brief work absences due to symptom flares. Appellant remained under treatment.[9]

By decision dated October 24, 2014, OWCP found that the permanent, modified part-time nursing assistant position properly represented appellant's wage-earning capacity. It found that appellant had successfully performed the job beginning on October 18, 2013, with earnings of $342.91 a week. OWCP obtained information from the employing establishment demonstrating that the current pay rate for appellant's job and step when injured was $646.16 as of September 22, 2014. Appellant would receive net compensation every four weeks at the rate of $941.00. OWCP noted that, although the modified job was part time and therefore not equivalent to her date-of-injury position, it was permissible to find that it represented her wage-earning capacity because it involved "the number of hours [appellant] is capable of working as determined by the medical evidence." As appellant was "working less than full time based on [appellant's] medical restrictions, the necessary criteria have been met," and a determination could be made that her earnings fairly and reasonably represented her wage-earning capacity.

On December 16, 2014 OWCP obtained an updated second opinion from Dr. Gary Hutchinson, a Board-certified neurosurgeon. Dr. Hutchinson reviewed the medical record and SOAF. He related that appellant had "difficulty working more than three days [a week] because of [appellant's] neck pain and numbness and weakness in her right arm," and that using a computer at work increased her symptoms. On examination, Dr. Hutchinson observed tenderness to palpation of the cervical paraspinal musculature, a gibbus deformity in the C7 to T2 area, no tenderness at Erb's point on the right and trace tenderness on the left, negative Adson's maneuver bilaterally, some diminished pinprick sensation in the thumb and index finger of each hand in the C6 dermatome, and no signs of carpal tunnel syndrome in either arm. He opined that appellant had no objective evidence of thoracic outlet syndrome. Dr. Hutchinson diagnosed chronic cervical strain, aggravated by required computer use at work. He explained that sitting in a head forward position while working at a computer produced "severe chronic cervical strain."

Appellant stopped work on February 2, 2015. She claimed compensation for total disability from February 3, 2015 onward. On February 9, 2015 Dr. Shade held appellant off work as of February 2, 2015 due to increased cervical and lumbar pain. He opined on March 10, 2015 that the accepted injuries caused thoracic outlet syndrome and chronic pain syndrome.

In a March 19, 2015 letter, OWCP advised appellant of the additional evidence needed to modify the October 24, 2014 loss of wage-earning capacity determination, including a material change in the nature and extent of the injury-related condition, or that she had been retrained or

[9] Appellant underwent right medial branch facet blocks from L3 to S3 on March 26, 2014, medial branch facet rhizotomies at L3, L4, L5, S1, S2, and S3 on the right on May 14, 2014, bilateral cervical facet injections at C3 through T1, bilateral fist rib injections, and right suboccipital nerve block on July 23, 2014.

vocationally rehabilitated, or that the original determination was in error. It afforded her 30 days to submit such evidence.

In response, appellant submitted reports from Dr. Shade dated from March 25 to May 5, 2015, holding her off work due to chronic pain syndrome and thoracic outlet syndrome. Dr. Shade noted that she was considering disability retirement.

By decision dated May 6, 2015, OWCP denied modification of the October 24, 2014 loss of wage-earning capacity determination, finding that the medical evidence of record demonstrated only an increase in pain symptoms, but no objective evidence that appellant was disabled from performing the modified-duty position for four hours a day.

On May 6, 2015 OWCP expanded the claim to include displacement of a cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and brachial neuritis/radiculitis.

In a May 18, 2015 letter, appellant requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. She contended that when arriving at work at 7:30 a.m., she was required to "push three to four veterans in a wheelchair to and from the dining room for breakfast," a distance of 30 to 100 feet. Appellant was also required to push the veterans back to their rooms after breakfast. On occasion, she was also required to push patients to and from the main hospital to attend medical appointments, a distance of 800 to 1200 feet depending on the location of the medical office. Appellant provided a June 11, 2015 witness statement from coworker L.B., confirming that she had witnessed appellant "pushing veterans in their wheelchairs to and from the dining room and back to unit since [appellant's] return to work." The coworker also witnessed appellant "transporting veterans to and from the [employing establishment's] main hospital. Numerous times [appellant's] has asked for help stating [that] she [i]s not supposed to push patients, but due to staffing being short-handed she assisted." L.B. and other coworkers assisted appellant when possible.

