

**United States Department of Labor
Employees' Compensation Appeals Board**

D.P., Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Leesburg, VA, Employer**

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**Docket No. 18-1384
Issued: February 21, 2019**

Appearances:

Sally F. LaMacchia, Esq., for the appellant¹
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 July 2, 2018 appellant, through counsel, filed a timely appeal from a June 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated August 22, 2017, which became final after 30 days of issuance and is not subject to further review.² As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation

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 20 C.F.R. § 501.6(d); see *P.S.*, Docket No. 18-0718 (issued October 26, 2018); *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *C.M.*, Docket No. 15-0471 (issued April 27, 2015); *D.A.*, Docket No. 08-1217 (issued October 6, 2008).

Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 28, 1987 appellant, then a 35-year-old air traffic controller, filed an occupational disease claim (Form CA-2) alleging intermittent respiratory and cardiac problems, anxiety, chronic fatigue, depression, intermittent muscular problems, and temporomandibular joint (TMJ) dysfunction. By decision dated April 23, 1992, OWCP accepted her claim for anxiety disorder, fatigue, aggravation of asthma, and fibromyositis. It authorized payment of wage-loss compensation and medical benefits on May 23, 1994.

On December 17, 2012 OWCP referred appellant, a list of questions, and a statement of accepted facts (SOAF) for a second opinion evaluation with Dr. Anjali Pathak, a Board-certified psychiatrist. In her January 28, 2013 report, Dr. Pathak diagnosed anxiety disorder, conversion disorder/somatization disorder, and dependent personality disorder. She opined that appellant's anxiety disorder was causally related to her federal employment. Dr. Pathak found that appellant's symptoms of anxiety were chronic and pervasive and likely to interfere with her ability to work at the employing establishment. She concluded that appellant was not currently a candidate for vocational rehabilitation.

On March 27, 2013 OWCP requested clarification from Dr. Pathak to further explain her findings. In an April 23, 2013 report, Dr. Pathak opined that appellant's symptoms of anxiety including feelings of apprehension, irritability, and labiality of affect, as well as nightmares and flashbacks, were directly related to her work. She reviewed appellant's post-employment activities including running for political office and traveling abroad. Dr. Pathak opined that appellant was not totally disabled and could work for an agency not related to the employing establishment. She determined that appellant could participate in vocational rehabilitation and that there were no psychiatric work restrictions other than not working for the employing establishment.

On March 10, 2014 Dr. Leonard J. Hertzberg, a Board-certified psychiatrist, diagnosed anxiety disorder. He opined that appellant continued to be disabled from working at the employing

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 16-1198 (issued August 22, 2017), *petition for recon. denied*, Docket No. 16-1198 (issued May 17, 2018); Docket No. 18-0038 (issued January 4, 2019).

establishment. Dr. Hertzberg noted, “It is not envisioned that [appellant] will be fit to work in any capacity and her status is regarded as permanent.”

In a letter dated January 27, 2015, OWCP proposed to reduce appellant’s compensation benefits as she was no longer totally disabled and had the capacity to earn wages as a customer service representative at the rate of \$431.60 per week. It relied on Dr. Pathak’s April 23, 2013 report and afforded appellant 30 days to respond.

By decision dated January 8, 2015, OWCP terminated appellant’s wage-loss compensation and medical benefits effective January 8, 2015 for the conditions of aggravation of asthma, fatigue, and fibromyositis. It noted that she was entitled to continued medical benefits and wage-loss compensation as a result of her anxiety disorder.

By decision dated March 2, 2015, OWCP reduced appellant’s loss of wage-earning capacity (LWEC) benefits, effective March 8, 2015, based on her capacity to earn wages as a customer service representative. It based her work restrictions on those set forth in the April 23, 2013 report of Dr. Pathak. On March 30, 2015 counsel requested a review of the written record from OWCP’s Branch of Hearings and Review of the wage-earning capacity determination. By decision dated December 14, 2015, OWCP’s hearing representative found that the March 2, 2015 wage-earning capacity determination was appropriate and that appellant had not established that the decision should be modified.

On January 5, 2016 appellant, through counsel, requested reconsideration of OWCP’s January 8, 2015 decision terminating appellant’s wage-loss compensation and medical benefits for fatigue, aggravation of asthma, and fibromyositis. By decision dated January 27, 2016, OWCP denied modification of its January 8, 2015 termination decision.

On May 16, 2016 counsel appealed the December 14, 2015 LWEC decision to the Board, contending that Dr. Pathak’s reports were stale and that the SOAF provided her was inaccurate.

On January 25, 2017 appellant, through counsel, requested reconsideration of the January 27, 2016 termination decision on January 25, 2017. By decision dated April 12, 2017, OWCP denied modification of the January 27, 2016 termination decision.⁵

On May 8, 2017 OWCP referred appellant for an additional second opinion evaluation with Dr. Pathak. On June 15, 2017 Dr. Pathak completed a report reviewing appellant’s history of injury. She found that appellant exhibited a mildly depressed mood, and that she reported symptoms of anxiety with triggers such as meeting people who work for the employing establishment and sexual harassment claims in the news. Dr. Pathak diagnosed anxiety disorder. She found that appellant was not currently disabled from a psychiatric standpoint from performing the duties of her date-of-injury job. Dr. Pathak also found that the anxiety appellant experienced

⁵ On October 5, 2017 counsel appealed the April 12, 2017 decision to the Board. In its January 4, 2019 decision, the Board found that OWCP met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits for the accepted conditions of aggravation of asthma, fatigue, and fibromyositis, effective January 8, 2015. The Board further found that she had not established continuing employment-related disability or residuals due to the accepted physical conditions after January 8, 2015. Docket No. 18-0038 (issued January 4, 2019).

was chronic and would not resolve completely. She concluded that appellant's accepted condition of anxiety state had not resolved due to her ongoing OWCP claim. Dr. Pathak noted, "This perpetuates the memory of the harassment she received while employed at the [employing establishment]."

