

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

D.O., Appellant)	
)	
and)	Docket No. 17-0911
)	Issued: February 2, 2018
DEPARTMENT OF THE ARMY, CORP OF)	
ENGINEERS, RESERVOIR REGULATION &)	
WATER QUALITY SECTION, Portland, OR,)	
Employer)	
)	

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 20, 2017 appellant filed a timely appeal from an October 20, 2016 merit decision and a February 3, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish modification of an August 21, 2006 wage-earning capacity decision during the period August 21, 2006 to October 29, 2013; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before Board.² The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 26, 1991 appellant, then a 37-year-old hydrological technician, filed an occupational disease claim (Form CA-2) alleging that she suffered neck pain and numbness/tingling as a result of working the keyboard with her right hand. OWCP initially accepted her claim for bilateral carpal tunnel syndrome and neck strain. It subsequently accepted cervical spondylosis with myelopathy, phlebitis, and thrombophlebitis of deep vessels of lower extremity, and peripheral fascial complications.

On May 30, 1996 Dr. Eric W. Long, appellant's treating Board-certified physiatrist, restricted appellant from regular or modified work. Appellant did not return to work.

Appellant participated in vocational rehabilitation, commencing November 8, 2001.

In an October 11, 2005 report, Dr. Long noted that appellant could not sit for more than 30 minutes at a time or for more than 4 hours a day, stand for more than 15 minutes at a time or more than 30 minutes a day, and walk for more than 15 minutes at a time or 1 hour per day. He opined that she was not physically capable of performing the work of an information clerk based on her tolerances for sitting, standing, and walking.

In an October 12, 2005 report, the vocational rehabilitation counselor determined that appellant was capable of working as an information clerk.

By decision dated August 21, 2006, OWCP finalized its proposed reduction of appellant's compensation benefits, effective that date, based on the constructed position of information clerk. Pursuant to this loss of wage-earning capacity (LWEC) decision, appellant's compensation was reduced as a result of her ability to work and earn wages commencing August 21, 2006.³

² Docket No. 11-1607 (issued April 23, 2012); Docket No. 13-1809 (issued September 11, 2014); Docket No. 15-0957 (issued April 1, 2016).

³ Appellant thereafter requested modification of the LWEC determination multiple times. On February 12, 2009 OWCP denied modification of the LWEC determination of August 21, 2006. However, by decision dated September 22, 2009, an OWCP hearing representative found that although the selected position was within appellant's medical restrictions and vocational abilities and that there was no evidence that the original decision was erroneous, the case was remanded for further development on the issue of whether there had been a material worsening of appellant's accepted condition warranting a modification of the wage-earning capacity. On January 4, 2010 OWCP denied modification of the August 21, 2006 LWEC determination. On February 8, 2011 it denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error. Appellant thereafter appealed to the Board, and by decision dated April 23, 2012, the Board found that, while appellant had requested reconsideration, she implicitly asserted that the medical evidence established that her employment-related condition had worsened. The Board determined that the issue was whether the August 21, 2006 wage-earning capacity should be modified, and remanded the case for adjudication of the wage-earning capacity issue. Docket No. 11-1607 (issued April 23, 2012). Upon remand, in a decision dated August 21, 2012, OWCP denied modification of the LWEC determination.

In an October 18, 2007 report, Dr. Long noted that appellant continued to be symptomatic, in spite of activity restrictions, and continued to have signs and symptoms of cervical spondylosis, with cervical radiculitis and cervical myelopathy. He indicated that he had no doubt that her symptoms would progress rapidly if she attempted competitive employment. Dr. Long noted that appellant was restricted from regular/modified work from August 2, 2006 through November 18, 2008.

On October 26, 2009 OWCP referred appellant to Dr. Darrell Weinman, a Board-certified orthopedic surgeon, for a second opinion. In a November 13, 2009 report, Dr. Weinman diagnosed bilateral carpal tunnel syndrome postoperative status bilateral carpal tunnel releases, cervical sprain, and cervical spondylosis with myopathy. He opined that appellant's cervical spondylosis should not prevent her from performing at sedentary strength and the occasional handling and reaching required in the position of information clerk. In the work capacity evaluation, Dr. Weinman noted two-hour limitations on wrist movements, pushing, and pulling.