At the hearing, held January 19, 2016, appellant's representative contended that OWCP should have allowed Dr. Butler to clarify his opinion before finding a conflict and selecting Dr. Williams as impartial medical examiner.[10] Appellant contended that she was forced to work outside of her 20-pound pushing and pulling restrictions by being assigned to push patients in wheelchairs.

Appellant's representative provided a May 30, 2015 statement contending that the October 24, 2014 loss of wage-earning capacity determination was erroneous as the modified nursing assistant position did not conform to appellant's work restrictions. He noted that Dr. Williams opined that her assigned computer duties worsened the accepted cervical conditions.

On May 20, 2015 Dr. Shade opined that pushing patients in wheelchairs aggravated appellant's bulging cervical discs, causing upper extremity radiculopathy that disabled her for work. He explained that the force of bending forward to push a patient in a wheelchair exerted

[10] Following the hearing, the representative submitted a February 16, 2016 statement reiterating this contention.

weighted pressure on the intervertebral spaces, placing pressure on cervical spinal nerves. Dr. Shade continued to hold appellant off work through July 2015. She received additional cervical epidural steroid injections.[11]

By decision dated March 4, 2016, an OWCP hearing representative affirmed the May 6, 2015 decision, finding that appellant had not established a worsening of her accepted condition, that she had been vocationally retrained or rehabilitated, or that the original loss of wage-earning capacity determination was in error. She found that Dr. Shade's reports were insufficiently rationalized to establish an objective worsening of the accepted conditions. The hearing representative noted that if appellant believed that her modified duties worsened her condition, she should file a new claim.

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, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination.[12]

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.[13] The Board has held that a new injury while on modified duty is not a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity warrants modification.[14]

OWCP's procedures provide that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless [appellant] requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[15] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[16]

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of a loss of wage-earning capacity determination if that light-duty

[11] January 13, 2016 computed tomography studies demonstrated a grade 1 Arnold-Chiari malformation and an L5-S1 annular tear.

[12] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[13] *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[14] *S.K.*, Docket No. 16-0171 (issued April 25, 2016).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

[16] *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

position is a classified position to which the injured employee has been formally reassigned.[17] The position must conform to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.[18] If these circumstances are present, a determination may be made that the position constitutes "regular" federal employment.[19]

With respect to part-time employment, FECA Procedure Manual provide: (1) a part-time position may form the basis of a loss of wage-earning capacity determination if the employee was a part-time worker at the time of injury; and (2) for an employee who was a full-time employee on the date of injury, a part-time position may form the basis of a loss of wage-earning capacity determination if the employee's stable, established work restrictions limit him or her to part-time work.[20] For a part-time position to fairly and reasonably represent the wage-earning capacity of an individual who was a full-time employee on the date of injury, the position should involve the number of hours the employee is capable of working as indicated in the current, stable work restrictions.[21]

As long as there is no work stoppage due to the accepted condition(s), a formal loss of wage-earning capacity determination should be issued following 60 calendar days from the date of return to work.[22]

ANALYSIS

OWCP accepted that appellant sustained herniated cervical and lumbar discs, cervical and lumbar sprains, displacement of a cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and brachial neuritis/radiculitis when she moved an obese patient on May 21, 2012.

Dr. Shade and Dr. Vaughan, attending Board-certified orthopedic surgeons, found appellant intermittently disabled for work through 2012. On April 5, 2013 OWCP obtained a second opinion from Dr. Butler, a Board-certified orthopedic surgeon, who attributed her symptoms to thoracic outlet syndrome. Appellant filed a claim for wage-loss compensation from March 10, 2013 and continuing, which was denied by a May 21, 2013 OWCP decision.

On May 30, 2013 OWCP found a conflict of opinion between Dr. Vaughan, for appellant, and Dr. Butler, for the government. On August 7, 2013 it selected Dr. Williams, a Board-

[17] 20 C.F.R. § 10.510. *S.K.*, Docket No. 16-0171 (issued April 25, 2016).

[18] *Id*. at § 10.510.

[19] *Id.*

[20] *Supra* note 15 at Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(1)(b) (June 2013).

