United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 17-0236**
	)	**Issued: July 17, 2018**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE NATIONAL OFFICE, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, 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 11, 2016 appellant, through counsel, timely appealed from a September 21, 2016 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 the 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that modification of her February 8, 2010 loss of wage-earning capacity (LWEC) determination was warranted.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On November 14, 2005 appellant, then a 40-year-old clerk, filed an occupational disease claim (Form CA-2) attributing her elbow and arm pain to her work duties. OWCP accepted the claim for lateral and medial epicondylitis of the right elbow and ulnar nerve entrapment at both elbows. Appellant was taken off work on February 16, 2006. On March 2, 2006 she returned to full-time work with restrictions. Appellant was taken off work on July 17, 2007. She was returned to light-duty work four hours a day on April 17, 2008. Appellant underwent right ulnar nerve transfer submuscular, gentle and right tennis elbow release on September 5, 2008. OWCP placed appellant on the periodic rolls and she received wage-loss compensation and medical treatment.[4]

In a June 22, 2009 report, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and second opinion physician, determined that appellant was at maximum medical improvement and was capable of performing full-time limited-duty work.

On August 6, 2009 Dr. Charles P. Bean, a Board-certified orthopedic surgeon and treating physician, concurred with Dr. Swartz's opinion and findings.

On December 7, 2009 appellant accepted a permanent position as a clerk and returned to full-time work with permanent restrictions. She was off work for personal reasons from March 24 to 26, 2011. Since March 2011, appellant was scheduled for full-time light-duty work. The record reflects that she worked from 20 to 58 hours every two weeks.

By decision dated February 8, 2010, OWCP advised appellant that she had been employed as a clerk with wages of $510.98 per week with the employment, effective December 7, 2009, the date she signed the job offer. It found that the duties of the clerk position reflected her work tolerance limitations and were established by the weight of the medical evidence. Additionally, appellant had demonstrated the ability to perform the duties of the position for two months or more. OWCP found that her actual earnings as a clerk represented her wage-earning capacity, and accordingly reduced her compensation to reflect her LWEC.[5] It set forth the computation of

[3] *J.V.*, Docket No. 09-1154 (issued February 26, 2010).

[4] Appellant also has a separate work-related injury which was accepted for left elbow ulnar nerve entrapment at the left elbow under File No. xxxxxx593. OWCP doubled the claims under the present claim.

[5] OWCP determined that appellant was entitled to compensation from December 7, 2009 to February 13, 2010, based on her actual earnings at the compensation level noted in the decision.

compensation noting a loss in earning capacity of $76.27 per week with an augmented compensation rate of $50.78 per week.

On May 9, 2014 OWCP referred appellant for a second opinion examination with Dr. Maya Thomas, a Board-certified neurologist, for an assessment of her work-related condition and the extent of her disability and the need for treatment.

In a November 21, 2014 report, Dr. Thomas noted appellant's history of injury and treatment and examined her. She diagnosed several conditions to include: bilateral myofascial pain; obstructive sleep apnea syndrome; fatigue; abnormal weight gain; and peripheral nerve disease. Dr. Thomas also indicated that appellant continued to suffer from residuals of her right elbow lateral epicondylitis, right medial epicondylitis, right elbow ulnar nerve entrapment, left ulnar nerve entrapment neuropathy, and left elbow ulnar nerve entrapment work-related conditions. Furthermore, she opined that it was likely that appellant met all of the symptoms for fibromyalgia. Dr. Thomas opined that appellant's symptoms had worsened since 2009. She indicated that appellant was employable for part-time work that did not involve repetitive movement of the arms or hands. Dr. Thomas also noted that appellant had gained 100 pounds over the last 10 years. She provided findings and determined that appellant should have restrictions to include working for no more than four hours a day. They included: sitting, walking, and standing for no more than four hours a day. Dr. Thomas also indicated that appellant could not do any repetitive movement. She indicated that the restrictions involved "not using her hands constantly with typing or paperwork if such a job exists."

On March 16, 2015 appellant filed a claim for compensation (Form CA-7) claiming intermittent wage loss from February 22 to March 7, 2015.

In a letter dated March 26, 2015, OWCP informed appellant that they had received her claim for wage-loss compensation. However, since a formal LWEC determination had been issued in her claim, on February 8, 2010, the claim for wage-loss compensation would be treated as a request for modification of her LWEC determination. OWCP allowed appellant 30 days to submit evidence forming the basis for modifying her LWEC determination.

In a letter also dated March 26, 2015, OWCP also sent a request for clarification to Dr. Thomas, regarding her assessment of work tolerance limitations.

