United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 18-1610**
	)	**Issued: April 25, 2019**
DEPARTMENT OF THE NAVY, NAVY PUBLIC WORKS CENTER, Norfolk, VA, Employer	)	

Appearances:
Neil C. Bonney, 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 August 20, 2018 appellant, through counsel, filed a timely appeal from a July 20, 2018 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.[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 Board notes that following the July 20, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish that modification of his October 31, 2007 loss of wage-earning capacity (LWEC) determination was warranted.

FACTUAL HISTORY

On June 17, 1996 appellant, then a 41-year-old roofer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his lower back when climbing and moving materials while in the performance of duty. On August 7, 1996 OWCP accepted his claim for right hip strain. On September 7, 1996 it expanded the acceptance of his claim to include lumbosacral strain, herniated disc L5-S1, right sciatica, and the resulting surgery on June 29, 1996 including hemilaminectomy, foraminotomy, on the right at L5-S1 with discectomy. On October 31, 1996 appellant underwent authorized lumbar fusion at L5-S1.

On December 26, 1996 OWCP placed appellant on the periodic rolls for payment of wage-loss compensation due to total disability. Appellant returned to part-time work on May 5, 1997 for four hours a day, five days a week with a 25-pound lifting restriction and no climbing, bending, or twisting. On March 16, 1998 he returned to work for eight hours a day.

On September 21, 1998 appellant filed a notice of recurrence (Form CA-2a) alleging that his June 17, 1996 employment injury rendered him disabled from work beginning September 18, 1998. On January 4, 1999 he underwent an authorized L4 right laminotomy, removal of instrumentation, and implantation of bone graft. On May 26, 1999 OWCP again placed appellant on the periodic rolls for wage-loss compensation due to total disability.

On May 24, 2007 the employing establishment offered appellant a light-duty position as an equipment, facilities, and services assistant working eight hours a day. The position was sedentary and required him to lift, push, and pull up to 10 pounds with the ability to alternate sitting and standing. Appellant was required to walk short distances for up to one hour a day. On June 12, 2007 he accepted that light-duty position and returned to work.

By decision dated October 31, 2007, OWCP found that the equipment, facilities, and services assistant position represented appellant's wage-earning capacity. It authorized wage-loss compensation benefits based on appellant's loss of wage-earning capacity (LWEC) in this position in the amount of $536.00 every 28 days.

On August 12, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that, on July 28, 2015, he stopped work due to his May 17, 1996 employment injuries. He indicated that he could only work four hours a day.

In an October 9, 2015 development letter, OWCP advised appellant that he should submit medical evidence in support of his claimed recurrence. It afforded him 30 days to respond. No response was received.

By decision dated November 16, 2015, OWCP denied appellant's claim for a recurrence of disability beginning on July 28, 2015.

On November 19, 2015 appellant responded to OWCP's request for information and asserted that his back condition had worsened such that he could no longer sit for eight hours a day. He provided a series of medical reports from Dr. Mark B. Kerner, a Board-certified orthopedic surgeon. Dr. Kerner opined that appellant's injury-related condition had worsened and that he required additional surgery.

On September 6, 2016 appellant requested reconsideration of the November 16, 2015 decision. By decision dated November 29, 2016, OWCP denied modification of the November 16, 2015 decision, finding that the record supported four hours disability, rather than total disability as appellant had claimed.

On March 6, 2017 appellant, through counsel, requested reconsideration of the November 29, 2016 decision. Counsel contended that appellant was not seeking total disability as described in OWCP's November 29, 2016 decision, but instead partial disability for four hours a day.

On May 22, 2017 OWCP informed appellant that as a formal LWEC determination had been issued on October 31, 2007, his request for reconsideration had been considered as a request for modification of the October 31, 2007 LWEC determination. It informed him of the standard for modifying an LWEC determination and afforded him 30 days to respond.

