United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 18-0407**
	)	**Issued: September 17, 2018**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant[1]
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 December 18, 2017 appellant, through counsel, filed a timely appeal from a November 1, 2017 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 to consider the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that his July 31, 2009 loss of wage-earning capacity (LWEC) determination should be modified.

FACTUAL HISTORY

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

On May 10, 2001 appellant, then a 47-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome as a result of his federal employment duties. On August 27, 2001 OWCP accepted the claim for bilateral carpal tunnel syndrome. By decision dated March 29, 2007, it expanded acceptance of the claim to also include bilateral epicondylitis and right trigger finger.

The record indicates that appellant underwent right carpal tunnel release surgery on December 28, 2001, left carpal tunnel release surgery on January 25, 2002, and left ulnar nerve decompression surgery on June 5, 2003. He returned to a light-duty position following his surgeries, but stopped work on September 23, 2003. On October 17, 2005 appellant returned to work for four hours per day and then filed a traumatic injury claim (Form CA-1) for injuries sustained on October 18, 2005 when he fell on stairs. OWCP accepted that claim for neck strain, right shoulder cuff tear, and right shoulder adhesive capsulitis and assigned OWCP File No. xxxxxx349. Appellant began receiving compensation for temporary total disability, which OWCP based on four hours per day for the occupational disease claim and four hours per day for the traumatic injury claim.

By decision dated July 31, 2009, OWCP reduced appellant's compensation, finding that he had the capacity to earn wages of $470.40 per week in the constructed position of motor vehicle dispatcher.[4]

On February 17, 2012 appellant requested resumption of temporary total disability compensation as his accepted conditions had allegedly worsened. By decision dated April 17, 2012, OWCP denied modification of the July 31, 2009 LWEC determination.

On April 19, 2012 appellant requested a hearing before an OWCP hearing representative. By decision dated December 13, 2012, OWCP's hearing representative affirmed the April 17, 2012 decision.

Appellant appealed to the Board. In a June 12, 2013 decision, the Board affirmed the December 13, 2012 OWCP's hearing representative's decision. The Board found that appellant

[3] Docket No. 15-1853 (issued January 19, 2016); Docket No, 13-0603 (issued June 12, 2013).

[4] The job description indicated that the job involved compiling lists of vehicles, assigning vehicles, recording data, maintaining records, and issuing equipment. The job was identified as sedentary, with occasional fingering and handling and a 10-pound lifting requirement. On September 19, 2008 Dr. Michael McManus, an attending Board-certified occupational medicine specialist, checked a box marked "yes" that he approved this occupation.

had not established a material worsening of his accepted conditions and noted that lymphedema was not an accepted condition.[5]

On September 19, 2014 OWCP accepted the condition of lymphedema.

On June 15, 2015 appellant, through counsel, again requested modification of the July 31, 2009 LWEC determination. By decision dated July 23, 2015, OWCP denied modification of the LWEC determination. Appellant appealed to the Board.

By decision dated January 19, 2016, the Board set aside the July 23, 2015 OWCP decision.[6] The Board found that, after OWCP determined that lymphedema was employment related, it failed to develop the medical evidence to determine whether modification of the LWEC determination was warranted.

On April 8, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon, for an opinion as to whether appellant's condition had materially worsened as a result of the accepted lymphedema condition.

In an April 20, 2016 report, Dr. McManus diagnosed bilateral carpal tunnel syndrome, bilateral upper extremity lymphedema, status post right trigger thumb release, and status post bilateral medial epicondylotomies and ulnar nerve compression for cubital tunnel release. He wrote that appellant's symptoms were unchanged and that appellant continued to complain of recurrent forearm, wrist, and hand swelling, which was greater on the right than the left with any repetitive or sustained upper extremity or hand use. Dr. McManus concluded that appellant's permanent work restrictions were unchanged.

In an April 28, 2016 report, Dr. Orenstein reviewed the statement of accepted facts (SOAF) and detailed appellant's medical history. Appellant's physical examination revealed decreased bilateral wrist and elbow range of motion, no thenar atrophy, negative bilateral wrist Tinel's and Phalen signs, and positive bilateral cubital Tinel's sign. Based on physical examination findings, Dr. Orenstein found objective evidence of bilateral carpal tunnel releases and cubital tunnel release, but no objective evidence of bilateral upper extremity lymphedema. He opined that the accepted lymphedema did not cause a material worsening of appellant's condition. Next, Dr. Orenstein indicated that appellant might benefit from an evaluation for possible Raynaud's disease based on bilateral upper extremity residual swelling, color, and temperature changes. He further noted that any evaluation for Raynaud's disease would be unrelated to appellant's accepted employment injuries. Dr. Orenstein reviewed the motor vehicle dispatcher job description and concluded that it would not require appellant to perform repetitive upper extremity activities on a regular basis. However, he noted that, if appellant were to develop any upper extremity symptoms from writing, he recommended avoiding repetitive use of the hands and taking breaks every 30 minutes.

