

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

C.C., Appellant)	
)	
and)	Docket No. 18-1127
)	Issued: January 29, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Orlando, FL, Employer)	
)	

Appearances:
Ronald S. Webster, 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 May 14, 2018 appellant, through counsel, filed a timely appeal from a March 13, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over 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 met his burden of proof to modify a February 19, 2010 loss of wage-earning capacity (LWEC) determination, effective April 18, 2011.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

In a claim adjudicated by OWCP under File No. xxxxxx661, OWCP accepted that appellant, then a 42-year-old customs and border protection officer, was injured in a motor vehicle accident on February 27, 1990. The accepted injuries were: closed fracture of left rib(s); contusion of left shoulder and upper arm; closed fracture of right carpal bone; closed fractures of bilateral tibia and fibula; fractures of phalanges of left third and fourth toes of foot; and tear of medial meniscus of the right knee. Appellant returned to work following his injury.

In a claim adjudicated under OWCP File No. xxxxxx318, OWCP accepted that on July 24, 2007 appellant sprained his right ankle and the medial collateral ligament of his right knee when he fell down stairs. It later expanded acceptance of this claim to include aggravation of degenerative arthritis of the right knee. Appellant subsequently returned to work for intermittent periods, until he had a total arthroplasty of the right knee on October 31, 2008. OWCP placed him on the periodic compensation rolls in December 2008.⁴

In June 2009 OWCP referred appellant for vocational rehabilitation services. Based on labor market analysis prepared by the vocational rehabilitation specialist, by letter dated January 6, 2010, OWCP proposed to reduce appellant's entitlement to monetary compensation due to his ability to earn wages as a telecommunication dispatcher. By decision dated February 19, 2010, it reduced appellant's compensation based on his ability to earn wages in the constructed position of telecommunication dispatcher.⁵ On October 19, 2009 appellant elected to receive Office of Personnel Management (OPM) retirement benefits in lieu of FECA benefits, effective November 30, 2009. OWCP terminated his FECA compensation effective November 30, 2009.

On August 29, 2011 appellant filed a claim for compensation (Form CA-7) for the period April 18, 2011 to present. By decision dated October 31, 2011, OWCP denied that appellant sustained a recurrence of disability on April 18, 2011. Appellant requested a hearing. On May 25,

³ Docket No. 16-1237 (issued May 3, 2017).

⁴ On January 29, 2010 OWCP administratively combined File Nos. xxxxxx661 and xxxxxx318, with the former serving as the master file.

⁵ The telecommunication dispatcher position was sedentary and required no climbing, balancing, stooping, kneeling, crouching, or crawling. On February 25, 2009 Dr. Christopher Mason, appellant's attending podiatrist, provided restrictions of 15 minutes per hour standing and walking with pushing, pulling, and lifting limited to 20 pounds and no squatting, kneeling, or climbing.

2012 an OWCP hearing representative set aside the October 31, 2011 decision and remanded the case to OWCP for further development of the medical evidence.

On August 9, 2012 OWCP expanded acceptance of appellant's claim under OWCP File No. xxxxxx661 to include the condition of abnormality of gait.

By *de novo* merit decision dated November 7, 2012, OWCP again denied that appellant sustained a recurrence of disability on April 18, 2011. The November 7, 2012 decision was affirmed by an OWCP hearing representative on May 30, 2013.

Appellant, through counsel, requested reconsideration on April 24, 2014 and December 15, 2014. In merit decisions dated July 23, 2014 and January 14, 2015, OWCP denied modification of the prior decisions, finding that appellant had not established a recurrence of disability commencing April 18, 2011.

Appellant, through counsel, again requested reconsideration on May 26, 2015. By merit decision dated March 21, 2016, OWCP denied modification of its prior decisions.

Appellant subsequently appealed that decision to the Board. By order dated May 3, 2017, the Board set aside the March 21, 2016 decision, finding that the case was not in posture for decision because OWCP applied the standard of review for a timely request for reconsideration rather than the standard for modifying an LWEC determination.⁶ The Board remanded the case to OWCP for adjudication under the proper standard.

Medical evidence relevant to appellant's condition beginning April 18, 2011 included an October 27, 2011 letter in which Dr. Mason advised that appellant's antalgic gait caused secondary and compensatory pain to his knee, hip, and, he suspected, to his low back. In November 14, 2011 reports, Dr. Mason noted injecting appellant's right ankle. He indicated that appellant could not climb, or squat, and standing and walking were limited and commented, "continue light duty[,] sit down only."