[21] *Id.*

[22] *Id.* at Chapter 2.815.6a.

certified neurosurgeon, to resolve the conflict. After this selection, an OWCP hearing representative issued an August 12, 2013 decision reversing the May 21, 2013 decision, and directed OWCP to obtain a supplemental opinion from Dr. Butler regarding the etiology of appellant's thoracic outlet syndrome. However, as OWCP had already found a conflict of opinion involving Dr. Butler, it proceeded to obtain the impartial opinion. Dr. Williams provided a September 5, 2013 report finding appellant able to work four hours a day, five days a week with lifting, pulling and, pushing limited to 20 pounds. Beginning on October 28, 2013 appellant worked as a modified nursing assistant at the employing establishment within these restrictions.

Appellant successfully performed the position through October 2014. Therefore, by decision dated October 24, 2014, OWCP found that her actual duties as a modified nursing assistant fairly and reasonably represented her wage-earning capacity. The Board finds that as the medical evidence established that appellant was medically restricted to working 20 hours a week, and the modified position was also for 20 hours a week, OWCP was permitted to base the loss of wage-earning capacity determination on this part-time position.[23]

Appellant stopped work on February 2, 2015 and did not return. She claimed compensation for total disability beginning February 3, 2015. The Board finds that OWCP properly interpreted the claim as one for modification of the loss of wage-earning capacity determination.[24] OWCP denied the claim by decision dated May 6, 2015. In a telephone hearing, appellant asserted that she became disabled from work as she was forced to work outside of her 20-pound pushing restriction. She described being assigned to push patients in wheelchairs to and from meals and medical appointments. Appellant provided a witness statement corroborating this account of events. The Board finds that she has established as factual that she pushed patients in wheelchairs as alleged. Following the hearing, Dr. Shade provided a May 20, 2015 letter opining that the physical strain of pushing patients in wheelchairs caused upper extremity radiculopathies, disabling her for work.

Appellant also contended that using a computer at work aggravated her cervical spine symptoms. Dr. Hutchinson, a Board-certified neurosurgeon and second opinion physician, opined on December 16, 2014 that using a computer at work as assigned aggravated accepted cervical conditions and created chronic cervical strain.

OWCP affirmed the loss of wage-earning capacity determination by the March 4, 2016 decision, finding that appellant had not established that the accepted conditions had spontaneously worsened, disabling her from her modified-duty job. Rather, the medical evidence supported that new work factors, including using a computer and pushing patients in wheelchairs, aggravated or caused spinal conditions disabling her for work. The Board has held that when a claimant sustains a new injury while on modified duty, this does not constitute a material change in the accepted condition requiring a modification of a standing loss of wage-earning capacity determination.[25] Appellant did not assert that the original determination was

[23] *Id.* at Chapter 2.815c(1)(b).

[24] *See supra* note 15.

[25] *Supra* note 14.

erroneous, or that she had been vocationally rehabilitated. She thus has failed to establish any of the three criteria for modifying a loss of wage-earning capacity determination. The Board therefore finds that OWCP's March 4, 2016 decision is proper under the law and facts of the case.

On appeal, appellant's representative contends that OWCP should not have obtained an impartial medical opinion from Dr. Williams, appointed to resolve a conflict of opinion between Dr. Vaughan, for appellant, and Dr. Butler, for the government, without first obtaining clarification from Dr. Butler as directed by OWCP's hearing representative's August 12, 2013 decision. The Board notes, however, that OWCP has broad discretion in the development of the evidence. Appellant's case was not prejudiced by moving the case forward to obtain an impartial medical opinion regarding her work capacity, rather than first obtaining a supplemental report from a physician already on one side of the conflict.

The representative also contends that appellant was made to work outside her restrictions. As set forth above, there is adequate factual evidence to substantiate that pushing patients in wheelchairs violated appellant's restriction against pushing more than 20 pounds. However, as explained, this is not a basis for modifying the loss of wage-earning capacity determination. As the hearing representative noted in the March 4, 2016 decision, it indicates that appellant sustained a new injury, for which she could choose to file a new claim for traumatic injury or occupational disease.

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

CONCLUSION

The Board finds that appellant has not established a basis for modification of the October 24, 2014 wage-earning capacity determination.

ORDER

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

Issued: January 30, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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