OWCP, in a May 11, 2016 decision, denied modification of its July 31, 2009 LWEC determination. It found Dr. Orenstein's opinion that appellant's condition had not materially

[5] Docket No. 13-0603 (issued June 12, 2013).

[6] Docket No. 15-1853 (issued January 19, 2016).

worsened due to the accepted lymphedema condition and that appellant was capable of performing the duties of the constructed position constituted the weight of the medical opinion evidence.

On June 28, 2016 appellant, through counsel, requested reconsideration. Counsel asserted that OWCP did not select a second opinion physician in the appropriate specialty. He argued that a vascular specialist should have been selected for the second opinion evaluation as an orthopedic specialist was not appropriate to evaluate appellant's condition.

In a July 14, 2016 report, Dr. McManus provided examination findings. He indicated that appellant continued to have permanent work restrictions, which were unchanged.

By decision dated July 28, 2016, OWCP denied modification of the July 31, 2009 LWEC determination. It rejected the argument that appellant should have been evaluated by a vascular surgeon as Dr. McManus was not a vascular surgeon.

In a July 27, 2016 report, Dr. McManus reviewed Dr. Orenstein's report and disagreed with his findings. He observed that recent electrodiagnostic testing confirmed a worsening of appellant's right carpal tunnel syndrome. Dr. McManus disagreed with Dr. Orenstein's opinion, which attributed appellant's bilateral upper extremity edema to Raynaud's disease and opined that appellant continued to suffer from traumatic lymphedema. Moreover, he reported that appellant had been evaluated for rheumatic disease in the past, with negative test results. Dr. McManus also opined that appellant's condition was aggravated or worsened by any forceful or repetitive upper extremity use. He explained that appellant could not frequently reach and opined that the job duties of the constructed motor vehicle dispatcher exceeded his upper extremity work restrictions.

On April 10, 2017 OWCP received appellant's request for reconsideration dated April 6, 2017.

The record contains reports dated November 14, 2016 and March 13, 2017 by Dr. McManus providing examination findings. In his March 13, 2017 report, Dr. McManus noted that appellant was awaiting authorization of an ultrasound desiccation and injection for recurrent right carpal tunnel syndrome. He indicated that appellant continued to have permanent work restrictions, which were unchanged.

By decision dated November 1, 2017, OWCP denied appellant's request for modification of the July 31, 2009 LWEC determination.

LEGAL PRECEDENT

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.[7] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[8]

[7] *Sue A. Sedgewick*, 45 ECAB 211 (1993).

[8] *Id.*

Section 8123(a) of FECA provides in pertinent part: "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[10]

ANALYSIS

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. McManus, and the second opinion physician, Dr. Orenstein.

The Board previously remanded this case, finding that once OWCP had determined that lymphedema was employment related, it should have further developed the medical evidence to determine if modification of the LWEC determination was warranted.

On April 20, 2016 Dr. McManus opined that appellant's symptoms and work restrictions remained unchanged.

On April 28, 2016 Dr. Orenstein, a second opinion Board-certified orthopedic surgeon, reviewed the SOAF and medical evidence, provided examination findings, and concluded that there was no objective of the accepted bilateral upper extremity lymphedema. He concluded that there was no material worsening of appellant's accepted conditions.

Dr. McManus reviewed Dr. Orenstein's report and disagreed with his findings. He related that appellant still had findings of traumatic lymphedema and observed that recent electrodiagnostic testing confirmed a worsening of appellant's right carpal tunnel syndrome. Thus, Dr. McManus disagreed with Dr. Orenstein's opinion, which attributed appellant's bilateral upper extremity edema to Raynaud's disease. Moreover, he reported that appellant had been evaluated for rheumatic disease in the past, with negative findings. Contrary to Dr. Orenstein's opinion that appellant should continue with the same work restrictions, Dr. McManus opined that appellant could not frequently reach and opined that the job activities of the constructed motor vehicle dispatcher exceeded his upper extremity work restrictions.

If there is disagreement between OWCP's referral physician and appellant's physician, OWCP will appoint a third physician who shall make an examination.[11] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[12] The Board finds that the medical opinions of Dr. McManus and Dr. Orenstein are of equal weight and are in

[9] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[10] *Bryan O. Crane*, 56 ECAB 713 (2005).

[11] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[12] *P.C.*, Docket No. 15-1013 (issued June 15, 2016); *Darlene R. Kennedy*, *supra* note 9.

conflict as to whether appellant's accepted conditions have worsened such that appellant is unable to perform the duties of the constructed position.

Because there remains an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the medical record and an updated SOAF, to an appropriate Board-certified physician or specialist in the proper field of medicine for an impartial medical examination as to whether appellant's accepted conditions have worsened such that he is unable to perform the duties of a motor vehicle dispatcher. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 1, 2017 is set aside and the case is remanded for further proceedings consistent with the above opinion.

Issued: September 17, 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