United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
	)	
and	)	**Docket No. 19-0515**
	)	**Issued: July 25, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Baltimore, MD, Employer	)	

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from an October 31, 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 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 her burden of proof to establish modification of the October 6, 2015 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On February 22, 2013 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on February 21, 2013 she injured her right knee while in the performance of duty. OWCP accepted her claim for a closed fracture of the right patella, a right knee contusion, and right knee sprain of the lateral collateral ligament.

On February 23, 2013 appellant underwent an open reduction and internal fixation of the right patella fracture. OWCP paid her wage-loss compensation for total disability beginning April 8, 2013. Appellant returned to part-time modified employment on August 13, 2013 and full-time modified employment on October 15, 2013. On May 28, 2014 she underwent a right patellofemoral debridement and removal of patella hardware.[3] Following the surgery, appellant returned to part-time modified employment on August 22, 2014 and to full-time modified employment on September 30, 2014.[4]

In a duty status report (Form CA-17) dated September 30, 2014, Dr. Todd Curran, an osteopath, found that appellant could work with restrictions of sitting for two hours per day, standing and walking for six hours per day, lifting up to 25 pounds, and twisting, pushing, and pulling for two hours per day.

On October 3, 2014 appellant accepted a position as a modified mail handler. The position required lifting up to 25 pounds, standing and walking up to six hours, sitting for two hours, and twisting, pushing, and pulling up to two hours respectively.

In a duty status report (Form CA-17) dated October 13, 2014, Dr. Curran advised that appellant could perform unrestricted sitting and intermittent standing and walking for eight hours per day for 20 minutes per hour.

By decision dated October 6, 2015, OWCP reduced appellant wage-loss compensation to zero as her actual earnings as a modified mail handler, effective October 3, 2014, fairly and reasonably represented her wage-earning capacity and established that she had no loss of earning capacity.

On October 13, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. Following a June 14, 2016 telephonic hearing, by decision dated August 25, 2016, OWCP's hearing representative affirmed the October 6, 2015 LWEC

[3] OWCP accepted that appellant had sustained a recurrence of disability beginning May 28, 2014 and paid her wage-loss compensation for total disability.

[4] By decision dated June 16, 2015, OWCP granted appellant a schedule award for seven percent permanent impairment of the right lower extremity.

determination. She noted that on August 18, 2015 appellant had resumed her bid appointment as a forklift operator in order to receive compensation for overtime work.

In a September 22, 2017 duty status report (Form CA-17), Dr. Curran advised that appellant could stand and walk for 20 minutes per hour, lift up to 25 pounds, and perform no kneeling.

In a report dated December 19, 2017, Dr. Curran evaluated appellant due to right knee pain. He discussed her history of a May 2014 open reduction and internal fixation of the right patella and diagnosed a healed closed fracture of the right patella and skin paresthesia. Dr. Curran advised that appellant required a special chair. In a disability certificate of even date, he found that she could resume work with restrictions of occasionally lifting up to 25 pounds from floor to waist and 20 pounds from floor to shoulder, carrying 20 pounds, and pushing and pulling up to 65 pounds. Dr. Curran further found that appellant could frequently stand and walk alternating the standing with occasional sitting.

On December 29, 2017 appellant filed a claim for compensation (Form CA-7) requesting intermittent wage-loss compensation from December 9 to 22, 2017. She continued to file claims for wage-loss compensation for disability subsequent to December 22, 2017.

In a statement dated December 29, 2017, the employing establishment noted that appellant had driven a forklift as part of the duties of her modified employment beginning in 2014. It advised that a September 22, 2017 duty status report (Form CA-17) provided work restrictions which precluded her use of a forklift. The employing establishment offered appellant a modified assignment within her new work restrictions, which she accepted on December 7, 2017. She stopped work on December 11, 2017.

In a development letter dated January 4, 2018, OWCP informed appellant that she should file a notice of recurrence of disability (Form CA-2a) and advised her of the type of evidence necessary to establish that she had sustained an employment-related recurrence of disability. It afforded her 30 days within which to submit the necessary evidence.

By decision dated March 1, 2018, OWCP denied appellant's request for wage-loss compensation for the period beginning December 11, 2017. It found that she had not established that she was disabled due to her accepted employment injury.

Thereafter, appellant submitted a December 25, 2018 notice of recurrence (Form CA-2a) beginning December 9, 2017 causally related to her February 21, 2013 employment injury. She attributed her recurrence of disability to the withdrawal of her limited-duty position.

