

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

K.D., Appellant)	
)	
and)	Docket Nos. 17-1894 & 18-1237
)	Issued: August 6, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Denver, CO, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Timothy Quinn, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 7, 2017 appellant, through counsel, filed a timely appeal from a June 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). On September 26, 2017 appellant appealed, through counsel, a September 8, 2017 merit decision of OWCP. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include a consequential psychological condition; and (2) whether he has met his burden of proof to establish modification of the January 28, 2015 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On April 20, 2011 appellant, then a 51-year-old hostler/tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on April 18, 2011 he injured his lower back while in the performance of duty. OWCP accepted the claim for displacement of the L5-S1 lumbar intervertebral disc and lumbar sprain.³ Appellant stopped work on July 5, 2011 and did not return.

OWCP, on August 31, 2012, referred appellant to a vocational rehabilitation counselor for vocational rehabilitation. The vocational rehabilitation counselor identified the positions of receptionist and customer service representative as targeted positions.

In a January 13, 2014 work release, Dr. Robert I. Kawasaki, an attending Board-certified physiatrist, opined that appellant had permanent restrictions against sitting more than 10 minutes consecutively, standing or walking more than 10 minutes, pushing, pulling, or lifting over 10 pounds, and performing no repetitive bending, twisting, or turning.

OWCP, on April 4, 2014, referred appellant to Dr. John D. Douthit, Board-certified in family practice, for a second opinion examination. In an April 30, 2014 report, Dr. Douthit found that appellant was unable to resume his regular employment due to residuals of his L5-S1 disc displacement and lumbar sprain, but could perform sedentary work changing positions every 30 minutes and lifting not more than 10 pounds.

On November 22, 2014 OWCP entered into a cooperative agreement with Connolly's Towing, Inc. (Connolly's Towing) for assisted reemployment.⁴ Connolly's Towing hired appellant to work as a full-time impound clerk, a sedentary position, and OWCP agreed to pay 75 percent of his wages from November 24, 2014 through November 23, 2015. Appellant began working as an impound clerk on November 24, 2014.

By decision dated January 28, 2015, OWCP reduced appellant's wage-loss compensation effective November 24, 2014 as his actual earnings as an impound clerk fairly and reasonably

³ By decision dated June 22, 2011, OWCP denied appellant's claim as the medical evidence was insufficient to show that he sustained a diagnosed condition causally related to the accepted April 18, 2011 work incident. On October 6, 2011 it vacated its June 22, 2011 decision.

⁴ In a May 22, 2014 progress report, Dr. Kawasaki reviewed the findings by Dr. Douthit. He diagnosed an L5-S1 disc protrusion with left radiculopathy at S1 and progressive lower extremity weakness. Dr. Kawasaki opined that appellant's work restrictions had not changed from those set forth on January 13, 2014.

represented his wage-earning capacity. It applied the formula set forth in *Albert C. Shadrick*,⁵ and found that he had a wage-earning capacity of 35 percent.

On February 18, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the January 28, 2015 decision. Counsel argued that OWCP should not use a subsidized position for an LWEC determination. He also maintained that a conflict in medical evidence existed regarding the extent of appellant's work restrictions.

Connolly's Towing terminated appellant's employment on April 18, 2015. It indicated that he lacked the ability to perform the "detail oriented job tasks" required or to satisfactorily resolve conflicts with customers.

Dr. Kawasaki, in a report dated August 13, 2015, noted that appellant complained of low back pain causing anxiety and difficulty with activities. He diagnosed a disc protrusion at L5-S1 with S1 radiculopathy on the left. Dr. Kawasaki related, "[Appellant] appears to have severe decompensation from an emotional and psychological standpoint. He has high-level anxiety and even some suicidal ideations. [Appellant] attributes his psychologic state to the injury...." He referred appellant for a psychological evaluation and advised that he believed that it was credible that his back pain and loss of function resulted in anxiety and depression and negatively impacted his marriage. Dr. Kawasaki found no change regarding his work restrictions.