On June 13, 2017 Dr. Kerner examined appellant due to back pain. He diagnosed lumbar radicular pain and end of the battery life for appellant's spinal cord stimulator.

By decision dated June 23, 2017, OWCP denied modification of the October 31, 2007 LWEC determination. It found that appellant had not submitted medical opinion evidence establishing a change in his accepted conditions and that he had therefore not established a basis for modification of the October 31, 2007 LWEC determination.

Subsequently, in a note dated June 13, 2017, Dr. Kerner reported appellant's symptoms of worsening pain down his left leg. He also noted that appellant's spinal cord stimulator was not working properly. Dr. Kerner recommended additional diagnostic testing to rule out junctional stenosis at the level above appellant's fusion.

On June 26, 2017 appellant underwent a lumbar spine computerized tomography (CT) scan which demonstrated markedly increased degenerative disc disease at L3-4 as compared to his June 2016 injury. Dr. Nripendra C. Devanath, a diagnostic radiologist, opined, "The findings likely represent significantly worsened degenerative disc disease."

On August 4, 2017 Dr. Kerner examined appellant due to back pain and diagnosed lumbar stenosis, lumbago-sciatica due to displacement of lumbar intervertebral disc, insertion of spinal cord stimulator, and displacement of lumbar intervertebral disc without myelopathy. He recommended additional back surgery.

On September 18, 2017 Dr. Franklin M. Epstein, a Board-certified neurosurgeon acting as an OWCP district medical adviser (DMA), reviewed the statement of accepted facts (SOAF) and medical records. He found that appellant required additional back surgery causally related to his June 17, 1996 employment injuries and resulting back surgeries on June 29, 1996, October 31, 1996, and January 4, 1999. Dr. Epstein noted that appellant was experiencing a marked increase

in the level of his chronic pain because of new nerve compression at the L3-4 level, an "adjacent level" problem due to his prior spine fusions.

On December 7, 2017 appellant requested modification of the October 31, 2007 LWEC determination. He continued to request compensation for four hours a day.

By decision dated January 10, 2018, OWCP denied modification of the October 31, 2007 LWEC determination. It found that Dr. Kerner's reports failed to establish a material change in the nature and extent of appellant's injury-related condition.

On January 22, 2018 appellant again requested modification of the October 31, 2007 LWEC determination. He provided a January 16, 2018 report from Dr. Kerner who noted that he reduced appellant's work hours to four hours a day in July 2015. Dr. Kerner further noted that appellant had sustained a material change in his injury-related condition as demonstrated by the June 16, 2018 CT scan which confirmed severe stenosis at the level adjacent to appellant's previous lumbar fusions. He also noted that appellant's lumbar pain had progressed necessitating the reduction in his work hours from eight to four.

By decision dated April 26, 2018, OWCP denied modification of the October 31, 2007 LWEC determination.

On July 5, 2018 appellant, through counsel, again requested modification of the October 31, 2007 LWEC determination. In a letter dated June 29, 2018, counsel asserted that, after 19 years of working following his back injury, appellant requested leave without pay for four hours a day due to a worsening of his accepted condition. On June 12, 2018 appellant described his medical treatment from June 17, 1996 and his return to work for eight hours a day on September 20, 2007. He noted on December 16, 2012 that he was transferred to a different position as a facility service assistant. Appellant alleged that this position required sitting for extended periods of time using a computer and other technology tools. He tried various ergonomic chairs and desks, but he experienced uncontrolled nerve pain and spasms. On July 28, 2015 Dr. Kerner reduced appellant's work hours to four a day. Appellant requested wage-loss compensation for four hours a day from July 28, 2015 through May 1, 2017.

On January 31, 2017 Dr. Kerner continued to diagnose junctional stenosis above the L4 fusion. He noted that appellant was working four hours a day. In a note dated September 5, 2017, Dr. Kerner diagnosed chronic back pain and post-laminectomy syndrome. On December 5, 2017 he diagnosed post-laminectomy syndrome with junctional stenosis at L3-4. Dr. Kerner recommended surgery.

