United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 16-1287**
	)	**Issued: March 7, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Topeka, KS, Employer	)	

Appearances:
Bruce A. Brumley, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 2, 2016 appellant, through counsel, filed a timely appeal from a December 17, 2015 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to modify the September 14, 2006 loss of wage-earning capacity (LWEC) decision.

[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.*

On appeal, counsel contends that the well-rationalized medical opinions of Dr. Peter V. Bieri, an otolaryngologist, and Dr. Sushmita Veloor, a Board-certified physiatrist, are sufficient to establish that appellant's accepted medical condition had materially worsened such that she was unable to work.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On May 17, 2004 appellant, then a 33-year-old packer/warehouseman, filed an occupational disease claim (Form CA-2) alleging that her acute/chronic cervical-thoracic strain was caused or aggravated by repetitive, overhead lifting at work. On December 19, 2005 OWCP accepted the claim for aggravation of cervical and thoracic sprains/strains bilaterally.

In a September 14, 2006 decision, OWCP determined that a modified packer/warehouseman position fairly and reasonably represented appellant's wage-earning capacity with no wage loss.

On September 14, 2010 appellant filed a claim for a recurrence (Form CA-2a) and stopped work on that day alleging that her accepted employment injuries had worsened. By letter dated October 29, 2010, OWCP treated her claim as a request to modify the September 14, 2006 LWEC determination.

In a December 7, 2010 decision, OWCP denied modification of the September 14, 2006 LWEC decision. It found that the evidence submitted had failed to establish an error in the original LWEC determination, that appellant had been vocationally rehabilitated, or a worsening of her accepted condition such that she could no longer work. Appellant filed a request for reconsideration and OWCP denied modification of this decision on January 26, 2012 decision, finding that she had not established any criteria for modification. She filed an appeal with the Board.

In a February 20, 2013 decision,[4] the Board set aside the January 26, 2012 decision and remanded the case for further development of the medical evidence. The Board found that, while Dr. Veloor's reports were not completely rationalized, they were consistent in support of a material worsening of appellant's accepted conditions, rendering her unable to perform the modified position on which the original LWEC determination was based. The Board also found that an August 2, 2011 medical opinion of Dr. Joseph W. Huston, a Board-certified orthopedic surgeon and OWCP's referral physician, was vague and speculative as to whether appellant had any residuals resulting from her accepted employment injury. The Board instructed OWCP to obtain a supplemental report from Dr. Huston.

[3] Docket No. 15-0520 (issued May 19, 2015); Docket No. 12-1594 (issued February 20, 2013).

[4] *Id*.

On remand of the case, OWCP requested that Dr. Huston provide a supplemental report and provided him with a list of specific questions. It advised him that he was authorized to perform a reexamination of appellant and further noninvasive testing or consultation, if necessary.

In an April 24, 2013 letter, Dr. Huston responded that it was very difficult to definitively opine whether appellant's work activities caused any worsening of her preexisting problems. He was sure that her work activities aggravated the symptoms of the underlying condition and apparently caused her to stop work, but he had no concrete evidence to know whether underlying muscle damage was made worse or whether there was permanent aggravation of her preexisting problem.

By decision dated May 17, 2013, OWCP denied modification of its September 14, 2006 LWEC decision, again finding that appellant met none of the criteria for modification.

In a May 7, 2014 letter, appellant, through counsel, requested reconsideration and submitted medical evidence. In a May 5, 2014 report, Dr. Bieri agreed with the opinion of Dr. Veloor that appellant's employment-related chronic cervical and thoracic strain had materially worsened to include myofascial pain syndrome and resulted in increased restrictions dating back to the fall of 2010 based on his objective examination findings of muscle spasms, trigger points, and myofascial symptoms.

In a July 17, 2014 decision, OWCP denied modification of the September 14, 2006 LWEC decision. It found that appellant had failed to submit evidence sufficient to satisfy the criteria for modification.

