United States Department of Labor
Employees' Compensation Appeals Board

A.N., Appellant	)	
and	)	**Docket No. 16-0166**
	)	**Issued: February 1, 2018**
U.S. POSTAL SERVICE, MORGAN GENERAL MAIL FACILITY, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 5, 2015 appellant, through counsel, filed a timely appeal from a May 20, 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.[3]

[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.*

[3] The record on appeal includes evidence received after OWCP issued its May 20, 2015 decision. The Board's jurisdiction is limited to the evidence in the case record at the time of OWCP's final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that a December 5, 2005 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

On January 13, 1989 appellant, then a 39-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that, on January 12, 1989, after "sweeping rejects," she picked up a tray and felt pain in the right side of her abdomen. She was pregnant at the time.[4] Appellant stopped work on January 13, 1989.

In February 1989, OWCP accepted the claim for right inguinal hernia and sciatic neuritis. It paid appellant continuation of pay and wage-loss compensation benefits.

Appellant subsequently underwent a complete lumbar and cervical myelogram and postmyelogram computerized tomography (CT) scan of cervical and lumbosacral spines on April 23, 1992. She was released to part-time, light-duty work on June 21, 2001. On March 1, 2002 the employing establishment provided appellant with a limited-duty position as a mail processor working four hours a day, with a grade level of 5 and an annual salary of $41,679.00 per year. The position was noted to be in strict compliance with her medical restrictions which included: no lifting over 20 pounds, no reaching overhead, and no repetitive bending. Appellant accepted the position with the modification that she could change positions and take a five-minute break every hour.

Appellant returned to work in the modified position on June 3, 2002 for four hours a day. OWCP paid wage-loss compensation benefits for the hours that she was unable to work.[5]

On May 23, 2005 OWCP advised appellant that she had been reemployed as a modified mail processor with wages of $466.87 per week, effective June 3, 2002. It found that the duties of the new position reflected on her capacity to work as established by the weight of the medical evidence then of record. Appellant's training, education, and work experience were also considered in determining the suitability of the position.

On December 5, 2005 OWCP issued a loss of wage-earning capacity (LWEC) determination, finding that appellant was reemployed as a modified mail processor, effective June 3, 2002, with wages of $466.67 per week. It adjusted her compensation benefits, effective November 27, 2005.

A November 4, 2008 magnetic resonance image (MRI) scan of the lumbar spine, read by Dr. Jonathan S. Garay, Board-certified in physical medicine and rehabilitation, revealed a partial visualization of T11 central compression fracture, likely old. He recommended correlation with

[4] Appellant had been performing light-duty work at the time of her January 12, 1989 injury.

[5] OWCP accepted appellant's claims for recurrence of total disability on August 13, 2002 for the period until August 26, 2002 and on March 6, 2004 for the period until March 20, 2004. On January 11, 2006 it denied her claims for a recurrence of disability on May 2 and June 1, 2005.

thoracic spine x-rays and thoracic spine MRI scan. Dr. Garay also found a small old L3 superior endplate fracture and lumbar spine degenerative changes without central canal stenosis.

Appellant filed a claim for recurrence of total disability (Form CA-2a) on November 23, 2008. OWCP determined that the claim was a request for modification of the December 5, 2005 LWEC decision. By decision dated May 1, 2009, it denied modification as the medical evidence of record did not support appellant's assertion that she was totally disabled.

In a December 16, 2009 report, Dr. Julian Sosner, Board-certified in physical medicine and rehabilitation, noted that appellant's history included that 20 years ago she injured her back while moving a tray at work. He advised that since that time she had many episodes of on and off lower back pain radiating to her lower extremity and that she had not worked since November 2009. Dr. Sosner indicated that an MRI scan of the lumbosacral spine from November 4, 2008, revealed an L5-S1 broad-based disc bulge with bilateral facet arthropathy and mild bilateral foraminal stenosis with a small old L3 superior endplate fracture and mild T1 old central compression fracture. He examined appellant, provided findings and diagnosed lumbago with right L5 radicular pain and degenerative joint disease of the right hip.

