United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 16-1784**
	)	**Issued: May 7, 2018**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 7, 2016 appellant filed a timely appeal from an August 24, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has met his burden of proof to establish that modification of the September 15, 2011 loss of wage-earning capacity (LWEC) determination is warranted.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

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

On April 7, 2997, OWCP accepted that appellant, then a 39-year-old supervisor of distribution operations, sustained anxiety, single episode depressive disorder, temporary aggravation of alcoholism, and gastritis due to factors of his federal employment. OWCP paid appellant wage-loss compensation and referred him for vocational rehabilitation services after the employing establishment advised that it could not accommodate his restrictions.

By decision dated November 2, 2004, OWCP determined that the selected position of administrative clerk represented his wage-earning capacity and adjusted his compensation, finding a 59 percent capacity to earn wages. OWCP found that appellant could earn $560.00 a week in the selected position.

On November 25, 2006 appellant was reinstated as supervisor of distribution operations. He stopped work on March 14, 2007.[3] On April 10, 2010 appellant returned to work as a labor relations specialist. He worked in that position from April 10, 2010 until his retirement on May 31, 2011.

By decision dated November 10, 2010, OWCP modified appellant's original LWEC determination, finding zero wage loss effective November 21, 2010.

Appellant requested a hearing, which was held on March 9, 2011. By decision dated May 16, 2011, OWCP's hearing representative set aside the November 10, 2010 decision, finding that further development was required.

By September 15, 2011 decision, OWCP again modified appellant's LWEC determination and reduced appellant's wage-loss compensation benefits to zero, effective November 21, 2010. Appellant requested a hearing, which was held on January 11, 2012. By decision dated March 30, 2012, the hearing representative affirmed the September 15, 2011 LWEC modification.

Appellant subsequently appealed to the Board. By decision dated February 11, 2013, the Board affirmed the March 30, 2012 decision, finding that appellant had been vocationally rehabilitated as a labor relations specialist and his current earnings fairly and reasonably represented his wage-earning capacity.[4] The Board further found that appellant's pay rate had increased significantly, more than the required 25 percent over the administrative clerk job for

[2] Docket No. 09-2067 (issued August 4, 2010); Docket No. 12-1221 (issued February 11, 2013).

[3] On July 14 and 20, 2009, OWCP determined that appellant received overpayments of compensation in the amount of $5,032.67 from March 28, 2008 through April 11, 2009 and $2,168.57 from March 14, 2007 through April 11, 2009 due to nonwitholding of health and life insurance premiums, respectively. By decision dated August 4, 2010, the Board affirmed the July 14 and 20, 2009 decisions. Docket No. 09-2067 (issued August 4, 2010).

[4] Docket No. 12-1221 (issued February 11, 2013).

which he was originally rated and, thus, there was no entitlement to continuing wage-loss compensation.

On July 5, 2015 appellant, through his then-representative, requested modification of the November 10, 2010 LWEC determination. Appellant's representative contended that appellant's labor relations specialist position was odd-lot, makeshift, temporary, and unclassified; not a light-duty or modified position. The representative further contended that appellant's accepted medical condition had worsened or was aggravated due to employment factors relating to his labor relations specialist position.

Evidence received with appellant's request for LWEC modification included: petitions for modification of LWEC dated January 28 and July 5 and 28, 2015; March 23, 2015 United States Bankruptcy Court Decision; a May 5, 2015 memorandum for the Division of Federal Employees' Compensation (DFEC) Fiscal Officer; a copy of $6,900.23 United States Treasury Check; a February 11, 2015 letter from OWCP regarding counsel's fee; a February 8, 2015 fee petition from counsel; OWCP's February 5, 2015 letter to appellant's then-representative regarding a fee petition; a February 4, 2015 fee petition; a February 1, 2015 timesheet to justify fee petition for dates January 6, 2014 to January 29, 2015; and a July 10, 2014 Notice of Decision from the Office of Disability Adjudication and Review.

Medical reports from Dr. Betsy Levine-Proctor, a clinical psychologist, were also received. In a November 2, 2013 report, Dr. Levin-Proctor indicated that, as a result of the work situation that caused appellant's disability, he suffered from alcoholism, gastritis, and depression. She indicated that these difficulties have caused him to become diabetic and dependent upon medication for treatment. Appellant continues to struggle with all of these health problems and remains significantly disabled by them. In a July 21, 2013 report, Dr. Levine-Proctor indicated that he was also experiencing chronic gastritis. She indicated that appellant was reduced to a nonfunctional level in activities of daily living by spring 2011 and he had not shown significant improvement since that time. In a March 9, 2013 report, Dr. Levine-Proctor diagnosed major depression, gastric ulcer, and diabetes. She opined that, due to his chronic symptoms and resulting impairments, appellant was unable to perform appropriate work-related mental activities, that his ability to interact socially had become severely impaired by symptoms of depression and anxiety as well as his capacity to adapt to new or changing situations.