By decision dated July 20, 2018, OWCP denied modification of the October 31, 2007 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, represent a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it

remains undisturbed until properly modified.[4] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.[5]

OWCP has by regulation defined when modification of an LWEC determination should occur.[6]

> "If OWCP issues a formal loss of wage-earning capacity determination including a finding of no loss of wage-earning capacity, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP. Modification of such a determination is only warranted where the party seeking the modification establishes either that 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. However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision, such as where an employee has a demonstrated need for surgery.[7]
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> "Further definition as to when modification of a formal LWEC determination should occur if the claimant's medical condition has materially changed is provided in OWCP's procedures.[8] These procedures provide for modification of a[n] LWEC determination when "Current medical evidence demonstrates either: (a) a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability; or (b) that the work-related condition has improved and disability has decreased."

The burden of proof is on the party seeking modification.[9] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[10]

ANALYSIS

The Board finds that this case is not in posture for a decision.

OWCP accepted appellant's claim for right hip strain, lumbosacral strain, herniated disc L5-S1, right sciatica, and the resulting surgeries on June 29, 1996, October 31, 1996, and January 4, 1999. On October 31, 2007 it found that the employing establishment equipment,

[4] *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

[5] *Id.; J.H.*, Docket No. 16-0314 (issued May 12, 2016); *Sue A. Sedwick*, 45 ECAB 211 (1993).

[6] 20 C.F.R. § 10.511.

[7] *Id*.; *supra* note 3; *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).

[8] Federal (FECA) Procedure Manual, *id*. at Chapter 2.1501 (June 2013).

[9] *Supra* note 4; *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[10] *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

facilities, and services assistant position, working eight hours a day, represented appellant's wage-earning capacity. Beginning on July 28, 2015, appellant alleged that he could no longer work eight hours a day, but could only work four due to his accepted employment injuries.[11] He continued working four hours a day through May 1, 2017.

Dr. Kerner provided several reports and diagnostic tests. He opined that appellant's injury-related condition had worsened and that he required additional surgery. OWCP referred the medical evidence to its DMA, Dr. Epstein, who found that appellant required additional back surgery causally related to his June 17, 1996 employment injuries and accepted back surgeries on June 29, 1996, October 31, 1996, and January 4, 1999. He noted that appellant was experiencing a marked increase in the level of his chronic pain because of new nerve compression at the L3-4 level, an "adjacent level" problem from his prior spine fusions.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[12] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[13] Herein, appellant alleged and submitted medical evidence in support of his claim that his condition worsened following the issuance of an LWEC determination. OWCP began to develop the evidence by seeking an opinion from a DMA regarding his need for additional surgery. It failed, however, to seek clarification as to whether appellant's accepted employment-related conditions had materially worsened thereby disabling him from performing the duties of his LWEC position of equipment, facilities, and services assistant at the employing establishment.

On remand, OWCP shall create a new SOAF which properly describes appellant's equipment, facilities, and services assistant position, which was the basis of his LWEC determination, and provide position descriptions for any subsequent positions to which he was assigned including facility service assistant. It shall thereafter refer the medical evidence of record and the new SOAF to a physician in the appropriate field of medicine for an opinion as to whether appellant had a change in his employment-related medical conditions that rendered him disabled from his LWEC position on or after July 28, 2015. After this and such other development of the evidence as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

[11] *See Sharon C. Clement*, 55 ECAB 552 (2004) (the criteria for modifying formal LWEC determinations remains the same regardless of whether a given claimant continues to work or stops work after the issuance of the formal LWEC determination).

[12] *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *D.G.*, Docket No. 15-0702 (issued August 27, 2015); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[13] *S.S., id.*; *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development in accordance with this decision of the Board.

Issued: April 25, 2019
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