On March 7, 2018 appellant requested an oral hearing before an OWCP hearing representative.

In a statement received March 13, 2018, appellant related that the employing establishment had informed her that she could no longer operate a forklift and relocated her to the third floor. She maintained that she had used a broken or damaged chair from October 3, 2014 to August 15, 2015. Appellant asserted that her physician had found that she could not perform the

October 3, 2014 offered position, but the position was not revised. She related that she had operated a forklift from August 15, 2015 until December 8, 2017.

A telephonic hearing was held on August 17, 2018. Appellant related that beginning in August 2015 she had operated a forklift at work. She advised that she was unable to perform the job for which she was rated in 2014. Appellant's physician had reviewed the 2014 position and found that appellant had to alternate sitting and standing. Appellant also alleged that the employing establishment changed her job and refused to provide her the chair ordered by her physician.

By decision dated October 31, 2018, OWCP's hearing representative affirmed the March 1, 2018 decision. She found that appellant had not established that the October 6, 2015 LWEC determination should be modified.

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, 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]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish modification of the October 6, 2015 LWEC determination.

OWCP accepted that appellant sustained a closed fracture of the right patella, a right knee contusion, and a right knee sprain causally related to her February 21, 2013 employment injury. Appellant accepted a position as a modified mail handler on October 3, 2014. By decision dated October 6, 2015, OWCP reduced her wage-loss compensation to zero based on its finding that the position of modified mail handler fairly and reasonably represented her wage-earning capacity and as the wages for the position met or exceeded those for her date-of-injury position. Appellant stopped work on December 11, 2017 and filed a claim for wage-loss compensation. She has the burden of proof to show that modification of the LWEC determination is warranted.[8]

[5] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

[6] *See M.K.*, Docket No. 17-1852 (issued August 23, 2018).

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

[8] *See L.P.*, Docket No. 17-1624 (issued March 9, 2018).

As OWCP issued a formal LWEC determination, the decision will remain in place unless there is a material change in the nature and extent of the injury-related position, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.[9]

Appellant has alleged that the original determination was in error. She contended that her physician found that she could not perform the October 3, 2014 position. Appellant noted that beginning August 15, 2015 she operated a forklift instead of working in the October 3, 2014 modified position.

The Board finds that appellant has not established error in the original LWEC determination. On October 3, 2014 appellant accepted a position as a modified mail handler. The position required lifting up to 25 pounds, standing and walking up to six hours each, sitting for two hours, and twisting, pushing, and pulling up to two hours respectively. Appellant has failed to provide any evidence to establish that she was unable to perform the duties of the modified position on the date that the October 6, 2015 LWEC determination was issued. The offered position set forth the duties and requirements of the position, was not a temporary or casual position, and the physical requirements were within Dr. Curran's work restrictions as set forth on September 30, 2014.[10] Additionally, appellant worked in the position for over 60 days. While Dr. Curran indicated in an October 13, 2014 duty status report (Form CA-17) that she could intermittently stand and walk for eight hours a day, he did not provide any rationale for his change in restrictions or otherwise address whether she could perform her modified employment.[11] Consequently, appellant has not met her burden of proof to establish error in the original LWEC determination.

Appellant further has failed to establish that she sustained a material change in her work-related condition that would render her unable to perform the duties of her position as modified mail handler.[12]

In a report dated December 19, 2017, Dr. Curran discussed appellant's history of right knee pain and surgery and diagnosed a healed closed fracture of the right patella and skin paresthesia. He found that she needed a special chair and provided work restrictions. However, Dr. Curran failed to specifically address the cause of appellant's limitations or relate them to her accepted employment injury, and thus his opinion is of diminished probative value.[13]

[9] *See supra* note 7.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5(c) (June 2013). Additionally, a makeshift or odd-lot position designed to meet an injured employee's particular needs will not be considered representative of wage-earning capacity. *I.H.*, Docket No. 17-1104 (issued December 6, 2018).

[11] *See J.J.*, Docket No. 17-1008 (issued December 1, 2017).

[12] *See supra* note 8.

[13] *See C.B.*, Docket No. 18-0040 (issued May 7, 2019).

As the medical evidence of record failed to establish that appellant sustained a material worsening of her accepted employment-related condition, such that she was precluded from performing her modified employment as a mail handler, she has not meet her burden of proof to establish that her condition has materially changed or worsened such that the LWEC determination should be modified.[14]

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 her burden of proof to establish modification of the October 6, 2015 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[14] *See S.J.*, Docket No. 17-0449 (issued May 7, 2018).