In its August 22, 2017 decision,⁶ the Board found that OWCP had met its burden of proof to reduce appellant's monetary benefits effective March 8, 2015 based on her capacity to earn wages in the constructed position of customer service representative based on Dr. Pathak's April 23, 2013 report.

On November 16, 2017 OWCP requested a supplemental report from Dr. Pathak. Dr. Pathak responded on December 7, 2017 and opined that appellant was not currently disabled from a psychiatric standpoint other than her inability to work at the employing establishment. She noted that appellant currently experienced anxiety symptoms when exposed to triggers that remind her of the employment-related sexual harassment. Dr. Pathak found, "She may not be able to return to work as an air traffic controller from a psychiatric standpoint." She noted that appellant could return to work for any employer not related to the employing establishment.

On June 11, 2018 appellant, through counsel, requested reconsideration of the March 2, 2015 LWEC determination. She again contended that Dr. Pathak's opinion was stale and based on an improper SOAF. Appellant also submitted a March 22, 2018 report from Dr. Hertzberg. Dr. Hertzberg examined appellant and diagnosed anxiety disorder. He noted that appellant's symptoms were exacerbated by discussion of her employing establishment workplace stressors. Dr. Hertzberg opined that appellant was permanently disabled and unable to work with or without accommodation. He concluded that appellant's present permanent psychiatric disability was a direct result of her work-related injury.

By decision dated June 28, 2018, OWCP denied appellant's June 11, 2018 reconsideration request. It found that the arguments submitted in support of the June 11, 2018 reconsideration request were repetitious. OWCP further found that Dr. Hertzberg's March 22, 2018 report was not relevant as he had not discussed appellant's ability to work during 2015 when the LWEC determination was issued.

LEGAL PRECEDENT

A LWEC 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.⁷ As a general rule, once a LWEC of an injured employee is determined, it remains undisturbed regardless of actual earnings or lack of earnings until properly modified.⁸ A formal LWEC determination will be modified when: (1) the original rating was in error; (2) the claimant's medical condition

⁶ *Supra* note 4.

⁷ K.K., Docket No. 17-0242 (issued May 9, 2017).

⁸ *Id.*; *Sharon C. Clement*, 55 ECAB 552 (2004).

has materially changed; or (3) the claimant has been vocationally rehabilitated.⁹ The burden of proof is on the party attempting to show that modification of the LWEC determination is appropriate.¹⁰ Any request for modification should be reviewed carefully by OWCP to determine whether the claimant is seeking a reconsideration of a recently issued LWEC determination or requesting modification of the LWEC determination.¹¹ There is no time limit for a claimant to submit a request for modification of a LWEC determination.¹²

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁴

A request for reconsideration must be received by OWCP within one year of the last merit decision.¹⁵ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁷

ANALYSIS

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

⁹ *E.H.*, Docket No. 17-0963 (issued August 24, 2018).

¹⁰ *Supra* note 7.

¹¹ *Supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4(a) (June 2013).

¹² *A.G.*, Docket No. 14-1347 (issued December 9, 2014).

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(3); *see also H.W.*, Docket No. 18-1175 (issued December 6 , 2018); *L.S.*, Docket No. 18-0811 (issued November 13, 2018).

¹⁵ *Id.* at § 10.607(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁶ *Id.* at § 10.608(b).

¹⁷ *Id.*; *H.W.*, *supra* note 14.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously consideration in the August 22, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸

Following the Board's August 22, 2017 decision, appellant filed a request for reconsideration on June 11, 2018 and repeated her previous arguments made before the Board regarding Dr. Pathak's April 23, 2013 report. She also submitted medical evidence from Dr. Hertzberg dated March 22, 2018.

Although appellant requested reconsideration, as noted above, when the underlying issue is LWEC, an initial question is whether the claimant has submitted an application for reconsideration of a recent LWEC determination or has requested modification of LWEC determination.¹⁹ This requires that OWCP conduct a limited review of the evidence or argument submitted to determine if the claimant is alleging either that the original determination was in error or that her injury-related condition had worsened.²⁰ While appellant, through counsel, resubmitted arguments regarding the original LWEC determination which had previously been reviewed by the Board,²¹ she also submitted new medical evidence from Dr. Hertzberg. The Board has held that, when an LWEC has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of the LWEC is warranted.²² In this case, Dr. Hertzberg supported that appellant was totally disabled on March 22, 2018 due to her accepted employment injuries. Therefore, appellant has submitted medical evidence with respect to one of the criteria for an LWEC modification in asserting that her injury-related condition had worsened.²³

The Board finds that OWCP should have adjudicated appellant's June 11, 2018 request as a request for modification of the March 2, 2015 LWEC determination. This adjudication should have included a merit review of the evidence submitted in support of the request.²⁴ The Board will, therefore, remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve her appeal rights.

¹⁸ *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

¹⁹ *B.R.*, Docket No. 17-0635 (issued August 2, 2017).

²⁰ *Supra* note 11 at Chapter 2.1501.4(b).

²¹ These repetitious arguments alone would not warrant treating her request as a request for modification of the LWEC. See *H.W.*, *supra* note 14; *G.A.*, Docket No. 14-1505 (issued November 5, 2014) (repetitious evidence and arguments should be evaluated under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(3) rather than as a request for modification of an LWEC).

²² *Supra* note 9.

²³ *Id.*

²⁴ *Id.*

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with decision of the Board.

Issued: February 21, 2019
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