In a January 24, 2015 report, Dr. Levine-Proctor indicated that she had been treating appellant in individual psychotherapy over a period of many years for symptoms resulting from a series of events that occurred during his time working for the employing establishment. She noted that he suffers from severe depression, anxiety, and stress-related gastric issues which rendered him unable to work and that his condition continued to deteriorate. Dr. Levine-Proctor noted the history of appellant's work conditions and the positions held in the employing establishment. She concluded that the determination that the manufactured labor relations specialist position represented his ability to earn wages was clearly an error on the part of OWCP, which further escalated his depression and self-esteem. Dr. Levine-Proctor noted that, in the spring of 2011, appellant was notified for a reduction-in-force and had to accept early retirement. She indicated that, as a result of all of the ongoing and severe stressors associated with his work, his condition became increasingly more severe. Dr. Levine-Proctor reported appellant's symptoms and indicated his self-esteem suffered immensely due to the lack of appropriate work opportunities and training and the related stress of the work situations that arose over the years. She noted that, in

addition to the gastric ulcer, appellant developed diabetes which contributed to depression. Dr. Levine-Proctor concluded that his condition had deteriorated significantly as a result of the various difficulties with the employing establishment and that he continued to deteriorate. A psychiatric review technique was also submitted.

In an August 12, 2015 letter, OWCP advised appellant of the deficiencies in his claim and informed him of the criteria required for modification of a formal LWEC determination. Appellant was afforded 30 days to provide evidence substantiating any of the criteria.

In an August 17, 2015 letter, appellant's then-representative requested that OWCP analyze the evidence submitted and issue a decision on the request for LWEC modification.

By decision dated October 14, 2015, OWCP denied modification of its prior LWEC determination,[5] finding that appellant had not met any of the requirements for modification. It found that his argument that the position of a Labor Relations Specialist was odd-lot, makeshift, or temporary was without merit; that there was no evidence to support that appellant had been retrained or otherwise vocationally rehabilitated; that appellant had not met his burden to establish that the events and conditions in place at the time he held the Labor Relations Specialist position caused a worsening of his medical condition; and that the medical evidence of record did not support that his injury-related medical condition had worsened. OWCP noted that appellant voluntarily chose to retire from the employing establishment and he was no longer exposed to work elements that caused or aggravated his accepted conditions.

On April 13, 2016 OWCP received an April 7, 2016 letter from appellant's then-representative requesting reconsideration. The representative stated that appellant had long been taking Paxil, a psychotropic medication, which had side-effects which caused his condition to worsen to the point that he was now totally disabled from work. In an April 7, 2016 statement included with the representative's April 7, 2016 letter, appellant attested to a conversation that he had with his representative regarding the side effects of Paxil, which he agreed that he was experiencing.

In an April 4, 2016 report, Dr. Harvey A. Lerchin, a psychiatrist, noted that he examined appellant on February 29, 2016 and understood that his medical and psychiatric conditions were accepted conditions of his workers' compensation claim, with a date of disability of November 29, 1995 (specifically gastritis and alcohol dependence). He indicated that the reported cause of appellant's work-related conditions was cumulative inappropriate conduct and harassment. Dr. Lerchin noted that, ultimately, appellant felt compelled by his employing establishment to elect voluntary early retirement in May 2011 and that he had not worked since that time. He noted that he was not provided with medical records from appellant's prior medical providers. He indicated that, since at least 1995, appellant had suffered persisting severe depressive and post-traumatic stress-type mental symptoms as well as serious physical illness and the emergence of a serious problem with excessive alcohol intake. Dr. Lerchin noted that appellant had been receiving care for his psychiatric condition since 1996, but there had been no involvement of a psychiatrist,

[5] OWCP noted the November 10, 2010 LWEC determination as the subject of modification. The Board notes, however, that, as the May 16, 2011 hearing representative decision set aside the November 10, 2010 decision, the September 15, 2011 LWEC determination was the proper subject of modification.

although he was prescribed a series of psychotropic medications, including Paxil. He noted appellant's complaints and symptoms, which were known to be side effects of Paxil, as well as a history of appellant's work injury. Dr. Lerchin reviewed records, including a January 24, 2015 report by Dr. Levine-Proctor; a January 28, 2015 letter from appellant's then-representative requesting modification of a prior LWEC; a July 10, 2014 decision from Social Security Administration; and a telephonic case conference with Dr. Levine-Proctor on March 24, 2016.