In an April 6, 2015 report, the treating physician, Dr. Robert R. Taylor, an internal medicine specialist, noted that appellant had fibromyalgia aggravated by her work injury. He determined that appellant had numbness and tingling in her arm from the ulnar nerve injury, positive Tinel's at the elbow, and trigger-point point tenderness throughout neck, shoulders, back, and legs from fibromyalgia. Dr. Taylor opined that the work injury limited her ability to function because of numbness and tingling. He recommended a referral to a rheumatologist, instead of a neurologist, to give an evaluation of her situation. Dr. Taylor explained that appellant would be better off with a different position; however, it never occurred. Furthermore, appellant was "off work waiting for

a Dragon [dictation] program to arrive."[6] Dr. Taylor indicated that, if the Dragon program had been implemented, it may eliminate the problem of repetitive movement. He indicated that, if the Dragon dictation program was implemented, appellant could work a minimum of four hours, but she should not have any hand or repetitive type of program.

In an April 10, 2015 report, Dr. Taylor indicated that he concurred with most of Dr. Thomas' report as far as the accepted injuries. However, he did not agree with the fibromyalgia diagnoses. Dr. Taylor opined that he, as well as other physician's, agreed that she had fibromyalgia and that it was "at the very least, aggravated, if not caused by the accepted work injuries…." He noted that Dr. Thomas believed it was sleep apnea. Dr. Taylor requested a referee examination.

On April 13, 2015 OWCP received a supplemental report from Dr. Thomas indicating that she completed her prior report to the best of her ability. Dr. Thomas indicated that she could not "fill the form any differently." She noted that appellant was working the same position despite reporting severe disability and she indicated that she was doing this with pain. Dr. Thomas indicated that appellant continuing to work with repetitive motions could cause persisting pain and was not advised. She recommended a referral to physical medicine and rehabilitation.

In a letter dated April 15, 2015, OWCP explained to appellant that Dr. Thomas' report was insufficiently rationalized with regard to her assessment of appellant's work tolerance. It advised appellant that the previous work tolerance limitations provided by Dr. Swartz on June 22, 2009 remained in effect. OWCP also advised that no further action would be taken regarding her pending claims for wage-loss compensation until the issue of her work-tolerance limitations was resolved.

On April 16, 2015 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions, and the medical record to Dr. Michael E. Callahan, a Board-certified orthopedic surgeon.

In a report dated May 11, 2015, Dr. Callahan described appellant's history of injury and treatment. He examined appellant and provided findings. Dr. Callahan found that appellant was morbidly obese and appeared in no acute distress. He examined the upper extremities and found well-healed surgical scars on the posteromedial and lateral aspect of her right upper elbow. Dr. Callahan advised that he did not detect any signs of muscular atrophy in the upper extremities. He explained that motor strength was within normal limits of muscle groups bilaterally. Dr. Callahan determined that there was a slight decrease in the grip on the right side, and explained that this was interpreted as being due to pain rather than any neurological weakness. He also indicated that there was no atrophy in the thenar or hypothenar eminence of either hand. Regarding the work-related accepted conditions, Dr. Callahan advised that appellant continued to complain of right lateral epicondylitis and medial epicondylitis demonstrated by marked tenderness to palpation in these areas with positive Tinel's sign over the ulnar nerve. Furthermore, he advised that she continued to complain of left ulnar nerve entrapment symptoms, but she had no surgical treatment on that side. Dr. Callahan addressed whether appellant exhibited current objective

[6] The record reflects that the employing establishment placed appellant off work pending installation of a Dragon dictation program from March 20, 2015. Dr. Taylor filled in an April 3, 2015 duty status report (Form CA-17) in which he diagnosed fibromyalgia and placed appellant off work until the Dragon dictation program was installed.

findings of the work-related conditions. He explained that appellant continued to be somewhat physically active, and noted that, despite having a full year off work while she was caring for her ill mother, there was no significant benefit to her physical condition. Dr. Callahan determined that she had positive electromyography (EMG) scans, but they were "markedly variable" in the reports of the severity of the ulnar neuropathies. Additionally, he found that appellant had marked tenderness to palpation.

Dr. Callahan indicated that appellant worked four hours per day and continued to do repetitive work activities. He also indicated that, if fibromyalgia was a valid diagnosis, it was chronic, unremitting, and very difficult to treat. Dr. Callahan explained that appellant was very cooperative during the evaluation and appeared to be a very goad historian. He also found that there was no obvious symptom exaggeration or evasive behavior. Regarding the physical examination, Dr. Callahan noted inconsistencies in the two-point discrimination testing her right hand. He explained that the arm pains did not follow a typical radicular pattern although her complaints of numbness and tingling were in the ulnar nerve distribution in the hand. Dr. Callahan noted that appellant had failed virtually every attempted treatment including surgical intervention as well as a long and extensive course of more conservative treatment. He opined that her prognosis was extremely guarded and unlikely to resolve. Dr. Callahan explained that appellant was a high risk for failure in any contemplated surgery whether on the left upper extremity or even for neck surgery. Furthermore, appellant had failed injection therapy consistently and in? opined that no further injections were indicated.

