

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

T.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dayton, OH, Employer**

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**Docket No. 16-1659
Issued: July 14, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

ORDER REMANDING CASE

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

On August 16, 2016 appellant, through counsel, timely filed an application for review of a June 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). The Board docketed the appeal as No. 16-1659.

Appellant, an 84-year-old former letter carrier, has an accepted traumatic injury claim for aggravation of degenerative disc disease postlaminectomy at C5-6 and strain on preexisting neurological condition, which arose on June 26, 1979.² He stopped work for various periods and received compensation on the periodic rolls beginning June 16, 2002. Appellant participated in a

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) (2014). 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 (2006). Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant previously injured his neck/upper back on August 25, 1976, which OWCP accepted for upper back strain (xxxxxx528).

vocational rehabilitation program and, in August 2014, his rehabilitation counselor determined that he was capable of earning \$360.80 per week as a receptionist.³

On May 18, 2015 OWCP issued a formal loss of wage-earning capacity (LWEC) determination based upon appellant's ability to earn wages in the selected position of receptionist. Consequently, it adjusted appellant's compensation effective May 16, 2015. Counsel requested a telephonic hearing with an OWCP hearing representative, which was held on January 15, 2016.

By decision dated February 25, 2016, the hearing representative affirmed OWCP's May 18, 2015 LWEC determination.

In a March 22, 2016 letter, which OWCP received on March 24, 2016, appellant indicated that he was requesting reconsideration of OWCP's February 25, 2016 decision. In connection with his claim, he submitted evidence that he believed showed he could no longer work as a receptionist.

In a March 16, 2016 report, Dr. Jason Higey, an attending Board-certified cardiologist, reported that appellant's cardiac condition, including coronary artery disease and valvular heart disease, had worsened in severity.

In a March 21, 2016 report, Dr. Antony T. Jacob, an attending physical medicine and rehabilitation physician, indicated that appellant's physical condition prevented him from sitting for more than 15 minutes at time, looking at a computer screen or holding a telephone for any length of time, or lifting above his waist level. He further noted that appellant was currently unable to engage in any kind of gainful employment.

In an April 4, 2016 letter that OWCP received on April 7, 2016, counsel indicated that he was requesting reconsideration of OWCP's February 25, 2016 decision on behalf of appellant. He also resubmitted copies of the March 16, 2016 report of Dr. Higey and the March 21, 2016 report of Dr. Jacob.

In a June 30, 2016 decision, OWCP denied modification of the hearing representative's February 25, 2016 decision which affirmed the original May 18, 2015 LWEC determination.

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.⁴ A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.⁵ Generally,

³ The physical requirements of the receptionist position were deemed to be within the work restrictions recommended on June 17, 2014 by Dr. Edward G. Fisher, a Board-certified orthopedic surgeon serving as an OWCP referral physician.

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

⁵ *See Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

an employee's actual earnings best reflect his or her wage-earning capacity.⁶ 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.⁷

Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.⁸ 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.⁹ The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹⁰

OWCP's procedure manual provides, "If a formal LWEC decision has been issued, and the claim is for recurrent disability, it should be processed in accordance with procedures for modifying a formal LWEC."¹¹

In this case, OWCP essentially determined that appellant had filed a request for reconsideration of its February 25, 2016 decision. Although both appellant and counsel did use the phrase "requesting reconsideration" in their letters, under the circumstances of this case, the Board finds that the issue presented was whether the May 18, 2015 wage-earning capacity determination should be modified. Appellant submitted evidence which indicated that he was totally disabled due to a worsening of his medical condition after OWCP issued its May 18, 2015 LWEC determination. It is clear that the claim in this case was that appellant could not work as a receptionist, the position that OWCP determined had represented his LWEC, for the foreseeable future. The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.¹²

If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a LWEC decision, then clearly there is an issue of whether modification is appropriate.¹³ In this case, appellant submitted evidence of an increased

⁶ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁷ *Id.*

⁸ *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁹ 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).

¹⁰ 20 C.F.R. § 10.511.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (February 2013).

¹² *See Katherine T. Kreger*, 55 ECAB 633 (2004). The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *See id.*

¹³ *Id.*

disability that prevented him from working as a receptionist. The Board finds that appellant's claim for compensation raised the issue of whether a modification of the May 18, 2015 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2016 is set aside, and the case remanded for further action consistent with this order.

Issued: July 14, 2017

Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board