In a report dated September 4, 2015, Dr. Ron Carbaugh, a psychologist, noted that subsequent to a 2011 employment injury appellant performed two jobs as required for workers' compensation, including working for four months at an impound lot. He related, "[Appellant] stated this was quite stressful, as generally the people coming for their cars were quite angry. It is uncertain why he was not able to continue other than the fact that this was unpleasant." He discussed appellant's complaints of pain in his low back and left buttock and left leg weakness. Dr. Carbaugh noted that he had "ongoing pain complaints related to an incident that occurred at work in 2011" with suicidal ideation. He diagnosed major depressive episode, persistent depressive disorder, and somatic symptom disorder. Dr. Carbaugh recommended psychiatric treatment.⁶

A hearing was held on September 17, 2015. Counsel, in a September 17, 2015 statement, argued that a conflict existed between Dr. Kawasaki and Dr. Douthit necessitating referral to an impartial medical examiner. He further asserted that the job was inconsistent with the restrictions

⁵ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403 (c)-(e).

⁶ Dr. Carbaugh provided session reports describing his treatment of appellant in 2015 and 2017.

found by the second opinion examiner. Counsel also challenged OWCP's use of a subsidized position as the basis for the LWEC determination and maintained that the evidence of record established that appellant had a consequential medical condition.⁷

On November 10, 2015 Dr. Carbaugh opined that appellant "developed a significant depressive disorder secondary to his work injury, subsequent chronic pain, and the negative impact on his vocation and his marital relationship."⁸ He noted that he had no problems at his job prior to the 2011 work injury.

By decision dated November 13, 2015, OWCP's hearing representative affirmed the January 28, 2015 decision. She found that the medical evidence of record did not establish a material change in the nature and extent of appellant's condition such that he could not perform the identified position and that he had not shown that the original LWEC determination was erroneous.

On December 2, 2015 counsel again requested modification of the LWEC determination. He further asserted that appellant had developed a consequential emotional condition resulting in disability.

In a December 2, 2015 evaluation, Dr. Gary S. Gutterman, a Board-certified psychiatrist, obtained a history of appellant experiencing a low back injury at work on April 18, 2011 getting out of a hostler. He diagnosed depressive disorder due to the work injury. Dr. Gutterman indicated that marital problems culminating in divorce contributed to appellant's depression.

On January 25, 2016 OWCP referred appellant to Dr. George Kalousek, a Board-certified psychiatrist, for a second opinion examination regarding whether he sustained an emotional condition caused or aggravated by his April 18, 2017 work injury. On January 28, 2016 it referred him to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination regarding his current condition and the extent of any disability due to his accepted work injury.

In a report dated February 17, 2016, Dr. Kalousek reviewed the history of injury and medical reports of record. On examination he found that appellant was exaggerating his symptoms. Dr. Kalousek further determined that he had major depressive disorder causally related to his injury and aggravated by his divorce. He related, "In summary, I do believe that [appellant] has major depression that is fairly significant and he also has a lot of pain and tremendous pain magnification due to his somatic symptom disorder." Dr. Kalousek advised that it appeared that he first experienced depression after his April 18, 2011 work injury, but that "pinning it down is extremely difficult because he is so vague about the first year following the accident." He found that appellant's psychiatric condition due to his April 18, 2011 work injury materially worsened

⁷ By decision dated October 26, 2015, OWCP found that appellant received an overpayment of wage-loss compensation in the amount of \$856.99 from November 24 through December 13, 2014 because it paid him compensation for total disability after he resumed work. It determined that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP found that it would recover the overpayment by deducting \$100.00 from continuing compensation payments every 28 days.

⁸ Dr. Kawasaki continued to submit progress reports describing his treatment of appellant.

at the time of his divorce. Dr. Kalousek attributed his current psychiatric condition to depression resulting from lack of function due to pain exacerbated by his divorce.

Dr. Lotman, on March 13, 2016, discussed appellant's work history and the medical evidence of record. On examination he found a positive straight leg raise on the left with muscle weakness of the left lower extremity compared with the right side and some atrophy and loss of sensation of the left leg. Dr. Lotman found significant pain behavior and tremors and recommended a neurological evaluation. He diagnosed acute and chronic lumbosacral sprain/strain that occurred when he was "entering the vehicle which requires described sharp ducking of the head and twisting of the spine." Dr. Lotman attributed appellant's symptoms to aging rather than the April 18, 2011 employment injury. He found that he could "perform the duties of an impound clerk with certain restrictions" and that his condition had not materially worsened subsequent to OWCP's LWEC determination.