Dr. Lerchin indicated that appellant suffered from severe levels of chronic anxiety, depressive disorder and alcoholism. He indicated that his consideration of appellant's account and history along with his review of the Dr. Levine-Proctor's records and recent telephone conference, spoke to the work relatedness of appellant's mental condition and much of the scope of his physical condition. Dr. Lerchin stated that his conclusions assumed an overall accuracy of appellant's account and that appellant's clinical presentation was consistent with his account and complaints. He diagnosed major depressive disorder concurrent with alcohol dependence. Dr. Lerchin indicated that it was evident from the medical record that appellant's various conditions have deteriorated over the past decade such that he was now considered permanently totally disabled. He indicated that appellant had never been provided with a reasonable measure of psychiatric consultation prior to this meeting, but was instead prescribed a series of psychotropic medications by nonpsychiatric primary care physicians, which lead to long-term usage of the antidepressant medicine Paxil, which was known to have cumulative side effects, including some that he had suffered from for many years. Dr. Lerchin indicated that Paxil had the greatest number of side effects of any modern-day antidepressant medicine and was the subject of numerous lawsuits because of its side-effects. He further indicated that many of appellant's symptoms were fitting with a very possible acquisition of known side effects of Paxil. Appellant was never given information by any of his physicians that he may be suffering from medication side effects of Paxil. Dr. Lerchin concluded that the very long-term daily administration of Paxil in appellant had probably resulted in an "iatrogenic syndrome" which had interfered with his recovery from his now chronic and totally disabling mental disorder.

Other evidence submitted on reconsideration included a duplicate copy of Dr. Levine-Proctor's March 9, 2013 report; one page of a July 10, 2014 "Decision" indicating that Social Security disability benefits were awarded since May 31, 2011; and evidence pertaining to administrative matters regarding appellant and his representative, which included fee petitions, the representative's decision to retire, and letters from the representative requesting fee approval and indicating that she no longer represents appellant.

By decision dated August 24, 2016, OWCP denied modification of its October 14, 2015 decision.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled from all gainful employment, is entitled to compensation computed on LWEC.[6] A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a

[6] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

selected/constructed position, represents a claimant's ability to earn wages.[7] Generally, an employee's actual earnings best reflect his or her wage-earning capacity.[8] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[9]

Compensation payments are based on the LWEC determination, and OWCP's finding remains undisturbed until properly modified.[10] 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.[11] The burden of proof is on the party seeking modification of the LWEC determination.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof. Appellant has not alleged that he was retrained or otherwise vocationally rehabilitated. Rather, he alleged that the LWEC determination was in error and that his accepted medical conditions have worsened.

Appellant's then-legal representative alleged, in a January 28, 2015 letter, that the Labor Relations Specialist position appellant held was odd-lot, make shift, temporary, and an unclassified job rather than a light-duty or modified position. This argument, however, is without merit as previously determined by the Board. The Board found in its prior decision that that the Labor Relations Specialist position was a permanent, full-time position, that it had a job description, and that appellant was given work and was provided training.[13] Appellant has presented no evidence to support that the LWEC determination, which became effective on November 21, 2010, was erroneous.

Appellant further alleged that his medical condition worsened as a result of the work events in place at the time of the September 15, 2011 LWEC modification. However, he presented no evidence to support his allegation. The record reflects that appellant voluntarily chose to retire from the labor relations specialist position and he currently remains retired.

Appellant also alleged that his accepted conditions worsened such that he is now totally disabled as a result of his accepted employment injuries. The medical evidence of record establishes that he continues to suffer from residuals of the accepted work injury. However, the

[7] *See Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[8] *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

[9] *Id.*

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

[11] 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

[12] 20 C.F.R. § 10.511.

[13] *Supra* note 7.

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 labor relations specialist position.

Dr. Levine-Proctor, appellant's treating clinical psychologist, submitted several reports indicating that appellant was totally disabled from work due to the accepted conditions as of spring 2011. However, she failed to offer any explanation as to how his functional ability had changed such that he could not perform the duties of the labor relations specialist position.[14] It is noted that in the spring of 2011, appellant retired from the employing establishment. In her March 9 and November 2, 2013 reports, Dr. Levine-Proctor indicated that appellant's accepted conditions caused him to become diabetic. She also diagnosed gastric ulcer. However, the conditions of diabetes and gastric ulcer are not accepted conditions. Dr. Levine-Proctor offered no explanation, supported by objective findings, that the resulting diabetic condition and gastric ulcer were due to a material change or worsening of the accepted work conditions.[15] These reports are, therefore, insufficient to establish that modification of OWCP's LWEC determination is warranted.

