United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 18-0174**
	)	**Issued: August 23, 2019**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, Warner Robins, GA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 30, 2017 appellant filed a timely appeal from an October 13, 2017 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 this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the October 13, 2017 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to modify a September 18, 2014 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On September 17, 2002 appellant, then a 42-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on September 14, 2002 he was removing bolts from a vertical stabilizer on an aircraft when he sustained severe pain in the neck and right shoulder while in the performance of duty.

On March 14, 2003 OWCP accepted the claim for cervical neck strain and right shoulder pectoral muscle strain. On April 13, 2004 it noted that the claim was accepted for aggravation of degenerative disc disease at C4-5, C5-6, and C6-7 with anterior discectomy and fusion at C5-6 on April 9, 2004. OWCP also accepted the claim for intervertebral disc order with myelopathy of the cervical region.[3] Appellant returned to work in June 2004 and stopped work on September 28, 2007. He elected benefits from the Office of Personnel Management effective July 1, 2008 and then FECA benefits from OWCP effective March 2, 2010. Appellant later elected FECA benefits from OWCP retroactively to August 3, 2008.

In a June 12, 2013 report, Dr. George Stefanis, a Board-certified neurosurgeon and treating physician, noted that appellant was seen and doing "quite well." He indicated that appellant had "a little bit" of pain in the back of his neck and right trapezius, but no arm pain and no headaches at the base of the skull or signs of weakness. Dr. Stefanis noted that appellant had undergone a functional capacity evaluation (FCE) and it showed that he could return to work at a medium level.

On December 2, 2013 OWCP referred appellant for vocational rehabilitation services based on work restrictions provided by Dr. Stefanis.

In a letter dated December 31, 2013, the vocational rehabilitation counselor determined that appellant qualified for the jobs of salesperson and appliance repairer which were both found to be performed in sufficient numbers in the Warner Robins, Georgia area. The counselor attached a Labor Market Survey and described the skill sets which were light and within appellant's transferable skills. She noted that the entry-level salary was $10.00 per hour and "the median" was $13.00 per hour based on the potential employers contacted during the preparation of the Labor Market Survey. The counselor determined that appellant had the necessary skills for entry-level employment in these two job objectives. She explained that, according to potential employers contacted in the survey, appellant's skill set qualified him for entry-level jobs in these two positions.

[3] The record reflects that appellant has prior claims under OWCP File No. xxxxxx098, accepted for traumatic left bicipital tendinitis; OWCP File No. xxxxxx481, accepted for cervical disc and right shoulder impingement; and OWCP File No. xxxxxx529, accepted for left bicipital tendinitis and adhesive capsulitis.

In an April 30, 2014 report, Dr. Stefanis opined that appellant could work within the restrictions set forth in the FCE.

By a July 16, 2014 notice of proposed reduction, OWCP proposed to reduce appellant's wage-loss compensation benefits by $1,760.00 every four weeks based upon the determination that he could earn wages in the position of appliance repairer. It afforded him 30 days to submit evidence or argument in opposition to the proposed reduction.

In a letter dated August 6, 2014, appellant disagreed with the proposal to reduce his compensation. He noted that he had no knowledge, experience, or training in small appliance repair. Appellant did not submit additional evidence.

By decision dated September 18, 2014, OWCP finalized the LWEC determination finding that appellant had the capacity to earn wages as an appliance repairer with wages of $400.00 per week effective September 20, 2014. It found that the duties of the new position reflected on his work tolerance limitations established by the weight of the medical evidence, including the opinion of Dr. Stefanis that appellant was not totally disabled. A computation of compensation worksheet was included which documented the required application of the *Shadrick*[4] formula used to determine appellant's wage-earning capacity.

Appellant disagreed with the September 18, 2014 LWEC determination and timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a letter dated February 23, 2015, OWCP advised him that the hearing would be a telephonic hearing and held on April 8, 2015.

By decision dated May 19, 2015, the hearing representative affirmed the September 18, 2014 LWEC determination.