Regarding fibromyalgia, Dr. Callahan determined that appellant displayed some symptoms of fibromyalgia including her chronic, somewhat diffuse, pain and complaints of muscle spasm. He noted that she complained of increased sensitivity to touch when she described discomfort wearing long sleeves, but he could not document that objectively when he conducted upper extremity muscular testing. For example, Dr. Callahan explained that appellant did not indicate any discomfort even with firm resistance in the hands, forearms, and arms of her upper extremities. While Dr. Callahan found some mild trigger-point findings in the trapezius, he did not find a pattern of the multiple trigger points usually described. Dr. Callahan determined that there was nothing in the medical records from any of her physicians to document trigger-point point testing. He indicated the only documentation was the diffuse pain and muscle spasms noted. Dr. Callahan opined that it was questionable that appellant met the diagnostic criteria for fibromyalgia. Additionally, Dr. Callahan explained that appellant's morbid obesity had an adverse effect on her overall physical health.

Regarding a worsening of her condition, Dr. Callahan opined that there were "no objective findings to consistently document any worsening of her diagnosis since June 2009. Appellant does complain subjectively of worsening symptoms, but these have not been documented by any imaging studies or electrodiagnostic studies. They did not provide any obvious evidence for progression." Dr. Callahan opined that he "would have expected significant improvement of her condition during that year away from her work-related activities. That also makes me skeptical of her prognosis and a likelihood of recovering fully from her accepted injuries." He completed the work restriction form and opined that appellant was capable of working an eight-hour day if the restrictions for her upper extremity and whole person limitations could be observed. Dr. Callahan advised intermittent rest periods every two hours as well as the lunch period during her eight-hour workday. He also indicated that psychometric testing and possible cognitive behavioral therapy

could be of significant benefit in her case to return her to a more functional and comfortable lifestyle.

By decision dated October 29, 2015, OWCP denied modification of its February 8, 2010 LWEC determination. It found that the original LWEC determination was not in error, that appellant had not been retrained or otherwise vocationally rehabilitated, or that her accepted employment-related medical condition had materially changed.

On November 4, 2015 appellant, through counsel, requested a telephonic hearing, which was held before an OWCP hearing representative on July 12, 2016. During the hearing, counsel indicated that he would submit medical evidence which supported appellant's disability due to fibromyalgia. Appellant described her job duties, which included working on a computer and sorting hundreds of documents a day for eight hours. She asserted that she performed the same repetitive duties, and it worsened to the point where she could no longer perform her duties. Appellant confirmed that she worked full time since November 2015.

Following the hearing, counsel submitted duplicate copies of Dr. Taylor's April 6 and 10, 2015 reports.

On July 21, 2016 a copy of the transcript was sent to the employing establishment for review and comment within 20 days. No response was received.

By decision dated September 21, 2016, OWCP's hearing representative affirmed the October 29, 2015 decision denying a modification of the February 8, 2010 LWEC determination.

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.[7]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted 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, in fact, erroneous.[8]

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

[7] *See R.E.*, Docket No. 17-1288 (issued May 16, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004).

[8] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[9] *Id.*

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that modification of her February 8, 2010 LWEC determination was warranted.

In seeking modification of her LWEC determination, appellant has not argued that the original determination was in error or that she has been retrained or otherwise vocationally rehabilitated. Rather, she argued that there has been a material change in the nature and extent of her injury-related condition.

In support of her request for modification, appellant provided two reports from her treating physician, Dr. Taylor. In an April 6, 2015 report, Dr. Taylor noted that appellant had fibromyalgia aggravated by her work injury. He determined that appellant had numbness and tingling in her arm from the ulnar nerve injury, positive Tinel's at the elbow, and trigger-point tenderness throughout neck, shoulders, back, and legs from fibromyalgia. Dr. Taylor opined that the work injury limited her ability to function because of numbness and tingling. He noted that appellant could work a minimum of four hours, but she should not have any hand or repetitive type of program.

Dr. Taylor also provided an April 10, 2015 report and opined that he concurred with most of Dr. Thomas' second opinion report as far as the accepted injuries. However, he did not agree with fibromyalgia diagnoses. Dr. Taylor opined that he, as well as other physicians, agreed that she had fibromyalgia, and it was "at the very least, aggravated, if not caused by the accepted work injuries…." He noted that Dr. Thomas believed the condition was sleep apnea instead of fibromyalgia.