In her January 24, 2014 report, Dr. Levine-Proctor concluded that the determination that the manufactured labor relations specialist position represented appellant's ability to earn wages was clearly an error on the part of OWCP, which further escalated his depression and self-esteem. However, she provided no medical rationale to support her assertion. It is well established that the role of a medical expert is to address the medical questions presented in the case and not act in an adjudicatory capacity or address legal issues in the case as these matters are outside the scope of expertise of the physician.[16] Dr. Levine-Proctor also indicated that, as a result of all of the ongoing and severe stressors associated with appellant's work, his condition became increasingly more severe and that his self-esteem suffered immensely due to the lack of appropriate work opportunities and training and the related stress of the work situations that arose over the years. She noted that he had developed a gastric ulcer and diabetes, which contributed to his depression. Dr. Levine-Proctor opined that appellant's condition had deteriorated significantly as a result of the various difficulties with his employing establishment and continued to do so. However, she did not provide any objective evidence of this alleged worsening of appellant's condition. The Board has long held that medical conclusions, unsupported by rationale, are of little probative value.[17] Dr. Levine-Proctor did not explain how those findings resulted in appellant's disability or a material worsening of his conditions. While she additionally noted that appellant developed a gastric ulcer and diabetes which she opined contributed to his depression, these conditions are not accepted conditions. As these conditions are not employment related, appellant has the burden of proof to establish an employment-related connection.[18] Dr. Levine-Proctor failed to provide a sufficiently rationalized medical opinion explaining the change in appellant's disability status or

[14] *F.B.*, Docket No. 15-1188 (issued November 6, 2015).

[15] *Id.*

[16] *Jeannette A. Holt*, Docket No. 95-1062 (issued July 2, 1997); *James Washington, Jr*., 42 ECAB 182 (1990).

[17] *Willa M. Frazier*, 55 ECAB 379 (2004).

[18] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

how his accepted conditions had materially worsened.[19] Thus, her opinion lacks a well-reasoned explanation of how those factors found accepted and compensable in this case caused or contributed to his condition. Therefore, Dr. Levin-Proctor's January 24, 2014 report is insufficient to establish that modification of the September 15, 2011 LWEC determination is warranted.

In his April 4, 2016 report, Dr. Lerchin, a psychiatrist, concluded that the very long-term daily administration of Paxil, a psychotropic medication, in appellant had probably resulted in an "iatrogenic syndrome" which had interfered with his recovery from his now chronic and totally disabling mental disorder. The Board finds that this opinion is speculative in nature.[20] Additionally, Dr. Lerchin provided no medical rationale, other than noting that appellant's complaints and symptoms which are known side effects of Paxil, explaining the change in appellant's disability status or how his accepted conditions had materially worsened.[21] While Dr. Lerchin indicated that appellant's various conditions have deteriorated over the past decade such that he was now considered permanently totally disabled, there is no indication that he had a complete and accurate factual and medical background as well as a knowledge of the accepted conditions. Dr. Lerchin indicated that he relied on the history taken from appellant, which contained elements that may have not been accepted as factual or work related, as well as limited evidence from Dr. Levine-Proctor. There is no list of medication that appellant had been on or any indication that Dr. Lerchin reviewed any medical evidence prior to January 24, 2015, the date of Dr. Levine-Proctor's report he indicated he reviewed. Dr. Lerchin also failed to provide any objective findings linking appellant's accepted conditions to a material worsening. It is well established that to be of probative value a medical opinion must be based on a complete and accurate factual and medical background. Medical opinions based on an incomplete history, such as that of Dr. Lerchin, are of diminished probative value and are insufficient to meet appellant's burden of proof.[22]

The other evidence of record is also insufficient to support either that the LWEC determination was erroneous or that there had been a material change in the nature and extent of appellant's injury-related condition. The Board notes that the "decision" from the Social Security Administration was incomplete and contained no findings as to how the determination that appellant was totally disabled was made. Moreover, disability findings by the Social Security Administration and of other administrative agencies are not determinative of appellant's level of disability under FECA. It is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing eligibility for benefits.[23]

[19] *J.I.*, Docket No. 15-0516 (issued September 21, 2015).

[20] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[21] *Supra* note 16.

[22] *L.G.*, Docket No. 09-1692 (issued August 11, 2010).

[23] *Andrew Fullman*, 57 ECAB 574 (2006).

As appellant has not established a material change in the nature and extent of his injury-related condition, that the original determination was in fact erroneous, or that he was vocationally rehabilitated, the Board finds that he has failed to meet his burden of proof.

On appeal appellant contends that an impartial medical specialist opinion is needed. However, the medical evidence of record is insufficient to support that conflict in medical evidence exists as to whether he sustained a material change or worsening of the accepted conditions such that he could not perform the duties of the labor relations specialist position for which he was rated.

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

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that modification of the September 15, 2011 LWEC determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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