On June 13, 2015 appellant requested reconsideration. He provided a copy of an electromyography (EMG) scan dated March 20, 2015. Appellant asserted that, in addition to neck and shoulder pain, he had severe carpal tunnel syndrome, Guyon canal syndrome, and cubital tunnel syndrome of the left arm. He explained that, with these conditions, he was unable to perform work in the position of a small appliance repairer.

By decision dated July 14, 2015, OWCP denied modification of the May 19, 2015 decision. It found that the evidence of record was insufficient to modify the prior decision because the diagnoses appellant claimed disabled him from working were nonemployment-related conditions which postdated the accepted employment injury.

In July 22 and September 8, 2015 reports, Dr. Stefanis noted that, while appellant had a degenerated disc at C6-7, appellant remained able to work within the parameters of the FCE.

On December 10, 2015 appellant requested reconsideration of the July 14, 2015 decision. He noted that he had two other claims, OWCP File No. xxxxxxx481 for the right shoulder and OWCP File No. xxxxxx529 for the left shoulder. Appellant indicated that his new treating

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

physician, Dr. Cathy Harper-Hogan, Board-certified in internal medicine, had determined that he was totally disabled from work. Dr. Harper-Hogan's report was not submitted in support of his reconsideration request.

By decision dated March 10, 2016, OWCP denied modification of the July 14, 2015 decision. It explained that appellant had not provided reasoned medical evidence addressing why he would be unable to perform the position of appliance repairer. OWCP noted that he had not submitted medical evidence to establish a material worsening of the accepted work injury that would render him unable to perform the duties of the position.

On September 29, 2016 appellant requested for reconsideration. He provided a new FCE report, dated September 14, 2016, and asserted that it found that he had no competitive work ability. The FCE was completed by a physical therapist.

In a letter dated November 2, 2016, Dr. Carlos J. Giron, a pain medicine specialist, indicated that he concurred with the FCE findings of September 14, 2016 and agreed that appellant was unable to work.

In a November 29, 2016 report, Dr. Stefanis advised that appellant had degenerative changes in the cervical spine and noted that appellant was not working.

By decision dated December 28, 2016, OWCP denied modification of the March 10, 2016 decision.

On March 16, 2017 OWCP referred appellant for a second opinion examination for an updated assessment of his work-related condition with Dr. Jeffery Fried, a Board-certified orthopedic surgeon.

In an April 11, 2017 report, Dr. Fried noted appellant's history of injury and treatment and examined appellant. He explained: appellant had severe limitation of cervical spine motion secondary to his previous fusion; some decreased two-point discrimination of the C7 distribution; and limitation of motion of the right shoulder. Dr. Fried noted that the subjective complaints corresponded to the objective findings. He diagnosed sprain of the neck, sprain of the right shoulder, and an intervertebral disc disorder with myelopathy of the cervical region as work related. Dr. Fried opined that appellant's work-related conditions had not resolved and explained that the cervical fusion of three levels had resulted in a loss of range of motion of the neck and the right shoulder. He also noted that a recent EMG and a nerve study from June 2, 2016, revealed a chronic left C7 radiculopathy. Dr. Fried also noted that a computerized tomography myelogram dated April 28, 2016 revealed degenerative changes above and below the level of the fusion, which was necessary due to his cervical disc displacement. He opined that appellant had reached maximum medical improvement and that no additional medical recovery was expected. Dr. Fried indicated that the pain management was necessary to control appellant's pain. He advised that appellant could not return to his job as an aircraft mechanic.

On July 6, 2017 appellant requested reconsideration.

OWCP received reports and copies of reports by Dr. Giron dating from December 11, 2015 to September 20, 2017, noting his continuing treatment of appellant.

OWCP also received reports from Dr. Stefanis. They included an April 25, 2017 report in which he noted that appellant was seen for neck and right shoulder pain, with a new complaint of suboccipital headaches. In a June 27, 2017 report, Dr. Stefanis advised that appellant's symptoms had not changed significantly. In an August 8, 2017 report, he noted that he was providing a letter to go over the questions regarding current diagnosed conditions that were causally related to appellant's work injury. Dr. Stefanis explained that appellant had problems at C6 to C7 and C7 to T1 below a surgical fusion that was done from C3 to C6. He opined that it was a work-related injury that had several FCE's that had been performed over the years that allowed appellant to return to work at a medium capacity. Dr. Stefanis opined that "[w]e've had several of these done, but [appellant] has not been given a job. We have [stated] that he could return [to] work within the provisions of the FCE."