On December 28, 2009 appellant claimed a recurrence of disability (Form CA-2a) commencing November 30, 2009. She indicated that she was working four hours daily with no lifting, and no repetitive bending, pushing, or pulling more than 10 pounds. Appellant was also prohibited from overhead reaching. She indicated that she had persistent pain that varied in intensity on a daily basis. Appellant stopped work on November 30, 2009.

In a March 18, 2010 report, Dr. Garay noted that appellant was under his care since February 6, 2008 for injuries sustained to her lower back when she lifted a 20-pound tray and felt a severe pain in her right lower back. He noted that she has another aggravation in November 30, 2009 and indicated that she was totally disabled as of December 18, 2009. Dr. Garay diagnosed lumbar radiculopathy and herniated lumbar disc.

By decision dated April 7, 2010, OWCP denied modification of the December 5, 2005 LWEC decision, finding that the medical evidence of record failed to explain how her employment-related conditions changed, worsened, or were aggravated such that she had a recurrence of total disability making her unable to perform her modified, limited-duty job assignments.

In a July 26, 2010 attending physician's report (Form CA-20), Dr. Garay noted that appellant had muscle spasm and lumbar sprain, right hemiparesis, chronic L5 radiculopathy and "CVA [cerebral vascular accident] hemiparesis." He indicated that she was totally disabled commencing November 30, 2009. Dr. Garay explained that appellant had an exacerbation of her low back pain near the end of November 2009 and that she became hypertensive and had an "EVA and resultant hemiparesis AUE + RLE."

In an April 30, 2012 report, Dr. Franco Cerabona, a Board-certified orthopedic surgeon, noted that appellant had low back pain for "many, many years worsening over the last five to seven years" after she had injured her back in 1989 at work lifting a tray. He indicated that she suffered a stroke in 2009 and she felt that her low back pain "may have worsened after the

stroke." Dr. Cerabona noted that appellant had residual weakness in the right side of her body where most of her back pain was located, as well as some radicular-type symptoms with numbness and paraesthesias coursing to her right thigh. He examined her and provided findings which included that she walked with a limp and had a trunk list to the right without any assistive device. In a May 21, 2012 report, Dr. Cerabona noted that appellant returned for review of her most recent MRI scan, which revealed disc herniation and disc space collapse at the L3-4 level, with a left greater than right foraminal narrowing and broad-based disc herniation. He also noted scoliosis and old compression injuries at T11 and T10. Dr. Cerabona recommended a decompression for laminectomy and facetectomies at L3-4 and L4-5 with stabilization and instrumentation at the L3 to L5 levels.

In an August 6, 2012 work capacity evaluation (Form OWCP-5c), Dr. Garay requested authorization for back surgery. He indicated that appellant remained totally disabled.

In a February 11, 2013 report, Dr. Garay noted that appellant was referred for a lumbar MRI scan examination that revealed an L4-5 disc herniation and a lumbar radiculopathy or pinched nerve. He explained that she received various treatments, but her pain level was not controlled and her activity level had decreased. Dr. Garay advised that appellant was unable to utilize public transportation due to her limited ambulation and that she required Access-a-Ride services. He related that she was referred to a spine surgeon for her "unremitting back and right leg pain." Dr. Garay noted that the spine surgeon recommended spinal surgery. He opined that her current condition was causally related to the January 12, 1989 accident and requested authorization for the spinal surgery.

On June 9, 2013 counsel requested reconsideration from the April 7, 2010 decision. He contended that OWCP had not accepted all of the injuries which were related to the employment injury on January 12, 1989. Counsel argued that the recurrence of total disability commencing on November 30, 2009 occurred while appellant was working in a limited-duty position and was related to her federal employment injury of January 12, 1989. He referred to the February 11, 2013 report of Dr. Garay and argued that the medical evidence of record established "clear evidence or error" in the denial of an LWEC modification. Counsel argued that there was a clear change in the nature and extent of appellant's injuries and disabilities causally related to the accepted condition and its worsening over time. He argued that OWCP must expand the accepted conditions to include all conditions in the reconsideration request and thereafter find that the work stoppage on November 30, 2009 was due to a material worsening of appellant's federal employment injuries.