In a report dated February 1, 2010, Dr. Long opined that it was clear that appellant's cervical spine condition had worsened from 1999 to 2003, from 2003 to 2006, and from 2006 to 2008. He diagnosed upper extremity pain and numbness, onset in the early 1980's, with median lesions, palms, decompressed, ulnar neuropathy elbows right greater than left, no radial neuropathy proximal forearms or elbows, imaging evidence of right C4-5 disc herniation with lateral recess/foraminal stenosis, symptomatic, C6-7 disc bulge, and bilateral C7 radiculitis right greater than left. Dr. Long noted that appellant did not have the sitting tolerance to function full-time as an information clerk. He discussed Dr. Weinman's report and noted that he had not addressed sensory disturbance in the upper limbs, hyperreflexia in the upper or lower limbs, or limitation of motion in the shoulder girdles. Dr. Long also noted that Dr. Weinman documented marked limitation of cervical mobility and described a positive Waddell's sign that had not previously been described by Dr. Weinman. Finally, he noted that Dr. Weinman completed an estimate of physical capacities that was grossly inconsistent with appellant's actual physical capacities. Dr. Long opined that appellant was restricted from regular/modified work from June 18, 2009 through June 1, 2010.

On August 19, 2013 appellant requested modification of the LWEC determination.

On October 30, 2013 appellant underwent a C5-6 anterior cervical discectomy and decompression; C5-6 and C6-7 anterior interbody arthrodesis; and anterior instrumentation insertion at C5, C6, and C7.

In a November 13, 2013 decision, OWCP determined that the evidence submitted supported a material worsening of appellant's work-related conditions, effective October 30, 2013. However, it determined that, prior to October 30, 2013, the evidence did not establish a material worsening of her work-related conditions that would prevent her from performing the job duties of an information clerk.⁴

⁴ On September 11, 2014 the Board reversed a February 1, 2013 decision of OWCP which found that appellant forfeited her right to compensation from November 6, 1996 to December 14, 2009 in the amount of \$362,751.51. Docket No. 13-1809 (issued September 11, 2014). The Board found that OWCP had not established that appellant had unreported earnings or work activity during the period in question.

By decision dated December 3, 2014, OWCP found that the evidence submitted by appellant was not of sufficient probative value to alter the decision dated November 13, 2013. It determined that the evidence submitted by appellant was duplicative, irrelevant, and did not support that the wage-earning capacity determination or the November 13, 2013 decision was erroneous.

On March 25, 2015 appellant appealed to the Board. By decision dated April 1, 2016, the Board found that the case was not in posture for a decision due to an unresolved conflict in the medical evidence. The Board found that Dr. Long, appellant's treating physiatrist, indicated in his October 18, 2007 report that appellant remained symptomatic and that appellant was restricted from both regular and modified work from August 2, 2006 through November 18, 2008. However, in a November 13, 2009 report, Dr. Weinman, the second opinion physician, reported that appellant's cervical spondylosis should not prevent her from performing at sedentary strength. The Board noted that, in a February 1, 2010 report, Dr. Long strenuously disagreed with Dr. Weinman's conclusion and opined that appellant remained restricted from work. The Board held that there was an unresolved conflict between Dr. Long and Dr. Weinman with regard to whether appellant experienced a material worsening of her condition, and remanded the case for an impartial medical examination (IME) with the purpose of resolving the conflict with regard to appellant's ability to work as an information clerk between August 21, 2006 and October 29, 2013.⁵

Following the Board's remand OWCP prepared a new statement of accepted facts (SOAF) dated March 8, 2016. It specifically noted that this version of the SOAF superseded all prior versions. This SOAF noted that appellant's accepted conditions included bilateral carpal tunnel syndrome and cervical strain, as well as cervical spondylosis with myelopathy, phlebitis, thrombophlebitis of deep vessels of the lower extremity, and peripheral vascular complications.

OWCP referred appellant to Dr. Warner Wood, a Board-certified orthopedic surgeon, for a medical review only. In a July 29, 2016 report, Dr. Wood opined that, based on his review of the medical records, appellant was capable of performing the position of information clerk for the period August 21, 2006 through October 30, 2013. He opined that appellant's cervical condition had progressed since she stopped work in 1996 because, as noted in the SOAF dated June 23, 2006, appellant had been engaged in outside work activity including work in her husband's upholstery shop. Dr. Wood concluded "squeezing an upholstery gun is much more likely to cause forearm pain of which [appellant] complained of and carpal tunnel syndrome than her computer work." He further opined that contrary to the SOAF, the conditions of cervical spondylosis with myelopathy, phlebitis, thrombophlebitis of deep vessels of the lower extremity, and peripheral vascular complications should not be accepted. Dr. Woods noted that the arthritic changes in appellant's neck and her congenitally small canal and cord changes had absolutely nothing to do with her work at the employing establishment. He further noted that appellant's deep vein thrombophlebitis was a postoperative complication following her anterior cervical spine fusion which did not develop until long after she stopped work in 1996 and was not related to her former employment.