OWCP determined that a conflict existed between Dr. Lotman and Dr. Kawasaki, regarding whether appellant had residuals of his work injury.⁹ It referred him to Dr. John T. McBride, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP requested that he address whether appellant could work either in his date-of-injury position or as an impound clerk with Connolly's Towing, and whether he sustained a material worsening of any employment-related condition.

In a July 28, 2016 report, Dr. McBride obtained a history of appellant experiencing a twisting injury causing low back pain on April 18, 2011. He reviewed the evidence of record. On examination, Dr. McBride found weakness of the left lower extremity, decreased sensation, atrophy, and left low back pain with straight leg raise. He diagnosed L4-5 and L5-S1 degenerative disc disease and myofascial low back pain without radiculopathy. Dr. McBride related that appellant "still has mechanical low back pain secondary to degenerative disc disease that was permanently aggravated by his work driving the hostler." He opined that appellant was unable to perform his regular employment. Regarding the position of impound clerk, Dr. McBride found that appellant could "perform this work *on a very limited basis...*" (Emphasis in the original). He related, "It is my opinion that [appellant] can sit for one hour and that would be the total amount of time that he is able to work." Dr. McBride noted that appellant is unable to do walking, standing, reaching, or reaching above the shoulder secondary to: (1) need for a cane for ambulation, and (2) his mechanical low back pain. He opined that appellant had significant nonorganic pain. In a July 28, 2016 work restriction evaluation (OWCP-5c), Dr. McBride found that appellant could work for one hour per day with breaks and drive a motor vehicle to and from work for 15 minutes.

In an August 14, 2016 addendum, Dr. McBride opined that appellant's condition had not significantly changed since July 3, 2012. He found that he "should be able to work in [a] sedentary position on a very limited basis" as set forth in the July 28, 2016 OWCP-5c form. Dr. McBride indicated that further medical treatment would be of no benefit.

⁹ OWCP also listed appellant's early attending physicians, Dr. Paul Ogden, a Board-certified internist, and Dr. Gary Ghiselli, a Board-certified orthopedic surgeon, in its conflict statement.

By letter dated February 7, 2017, OWCP requested that appellant submit additional information supporting his request for modification of its LWEC determination and for expanding the acceptance of his claim to include a psychological condition.

In a report dated February 22, 2017, Dr. Carbaugh reviewed Dr. Kalousek's findings and noted that "his assessment appeared similar to that of this psychologist, some 17 months apart." He related, "In agreement with Dr. Kalousek, [appellant's] depression is directly attributable to his 2011 work injury, subsequent treatment with modest benefit, financial difficulties, and ultimately divorce from his wife." Dr. Carbaugh diagnosed major depressive episode, persistent depressive disorder, somatic symptom disorder, and to rule out a functional neurological disorder. He reviewed OWCP's finding that there was no rationalized evidence supporting an emotional condition due to the work injury, noting that both he and OWCP's referral physician attributed his depression to the 2011 employment injury. Dr. Carbaugh recommended psychiatric treatment.

By decision dated June 2, 2017, OWCP denied modification of its January 28, 2017 LWEC determination. It found that Dr. Lotman's opinion established that appellant could work in the impound clerk position with certain restrictions. OWCP further found that the opinions of Dr. Kalousek and Dr. Carbaugh were insufficient to support a consequential emotional condition as they failed to adequately address the causal relationship between the claimed psychological condition and the accepted work injury.

By decision dated September 8, 2017, OWCP denied appellant's request to expand the acceptance of his claim to include a consequential psychiatric condition. It found that the reports from Dr. Kawasaki and Dr. Carbaugh were insufficient to establish causation between the April 18, 2011 work injury and the alleged emotional condition.

On appeal counsel contends that the acceptance of the claim should be expanded to include an employment-related psychological condition, noting that Dr. Kalousek, OWCP's referral physician, and Dr. Carbaugh attributed his major depressive disorder to his work injury. He asserts that OWCP failed to consider the effects of the consequential emotional condition in denying modification of the LWEC. Counsel also asserts that the subsidized position was not suitable, noting that OWCP did not consider the opinion of Dr. McBride, who found that appellant could only work one hour per day with breaks and drive a motor vehicle to and from work for 15 minutes.