By decision dated June 12, 2013, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. On December 13, 2013 counsel appealed to the Board. By order dated June 4, 2014, the Board set aside the June 12, 2013 decision. The Board found the case was not in posture as OWCP should have considered the criteria for modification of an LWEC determination when the claimant requested resumption of compensation for total wage loss, as opposed to its determination as to

whether appellant had established clear evidence of error. The Board remanded the case for proper adjudication, followed by an appropriate merit decision.[6]

By decision dated May 20, 2015, OWCP denied modification of the December 5, 2005 LWEC decision.[7] It found that appellant had not met any of the criteria for modifying the formal LWEC determination, nor had she established that any of the conditions for which she claimed recurrent disability were causally related to the accepted January 12, 1989 work injury.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[8] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[9] 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.[10] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[11]

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.[12] The position must conform to the established physical limitations of the injured employee, the employer 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.[13] If these circumstances are present, a determination may be made that the position constitutes "regular" federal employment.[14]

With respect to part-time employment, the Federal (FECA) Procedure Manual provides: (1) a part-time position may form the basis of an LWEC 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

[6] *Order Remanding Case*, Docket No. 14-0322 (issued June 4, 2014).

[7] OWCP also found that the evidence did not support a recurrence of disability on November 30, 2009 causally related to the January 12, 1989 work injury.

[8] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[9] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[10] 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000).

[11] *Id*. at § 10.511.

[12] *Id*. at § 10.510.

[13] *Id.*

[14] *Id.*

the date of injury, a part-time position may form the basis of an LWEC determination if the employee's stable, established work restrictions limit him or her to part-time work.[15] 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.[16]

As long as there is no work stoppage due to the accepted condition(s), a formal LWEC determination should be issued following 60 calendar days from the date of return to work.[17]

ANALYSIS

OWCP determined on December 5, 2005, that appellant's weekly wages as a part-time, modified mail processor represented her wage-earning capacity. Appellant seeks modification of the December 5, 2005 LWEC determination, therefore, she bears the burden of proof.[18] Counsel does not claim that modification is warranted on the basis that appellant has been retrained or otherwise vocationally rehabilitated. Rather, he argues that OWCP should expand the claim to include lumbar disc herniation, lumbosacral spondylosis with subsequent gait disorder, and right hip degenerative joint disease.[19] Counsel also argues that appellant's November 30, 2009 work stoppage should be compensable because of a material worsening of her employment-related injuries and conditions.

Modification of an LWEC determination is appropriate where the evidence demonstrates a material change in the nature and extent of the injury-related condition.[20] The current medical evidence must demonstrate a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability.[21]

The Board finds that the medical evidence of record is insufficient to establish a material change or worsening of the accepted condition(s), such that appellant could not perform the duties of the modified mail processor position. This is especially important as the only accepted conditions are right inguinal hernia and sciatic neuritis. The medical evidence of record

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(1)(b) (June 2013).

[16] *Id.*

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

[18] 20 C.F.R. § 10.511.

[19] Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[20] 20 C.F.R. § 10.511.

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3a(2) (June 2013).

indicates that she suffered a new injury, a stroke in 2009, which has not been shown to be work related, and which may have affected her work ability.[22]

The medical evidence includes a December 16, 2009 report from Dr. Sosner, who noted that appellant's history included that 20 years ago she injured her back while moving a tray at work. Dr. Sosner noted episodes of on and off lower back pain and related that appellant had not worked since November 2009. He reviewed diagnostic reports including a lumbosacral MRI scan of November 4, 2008 and he diagnosed lumbago with right L5 radicular pain and degenerative joint disease of the right hip. However, these conditions have not been accepted by OWCP. Dr. Sosner failed to offer an opinion in which he provides medical reasoning to support that these additional conditions demonstrate a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.[23] Medical evidence that is not based upon a full and complete history is of limited probative value.[24] The Board has also held that medical evidence offering no opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[25]