Appellant appealed to the Board. In a decision dated May 19, 2015, the Board set aside the July 17, 2014 decision.[5] The Board found that Dr. Huston's supplemental report had not adequately elaborated on his original report by providing a rationalized medical opinion. The case was remanded for referral to another referral physician to obtain a rationalized medical opinion on the issue of whether appellant's accepted employment-related condition had materially worsened such that she was unable to perform the duties of her modified position. The Board also reviewed Dr. Bieri's May 5, 2014 report and found it insufficient to establish a material change in the accepted work-related conditions.

On remand of the case, OWCP referred appellant, together with a statement of accepted facts, a question, and the medical record, to Dr. John H. Gilbert, a Board-certified orthopedic surgeon. Dr. Gilbert examined appellant on July 15, 2015 and noted a history of her employment injury and her medical, family, and social background. He also noted his review of the medical record. On examination, Dr. Gilbert reported a balanced stance and gait. Appellant was able to walk on her heels and toes with some affectation in gait. Her cervical spine showed good range of motion with complaints of pain on the left side of the neck on rotation to the right. Foraminal closure tests were negative. Upper extremity motor strength was intact to manual testing. There was minimal weakness in opposition pinch in the right arm compared to the left. The shoulders had good range of motion without crepitation, instability, or dysrhythmia.

[5] *Id*.

Two-point discrimination was intact at three to five millimeters over the thumb and index and little finger pulps bilaterally. Deep tendon reflexes were intact and symmetrical. The lumbar spine showed diffuse paravertebral and midline tenderness through the thoracic and lumbar regions. Motion in the spine showed flexion to 75 degrees, lateral flexion to 20 degrees in either direction, and extension to 15 degrees. Four of five Waddell's tests were positive. Chest expansion was adequate. Deep tendon reflexes in the legs were intact and symmetrical. Motor testing in the lower extremities was intact. Sensation was intact to light touch over the feet and legs and distal pulses were intact.

Diagnostic tests were performed on the date of Dr. Gilbert's examination. Cervical spine x-rays revealed good preservation of disc spaces with minimal suggestion of early osteophyte formation at the C5-6 intervertebral disc space, but were normal for appellant's age. X-rays of the thoracic spine were normal with good preservation of disc heights and vertebral body alignment. A magnetic resonance imaging (MRI) scan of the thoracic spine was likewise normal with good maintenance of disc hydration, disc height, and without evidence of foramina, cord or nerve root impingement. A December 1, 2014 cervical spine MRI scan revealed only minimal degenerative change at the C3-4 intervertebral disc level on the right, but otherwise showed good preservation of disc height, hydration, and facet joints.

Dr. Gilbert diagnosed nonspecific and exertionally related musculoskeletal complaints involving the thoracic, cervical, and shoulder regions, tobaccoism, and evidence of multiple psychosocial issues. He advised that he was unable to demonstrate findings that would preclude appellant from performing any activities that she felt capable of performing. Dr. Gilbert related that a functional capacity evaluation (FCE), if valid, would provide objective evidence for defining her precise limitations. Given appellant's stature of 5 feet 2 inches and 93 pounds, her job demands, as she described them, likely exceeded her physical capabilities and could be expected to exacerbate the nonspecific musculoskeletal complaints that were aggravated by her continuing tobaccoism. Dr. Gilbert indicated that she showed a history and signs on examination of symptom magnification consistent with significant psychosocial issues, which likely affected her ability to perform the activities of her occupation as a group leader at the employing establishment. He related, however, that this was outside of his expertise.