LEGAL PRECEDENT -- ISSUE 1

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.¹⁰ The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury,

¹⁰ See *Mary Poller*, 55 ECAB 483 (2004).

even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.¹¹

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹²

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁵ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁶

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant developed a consequential psychiatric condition due to his accepted April 18, 2011 employment injury.

On August 13, 2015 Dr. Kawasaki, appellant's attending physician, noted that appellant was decompensating emotionally and found that it was likely that the pain in his back and left lower extremity due to his work injury caused significant depression and anxiety. He referred him for a psychological evaluation.

Dr. Carbaugh, on September 4, 2015, diagnosed a major depressive episode, persistent depressive disorder, and somatic symptom disorder. He noted that appellant worked for four months at an impound lot and that it was unclear why he was unable to continue except that he disliked the demands of dealing with customers. On November 10, 2015 Dr. Carbaugh attributed his depressive disorder to his employment injury and resulting chronic pain, which he found caused stress in his marital relationship and vocation.

¹¹ See *S.S.*, 59 ECAB 315 (2008); *Debra L. Dillworth*, 57 ECAB 516 (2006).

¹² *Charles W. Downey*, 54 ECAB 421 (2003).

¹³ See *V.H.*, Docket No. 17-0439 (issued December 13, 2017); *Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ See *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁵ 20 C.F.R. § 10.121.

¹⁶ See *E.W.*, Docket No. 17-0707 (issued September 18, 2017); *Melvin James*, 55 ECAB 406 (2004).

In a December 2, 2015 report, Dr. Gutterman opined that appellant's April 18, 2011 work injury and subsequent chronic pain caused a depressive disorder. He noted that his divorce aggravated his depression.

OWCP referred appellant to Dr. Kalousek for a second opinion examination regarding whether he sustained a consequential emotional condition. In a February 17, 2016 report, Dr. Kalousek found that he experienced major depressive disorder as a result of his employment injury that was aggravated by his divorce. He further found that appellant had symptom magnification as a result of a somatic symptom disorder. Dr. Kalousek advised that it was difficult to determine when the depression began due to his difficulty obtaining a specific history of the year after the work injury. He concluded that appellant's depression resulted both from his limitations in function due to pain and his divorce. Dr. Carbaugh reviewed Dr. Kalousek's opinion on February 22, 2017 and indicated that they both attributed the depression to the April 18, 2011 work injury.

As noted, proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁷ While the claimant has the burden to establish an emotional condition as a consequence of his accepted injury, it shares responsibility to see that justice is done.¹⁸ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁹

In its September 8, 2017 decision, OWCP denied expansion of the acceptance of appellant's claim to include a consequential emotional condition as it found that neither Dr. Carbaugh nor Dr. Kawasaki explained how his accepted work injury resulted in his psychological condition. It did not, however, discuss the report from Dr. Kalousek, its referral physician, on the issue of whether appellant sustained a consequential emotional condition. OWCP, in its June 2, 2017 decision denying modification of the LWEC determination, found that Dr. Kalousek did not provide an opinion regarding the date of onset of the diagnosed psychological condition and attributed his condition to nonwork-related incidents, including his divorce. However, as OWCP undertook development of the record by seeking a second opinion, it should have sought clarification from Dr. Kalousek prior to finding his report insufficient to demonstrate a consequential emotional condition.²⁰ Additionally, the Board notes that the reports from Dr. Kawasaki, Dr. Carbaugh, and Dr. Kalousek, while insufficiently rationalized to meet his burden of proof to establish a consequential emotional condition, are sufficient to raise an uncontroverted inference between the claimed emotional condition and the April 18, 2011 work injury.²¹ Accordingly, the Board will remand the case for OWCP to further consider the medical evidence. After such further development as deemed necessary, it shall issue a *de novo* decision.

¹⁷ See *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

¹⁸ See *C.N.*, Docket No. 17-1751 (issued May 3, 2018).

¹⁹ See *R.A.*, Docket No. 14-1918 (issued March 3, 2015); see also *Richard F. Williams*, 55 ECAB 343 (2004).

²⁰ See *A.J.*, Docket No. 09-0951 (issued December 23, 2009); *D.O.*, Docket No. 12-1889 (issued January 23, 2013).

²¹ See *M.M.*, Docket No. 13-1017 (issued September 13, 2013).