⁵ Docket No. 15-0957 (issued April 1, 2016).

By decision dated October 20, 2016, OWCP determined that appellant had not provided sufficient evidence to modify the August 21, 2016 LWEC decision. It quoted at length from Dr. Wood's opinion regarding appellant's work activities at her husband's upholstery shop. OWCP also noted that Dr. Wood was asked to determine whether appellant was capable of working as an information clerk during the period August 21, 2006 through October 30, 2013, that he clearly indicated that appellant could work as an information clerk for this time period, and that Dr. Wood resolved the conflict in the medical evidence.

On November 3, 2016 appellant requested reconsideration. She challenged Dr. Wood's opinion, indicating that his opinion was outside of the framework of the SOAF, based on an inaccurate factual history, insufficient to meet OWCP's burden of proof to determine work abilities, wholly unrationalized, and internally contradictory, failed to consider all of her medical conditions, and did not provide medical reasoning in support of his conclusions.

OWCP continued to receive medical evidence from appellant's treating physicians regarding her current status.

By decision dated February 3, 2017, OWCP denied appellant's request for reconsideration of the October 20, 2016 decision without conducting a merit review. It determined that she failed to present any relevant evidence to show that OWCP erroneously applied or interpreted a specific point of law, did not advance new legal argument previously not considered by OWCP, and did not submit any new or relevant evidence.

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.⁶ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁷ Section 10.511 of OWCP regulations provide that, if a formal LWEC decision has been issued, the rating is left in place until that determination is modified by OWCP. Modification is only warranted where the party seeking modification establishes 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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

On August 21, 2006 OWCP reduced appellant's compensation benefits based on the constructed position of information clerk. It subsequently determined that she had established a material worsening of her accepted medical condition as of October 30, 2013.

⁶ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁷ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ 20 C.F.R. § 10.511.

⁹ See *Stanley B. Plotkin*, 51 ECAB 700 (2000).

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical evidence between appellant's treating physician, Dr. Long, and the second opinion physician, Dr. Weinman as to whether the wage-earning capacity determination should have been modified during the period August 21, 2006 to October 30, 2013.

The Board previously remanded this case finding that a conflict existed between Dr. Long and Dr. Weinman as to appellant's medical status during the relevant time period. On remand, OWCP referred appellant to Dr. Wood for a records review to resolve the conflict of medical opinion evidence. It provided Dr. Wood a SOAF, dated March 8, 2016, which specifically noted that it superseded all prior SOAFs of record. The Board finds that Dr. Wood's opinion is inconsistent with the March 8, 2016 SOAF, and therefore does not resolve the conflict in the medical opinion evidence.¹⁰

Dr. Wood referred to the 2006 SOAF, which was superseded by the March 8, 2016 SOAF. Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹¹ Dr. Wood's July 29, 2016 report was not based upon a proper factual background, and is therefore not entitled to special weight.

Furthermore, Dr. Wood premised his opinion that appellant's employment-related condition had not materially worsened prior to October 30, 2013 on his conclusion that OWCP should not have accepted the conditions of cervical spondylosis with myelopathy, as well as her lower extremity conditions. While an IME may question whether the accepted diagnosis was appropriate, he may not disregard the accepted facts of the case.¹² The Board has therefore found that, if an IME does not base his opinion on the SOAF, his opinion lacks a proper factual background, and thus, is not rationalized.¹³

Accordingly, as Dr. Wood's report lacks a proper factual background, there remains an unresolved conflict in the medical evidence with regard to whether appellant was able to perform the position of information clerk for the period August 21, 2006 through October 30, 2013. The case will be remanded to OWCP for further development of the medical evidence. On remand, OWCP should refer appellant, an updated SOAF, and a list of specific questions to an appropriate Board-certified physician to determine whether appellant experienced a material worsening of her employment-related condition which prohibited her from working as an information clerk from August 21, 2006 through October 30, 2013. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

In light of the Board's disposition of issue 1, issue 2 is rendered moot.

¹⁰ See *B.G.*, Docket No. 11-1088 (issued November 3, 2011); see also *L.L.*, Docket No. 15-0672 (issued September 23, 2016).

¹¹ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹² *Id.*

¹³ *Id.*

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 3, 2017 and October 20, 2016 are set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: February 2, 2018
Washington, DC

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

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

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