In a September 26, 2017 report, Dr. Stefanis advised that appellant was unable to work and recommended trigger point injections in the right trapezius muscle to provide pain relief.

By decision dated October 13, 2017, OWCP denied modification of the December 28, 2016 decision.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[5] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[6]

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] OWCP's procedures provide that, "[i]f a formal [LWEC] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC]."[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

[5] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[6] *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

[7] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.812.9(a) (June 2013); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

[9] *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the September 18, 2014 LWEC determination.

Appellant does not assert that modification of his LWEC determination is warranted because he has been retrained or otherwise vocationally rehabilitated.

In its September 18, 2014 LWEC determination and accompanying documentation, OWCP clearly explained its calculations used in finding appellant's wage-earning capacity in the position of appliance repairer, with wages of $400.00 per week effective September 20, 2014. It found that the duties of the new position were within his work tolerance limitations as established by the weight of the medical evidence and FCE's. Additionally, OWCP found that appellant's training, education, and work experience had been properly considered in determining the suitability of the position and represented his wage-earning capacity. Therefore, the Board finds that he has not met his burden of proof to establish that the original determination was erroneous.

Thus, appellant must establish a material change in the nature and extent of the injury-related condition by establishing that the current medical evidence demonstrates a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.[10] He asserts that he cannot perform the selected position due to his present medical conditions.

In support of appellant's request to modify the LWEC determination, he has submitted numerous reports from Dr. Stefanis regarding his status following the September 18, 2014 LWEC determination. In a November 29, 2016 report, Dr. Stefanis noted degenerative changes in appellant's cervical spine and noted that he was not working. In reports dated from April 25 to August 8, 2017, he noted that appellant was seen for neck and right shoulder pain, with a new complaint of suboccipital headaches, that appellant's symptoms had been stable, and reiterated the accepted conditions in the claim. In the August 8, 2017 report, Dr. Stefanis opined that "[w]e've had several [FCE's,] but [appellant] has not been given a job. We have [stated] that he could return [to] work within the provisions of the FCE." The Board finds that these reports and FCE's do not support that appellant could not perform the duties of the appliance repairer position and are therefore insufficient to establish modification of the LWEC determination.

In a September 26, 2017 report, Dr. Stefanis advised that appellant was "not fit for work" and recommended trigger point injections in the right trapezius muscle to provide pain relief. In this report, he did not provide an explanation as to why appellant was unfit for work nor did he provide medical rationale as to why or how there had been a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.[11] This report is insufficient to require modification of the LWEC as it does not contain medical rationale

[10] *Supra* note 8 at Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3(a)(2) (June 2013).

[11] *See id*.

explaining the relationship between the accepted employment conditions and appellant's current inability to perform any employment duties.[12]

Reports by Dr. Giron from December 11, 2015 to September 20, 2017 were submitted, but do not provide an opinion as to whether there had been a material change in the nature and extent of appellant's injury-related condition. As such, these reports are insufficient to require modification of the LWEC determination.[13]

To obtain an updated assessment of appellant's work-related conditions, OWCP referred him for examination with a second opinion physician, Dr. Fried. Dr. Fried indicated in his April 11, 2017 report that appellant could not return to work as an aircraft mechanic. However, he did not address appellant's ability to work as an appliance repairer, upon which the LWEC determination was based. As such, the second opinion report of Dr. Fried is insufficient to require modification of the LWEC determination.

The record contains a new FCE dated September 14, 2016 and appellant argued that it found that he had no competitive work ability. However, this report is insufficient to warrant modification of the LWEC determination because it was from a physical therapist. Physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.[14]

The Board finds that appellant has not met his burden of proof to establish 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. Appellant has therefore not met his burden of proof to establish that the September 18, 2014 LWEC determination should be modified.

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

[13] *Supra* note 9.

[14] *Id.*; *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuck*, 57 ECAB 316 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).

CONCLUSION

The Board finds that appellant has not met his burden of proof to modify a September 18, 2014 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 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