Dr. Richard Steinfield, a Board-certified orthopedic surgeon, provided a second opinion evaluation on March 6, 2012. Following his examination, he diagnosed history of multiple traumatic injuries, obesity, Trendelenburg gait, and chronic low back pain. Dr. Steinfield advised that all accepted work-related conditions under both OWCP File No. xxxxxx661 and OWCP File No. xxxxxx318 had resolved with no residuals and that appellant's gait could be suggestive of degenerative joint disease of the left hip and back problems which were not related to the 1990 injury.

OWCP determined that a conflict in medical opinion had been created regarding the cause of appellant's current disability, and gait and back problems, and referred him to Dr. Robert W. Elkins, Board-certified in orthopedic surgery. In reports dated May 12 and July 18, 2012, Dr. Elkins diagnosed adhesive capsulitis of the right shoulder with marked limitation of motion, decreased wrist range of motion, left knee osteoarthritis with prior surgery, and right ankle loss of dorsiflexion. He advised that, regarding the accepted contusion of the upper arm and shoulder,

⁶ Docket No. 16-1237 (issued May 3, 2017).

appellant had moderate adhesive capsulitis and decreased range of motion that was probably post-traumatic arthritis of the shoulder joint. Dr. Elkins found that the closed fracture of ribs had resolved, and the closed fracture of carpal bones (wrist) had resolved with restricted range of motion in all modalities. He advised that the fracture of phalanges of the foot had resolved without residuals, but that the closed fracture of tibia and fibula, and tear of medial meniscus of right knee had remaining residuals which contributed to his limp. Dr. Elkins also noted that appellant had a total knee replacement due to aggravation of post-traumatic arthritis, and loss of ankle range of motion, which also contributed to his limp.

In a report dated April 3, 2013, Dr. Thomas F. Winters, Jr., a Board-certified orthopedist, noted seeing appellant in follow-up for his right knee. He noted that appellant was also having significant left knee symptoms and provided restrictions of lifting 20 pounds with limited squatting and climbing.

In an April 3, 2013 report, Dr. Mason noted that appellant had not been seen since 2011. He diagnosed severe degenerative changes of the left ankle and performed an injection. In a treatment note dated September 25, 2013, Dr. Mason indicated that appellant had chronic left ankle osteoarthritis. In correspondence dated October 7, 2013, he advised that appellant had progressive traumatic degenerative changes in his left ankle that would ultimately require an ankle joint fusion or arthroplasty. Dr. Mason saw appellant in follow up on May 23, 2014, noting that he had chronic pain and discomfort associated with osteoarthritis, significant degenerative changes, and joint effusion. In an undated report, received by OWCP on December 15, 2014, Dr. Mason noted that he was mainly involved with treating the accepted conditions of appellant's lower extremities. He opined that appellant's condition was progressive in nature and becoming worse with increased degenerative changes of the knee and ankle directly related to the 1990 and 2007 employment injuries. Dr. Mason indicated that appellant had restrictions regarding his ability to walk, climb, stoop or other use of either extremity due to increasing changes, which caused difficulties in activities of daily living. He concluded that appellant obviously could not work based on these restrictions as they would cause additional pain and discomfort.

In an April 20, 2015 witness statement, under direct examination by counsel, Dr. Mason indicated that the employment injuries caused worsening post-traumatic degenerative changes of appellant's left ankle such that at some point he would need either a fusion or joint replacement. He described current complaints of severe pain and discomfort and opined that, if appellant worked, it would have to be a sit-down job with minimal ambulation but, in his opinion, appellant was totally disabled due to the severe pain and discomfort of his left ankle that had existed at least since 2011.

By decision dated June 20, 2017, OWCP found that the medical evidence of record was insufficient to warrant modification of the February 19, 2010 LWEC determination.

Appellant, through counsel, again requested reconsideration on December 20, 2017.

In a December 11, 2017 report, Dr. Mason noted that appellant had been a long time patient. By way of history, he indicated that appellant had other accepted conditions of the shoulder, arms, knees, and aggravation to degenerative conditions, and other significant injuries that were treated by other physicians. Dr. Mason opined that by 2011 and certainly within a year

or two after that, appellant would not have been able to work uninterruptedly at any employment due to the numerous and very painful injuries he had. He concluded that he believed that appellant was permanently and totally disabled from his foot and ankle injuries alone, maintaining that it was absurd to think that an individual who had such injuries could have worked since 2011.