Appellant also submitted reports of Dr. Garay who provided a March 18, 2010 report, in which he advised that appellant had another aggravation in November 30, 2009 and indicated that she was found totally disabled on December 18, 2009. Dr. Garay diagnosed lumbar radiculopathy and a herniated disc. However, he did not explain how the accepted conditions worsened or why appellant could not perform her modified mail processor position due to her work injury. Furthermore, in a July 26, 2010 report, Dr. Garay noted that appellant had muscle spasm and lumbar sprain, right hemiparesis, chronic L5 radiculopathy, and "CVA hemiperesis." While he opined that she was totally disabled from November 3, 2009 to the present, he summarily concluded without explanation that appellant had an exacerbation of her low back pain near the end of November 2009. Dr. Garay indicated that she became hypertensive and had an "EVA and resultant hemiparesis AUE + RLE." However, the only conditions accepted by OWCP were a right inguinal hernia and sciatic neuritis and Dr. Garay did not provide a rationalized medical opinion upon which additional conditions could be established as causally related to the accepted work injury. A mere conclusory opinion provided by a physician without the necessary rationale explaining how and why the work injury was sufficient to result in the diagnosed medical condition is insufficient to meet the appellant's burden of proof to establish her claim.[26] The Board finds that without further rationale to show how the current conditions and medical restrictions are causally related, the reports of Dr. Garay are insufficient to modify the LWEC determination. In an April 30, 2012 report, Dr. Cerabona noted that appellant had low back pain for "many, many years worsening over the last five to seven years," but also noted her 2009 stroke. He noted that she had residual weakness in the right side of her body where

[22] *Id.*

[23] *See supra* note 20 at Chapter 2.1501(3)(a)(2) (June 2013).

[24] *See D.W.*, Docket No. 17-1151 (issued November 7, 2017).

[25] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, *supra* note 19.

[26] *J.D.*, Docket No. 14-2061 (issued February 27, 2015).

most of her back pain was, as well as some radicular-type symptoms with numbness and paraesthesias coursing to her right thigh. Dr. Cerabona examined appellant, reviewed her diagnostic test results, and recommended a decompression for laminectomy and facetectomies at L3-4 and L4-5 with stabilization and instrumentation at the L3 to L5 levels. However, his reports are of limited probative value as he did not offer any opinion that she had a material change in the nature and extent of the original injury-related condition such that she could no longer perform the modified-duty position. This is especially important as the stroke, along with other degenerative findings noted by the physician have not been accepted as work-related conditions.[27]

OWCP received diagnostic reports dating from November 4, 2008 to October 22, 2013. However, these reports are insufficient because none of the physicians provided an opinion regarding disability. Therefore, their reports have no probative value in establishing causal relationship.[28]

OWCP also received reports from social workers, physical therapists and occupational therapists. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[29] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[30]

The other evidence of record is insufficient to support either the original LWEC determination was erroneous or that there had been a material change in the nature and extent of appellant's injury-related condition.

Appellant has failed to meet her burden of proof to establish a material change in the nature and extent of her injury-related condition, that the original determination was in fact erroneous, or that she was vocationally rehabilitated. Thus, she has failed to establish that the December 5, 2005 LWEC determination should be modified.

CONCLUSION

Appellant has not met her burden of proof to establish that the December 5, 2005 LWEC determination should be modified.

[27] *Supra* note 19.

[28] *See Michael E. Smith*, 50 ECAB 313 (1999).

[29] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[30] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. *E.R.*, Docket No. 16-1634 (issued May 25, 2017) (occupational therapist is not a physician under FECA); *M.R.*, Docket No. 17-1388 (issued November 2, 2017) (social workers and physical therapists are not physicians under FECA). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2018
Washington, DC

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

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

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