LEGAL PRECEDENT -- ISSUE 2

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.²² Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.²³

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.²⁴ OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.²⁵ The relevant part provides that a formal loss of wage-earning capacity 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.²⁶

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.²⁷ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before OWCP at the time of its final decision,²⁸ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,²⁹ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.³⁰

ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained lumbar sprain and displacement of a lumbar intervertebral disc at L5-S1 causally related to an April 18, 2011 work injury. Appellant's attending physician, Dr. Kawasaki, and Dr. Douthit, an OWCP referral physician, determined that he could resume work with limitations. On November 24, 2014 appellant began working in assisted reemployment as an impound clerk with a private employer, Connolly's Towing. In a

²² See 5 U.S.C. § 8115 (determination of wage-earning capacity).

²³ *Sharon C. Clement*, 55 ECAB 552 (2004).

²⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

²⁶ *Id.* at § 2.1501.3(a).

²⁷ 5 U.S.C. § 8124(a)(2).

²⁸ 20 C.F.R. § 501.2(c).

²⁹ *Id.* at § 501.6(d).

³⁰ See *E.P.*, Docket No. 14-0278 (issued February 26, 2014).

January 28, 2015 decision, OWCP reduced his wage-loss compensation effective November 24, 2014 after finding that his actual earnings as an impound clerk fairly and reasonably represented his wage-earning capacity.³¹ Connolly's Towing terminated appellant's employment on April 18, 2015, providing as a reason that he was unable to resolve conflicts with customers or perform duties that were detail oriented.

Appellant, through counsel, requested modification of the LWEC determination. OWCP referred him to Dr. Lotman to determine whether he had any further residuals of his work injury and, if so, the extent of disability. On March 13, 2016 Dr. Lotman diagnosed acute and chronic lumbosacral strain/sprain due to his work injury. He found that appellant's current symptoms resulted from aging, that he could work as an impound clerk with restrictions, and that his condition had not materially worsened subsequent to OWCP's LWEC determination.

OWCP properly found that a conflict in the medical opinion evidence arose between Dr. Kawasaki and Dr. Lotman regarding whether appellant had permanent restrictions due to his work injury. It referred him to Dr. McBride for an impartial medical examination. OWCP requested that Dr. McBride address whether appellant could work as an impound clerk and whether he experienced a material worsening of his work-related condition.

On July 28, 2016 Dr. McBride diagnosed degenerative disc disease at L4-5 and L5-S1 and myofascial low back pain due to degenerative disc disease permanently aggravated by employment. He opined that appellant could work as an impound clerk for one hour per day. In a July 28, 2016 work capacity evaluation, Dr. McBride found that appellant could work for one hour per day with breaks. In an August 14, 2016 addendum, he advised that his condition had not significantly changed since July 3, 2012 and that he could work within the restrictions set forth in the July 28, 2016 work capacity evaluation.

In its June 2, 2017 denial of modification of the LWEC determination, OWCP did not consider Dr. McBride's opinion, but instead found that the opinion of Dr. Lotman constituted the weight of the evidence and established that appellant had not established a material change in his employment-related condition. It sought an opinion from Dr. McBride regarding whether appellant had the capacity to work in the position of impound clerk, the basis for the LWEC determination. As noted, OWCP shall determine and make findings of fact in making an award for against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.³² As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter received by OWCP prior to the issuance of its final decision be addressed by OWCP.³³ OWCP failed to consider Dr. McBride's report in denying modification of its LWEC determination, and thus the Board will remand the case to OWCP for consideration of all the evidence. On remand OWCP should determine whether the medical evidence establishes

³¹ If the employee returned to work outside federal employment, and is reemployed through vocational rehabilitation, OWCP may generally presume that the injured employee's actual earnings fairly and reasonably represented his wage-earning capacity. *See supra* note 25 at § 2.1501.3(a).

³² *See supra* note 27; *see also I.L.*, Docket No. 17-0684 (issued July 18, 2017).

³³ *See supra* note 30.

that the January 28, 2015 LWEC determination should be modified based on appellant's condition due to either his accepted employment injury or the development of an emotional condition causally related to the accepted employment injury. Following such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether the acceptance of appellant's claim should be expanded to include a consequential emotional condition or whether he has established modification of the January 28, 2015 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the September 8 and June 2, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 6, 2018
Washington, DC

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

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

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