The Board finds that the medical reports of Dr. Taylor are insufficient to warrant modification of the LWEC determination. First, Dr. Taylor did not provide any medical rationale explaining how or why appellant's condition had deteriorated such that she was precluded from continuing to work in the position of clerk.[10] Second, his opinion is insufficient to support a finding that appellant sustained a new medical condition, fibromyalgia. Although the physician provided an opinion on the cause of appellant's conditions, which he believed was "at the very least, aggravated, if not caused by the excepted work injuries…." Dr. Taylor's report is of limited probative value on this issue because he did not provide a clear opinion, supported by medical rationale, that appellant sustained a claimed condition due to either of the specific employment factors accepted in this case.[11] The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/disability was related to employment factors.[12]

[10] *R.M.*, 59 ECAB 690 (2008).

[11] *D.R.*, Docket No. 16-0528 (issued August 24, 2016).

[12] *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale describing the relation between work factors and a diagnosed condition/disability).

In support of her claim for modification of the LWEC determination, appellant also relied upon the second opinion report of Dr. Thomas, who examined her and provided a November 21, 2014 report in which she opined that appellant's condition had worsened. She diagnosed appellant with several conditions to include: bilateral myofascial pain; obstructive sleep apnea syndrome; fatigue; abnormal weight gain; and peripheral nerve disease. Dr. Thomas also indicated that appellant continued to suffer from residuals of her right elbow lateral epicondylitis, right medial epicondylitis, right elbow ulnar nerve entrapment, left ulnar nerve entrapment neuropathy, and left elbow ulnar nerve entrapment work-related conditions. Furthermore, she opined that it was likely that appellant met all of the symptoms for fibromyalgia. Dr. Thomas opined that appellant's symptoms worsened since 2009. She indicated that appellant was employable for part-time work that did not involve repetitive movement of the arms or hands. Dr. Thomas determined that appellant should have restrictions to include working for no more than four hours a day including sitting, walking, and standing for no more than four hours a day and that appellant could not do any repetitive movement. She noted that the restrictions involved "not using her hands constantly with typing or paperwork if such a job exists."

However, when Dr. Thomas was requested to clarify her opinion and provide objective findings to support her opinion, she responded, but merely reiterated her prior opinion.

The Board finds that Dr. Thomas did not provide objective findings to explain why appellant could not perform the duties of the clerk position. There was no explanation as to how the work restrictions were due to the accepted work-related condition. Furthermore, there was no explanation of how appellant's functional ability due to her accepted conditions had changed such that she could not perform the duties of the clerk position. The Board also notes that fibromyalgia was not accepted as a work-related condition.[13] The opinion of Dr. Thomas was that appellant did not develop the condition of fibromyalgia, and thus her opinion does not support a finding that the acceptance of the claim should be expanded to include this condition.[14]

Dr. Callahan examined appellant and provided findings and his opinion regarding appellant's physical condition and ability to perform her employment duties. He examined appellant's upper extremities and found well-healed surgical scars on the posteromedial and lateral aspect of her right upper elbow. Dr. Callahan explained that appellant continued to be somewhat physically active, and noted that despite having a full year off work while she was caring for her ill mother, there was no significant benefit. He reviewed the diagnostic testing which was "markedly variable" and also found marked tenderness to palpation. Dr. Callahan indicated that appellant worked four hours per day and continued to do repetitive work activities. Regarding fibromyalgia, he determined that there was nothing in the medical records from any of her physicians to document trigger-point testing and opined that it was questionable that appellant met the diagnostic criteria for fibromyalgia. Regarding a worsening of her condition, Dr. Callahan opined that there were "no objective findings to consistently document any worsening of her

[13] Where a claimant alleges that a condition not accepted or approved by OWCP was due to his or her employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence. *See M.B.*, Docket No. 17-1773 (issued May 24, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[14] *See M.B., id.*

diagnosis since June 2009...." He noted that while she complained subjectively of worsening symptoms, these were not documented by any imaging studies or electrodiagnostic studies. "They did not provide any obvious evidence for progression." Dr. Callahan opined that he "would have expected significant improvement of her condition during that year away from her work-related activities. That also makes me skeptical of her prognosis and a likelihood of recovering fully from her accepted injuries." Dr. Callahan completed the work restriction form provided to him and opined that appellant was capable of working an eight-hour day if the restrictions for her upper extremity and whole person limitations could be observed. He advised intermittent rest periods every two hours as well as the lunch period during her eight-hour workday. The Board finds that Dr. Callahan is entitled to the weight of the evidence as it provides a well-rationalized opinion explaining that there had been no material change in the nature and extent of appellant's injury-related condition. Appellant has not established 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 not met her burden of proof to establish that the February 8, 2010 LWEC determination should be modified.[15]

On appeal counsel for appellant, argues that OWCP committed error when it failed to accept fibromyalgia. However, for the reasons noted above, the Board found that she did not meet her burden of proof to support that either the original LWEC determination was erroneous or that there had been a material change in the nature and extent of her injury-related conditions.

Appellant may request modification of an LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that modification of the LWEC determination was warranted.

[15] *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 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