By decision dated March 13, 2018, OWCP denied modification of the February 19, 2010 LWEC determination.

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 for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁷ A loss of wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.⁸ Generally, an employee's actual earnings best reflect his wage-earning capacity.⁹ 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.¹⁰

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.¹¹ Modification of a wage-earning capacity 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.¹² The burden of proof is on the party seeking modification.¹³

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the February 19, 2010 LWEC determination effective April 18, 2011.

Appellant has not alleged that he had been retrained or otherwise vocationally rehabilitated, or that the February 19, 2010 LWEC determination was erroneous. He has alleged that his accepted conditions worsened such that he became totally disabled from all work as a result of the accepted condition commencing April 18, 2011. Since OWCP found that appellant could perform

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

⁸ *See Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁹ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹⁰ *Id.*

¹¹ *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

¹² 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).

¹³ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

the duties of a telecommunication dispatcher, the issue is whether there has been a material change in his work-related condition that would render him unable to perform those prescribed duties.¹⁴ This is primarily a medical question.¹⁵ In reviewing the medical evidence of record, the Board finds that appellant has failed to provide sufficient evidence to establish that a modification of the February 19, 2010 LWEC determination is warranted.¹⁶

In his April 2, 2013 report, Dr. Winters noted seeing appellant in follow-up and provided lifting restrictions of 20 pounds with limited squatting and climbing. The lifting requirements of the constructed position of telecommunication dispatcher are 10 pounds occasionally, and stooping, crouching, crawling, and climbing are never required. Dr. Winters' report is, therefore, insufficient to establish that appellant could not perform the position of telecommunication dispatcher.¹⁷

The multiple reports from Dr. Mason commencing October 27, 2011 also do not establish a material worsening of an accepted condition. His reports do not contain a rationalized opinion explaining how the residuals of the employment injuries prevented appellant from performing the duties of telecommunication dispatcher position, commencing April 18, 2011. Dr. Mason provided examination findings, described the chronicity of appellant's pain, provided injections, and opined that appellant was totally disabled. In his most recent report dated December 11, 2017, he noted additional accepted conditions and indicated that appellant had been his patient for a number of years.¹⁸ Dr. Mason opined that, by 2011, and certainly within a year or two after that, appellant would not have been able to work uninterruptedly at any employment due to the numerous and very painful injuries he had. He concluded that he believed that appellant was permanently and totally disabled from his foot and ankle injuries alone. The Board has held that medical conclusions unsupported by facts and rationale are of limited probative value.¹⁹ Dr. Mason did not explain why appellant was unable to perform the duties of the telecommunication dispatcher position on which the February 19, 2009 LWEC was based. In fact, he did not address the telecommunication dispatcher position at all. The Board finds Dr. Mason's opinion insufficient to establish a material change in the injury-related conditions such that the February 19, 2010 LWEC determination should be modified.²⁰

Counsel asserts on appeal that the reports of Dr. Mason were sufficient to establish that appellant was totally disabled beginning April 18, 2011. The Board, however, finds the medical evidence of record fails to establish a material worsening of the accepted conditions such that

¹⁴ *Phillip S. Deering*, 47 ECAB 692 (1996).

¹⁵ *R.S.*, Docket No. 15-1229 (issued October 2, 2015).

¹⁶ *See R.L.*, Docket No. 15-1337 (issued January 27, 2016).

¹⁷ *See A.N.*, Docket No. 16-0166 (issued February 1, 2016).

¹⁸ It is unclear if Dr. Mason continues to be appellant's treating podiatrist. Dr. Mason's last treatment note of record is dated May 13, 2014.

¹⁹ *C.B.*, Docket No. 08-2268 (issued May 22, 2009).

²⁰ *B.B.*, Docket No. 17-1757 (issued March 14, 2018).

appellant was precluded from performing his duties as a telecommunication dispatcher commencing April 11, 2011. Thus, appellant has not met his burden of proof.²¹

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 has not met his burden of proof to establish that the February 19, 2010 LWEC should be modified, effective April 18, 2011.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 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

²¹ *S.J.*, Docket No. 17-0449 (issued May 7, 2018).