Appellant underwent an FCE on August 20, 2015 which found that she demonstrated an ability to perform 13.1 percent of the physical demands of her job at the employing establishment. The examiner found that appellant had put forth full effort during the test. Based on the results obtained, the report reflected that she was able to perform sedentary work with occasional lifting below waist height to 17.5 pounds, 15 pounds to shoulder height, and 12 pounds overhead. Appellant could carry 18 pounds and could pull or push zero horizontal force pounds, respectively. She demonstrated the ability to crawl with frequent tolerance. It was recommended that appellant avoid above shoulder reach, dynamic balance, bending, forward reaching, firm grasping, repetitive kneeling, ladder/other, pinching, simple grasping, squatting, and stair climbing in a competitive work environment.

In an August 26, 2015 letter, Dr. Gilbert noted that he reviewed the results of the August 20, 2015 FCE. He related that he was unable to define an orthopedic change in appellant's employment-related medical condition specifically ascribable to the September 2010

date when she was no longer able to continue the activities required in her occupation with the employing establishment.

In a December 17, 2015 decision, OWCP denied modification of the September 14, 2006 LWEC decision. It found that the weight of the medical opinion evidence rested with Dr. Gilbert.

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 and it remains undisturbed until properly modified.[6]

OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.[7] The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.[8] It further provides that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met.[9]

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the opinion.[10]

ANALYSIS

Initially, on February 20, 2013 the Board remanded this case to OWCP to obtain a supplemental report from Dr. Huston, an OWCP referral physician. Subsequently, on May 19, 2015, the Board remanded this case to OWCP for a second referral physician based upon a finding that he had again failed to provide a rationalized medical opinion. Following this remand, OWCP referred appellant to Dr. Gilbert.

In the July 15, 2015 report, Dr. Gilbert opined that appellant did not have any findings to preclude her from performing any activities. He reviewed her history and diagnostic test results and set forth essentially normal findings on examination with the exception of some affectation in gait when she walked on heels and toes, complaints of pain on the left side of the neck on rotation to the right, diffuse paravertebral and midline tenderness through the thoracic and

[6] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

[8] *Id.* at Chapter 2.1501.3(a) (June 2013).

[9] *Id.* at Chapter 2.1501.4 (June 2013).

[10] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

lumbar regions, and positive Waddell's tests. Dr. Gilbert provided an impression of nonspecific and exertionally related musculoskeletal complaints involving the thoracic, cervical, and shoulder regions, tobaccoism, and evidence for multiple psychosocial issues. He recommended an FCE to determine appellant's physical capabilities as her stature of 5 feet 2 inches and 93 pounds and job demands, as she described, likely exceeded her physical capabilities and could be expected to exacerbate the nonspecific musculoskeletal complaints that were aggravated by her continuing tobaccoism. Dr. Gilbert noted that she showed a history and signs of symptom magnification on examination consistent with significant psychosocial issues.

On August 26, 2015 Dr. Gilbert reviewed the results of an August 20, 2015 FCE and determined that there was no orthopedic change in appellant's employment-related medical condition specifically attributable to the date she stopped work in September 2010.

The Board finds that Dr. Gilbert's report represents the weight of the medical evidence with regard to whether there was a material change in appellant's accepted employment injuries that rendered her totally disabled from work. Dr. Gilbert's opinion is based on a proper factual and medical history as he reviewed the statements of accepted facts and appellant's prior medical treatment. He also related that his comprehensive examination findings in support of his opinion that appellant's employment-related condition had not materially changed such that she was disabled from work.

Appellant has not submitted any new medical evidence on remand to establish a change in the nature and extent of her injury-related condition such that her September 14, 2006 LWEC decision should be modified. She also has not shown that the original wage-earning capacity determination was in error.

On appeal, counsel reiterates his contention that the medical opinions of Drs. Bieri and Veloor are sufficient to establish that appellant's accepted medical condition had materially worsened and that she was unable to work. This contention was previously raised and the Board found in its February 20, 2013 and May 19, 2015 decisions that these physicians' opinions were not sufficiently rationalized to establish a material change in the accepted condition.

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 appellant has failed to meet her burden of proof to modify the September 14, 2006 LWEC decision.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 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