United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 18-0797**
	)	**Issued: March 14, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, COATESVILLE VAMC, Coatesville, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 6, 2018 appellant, through counsel, filed a timely appeal from a February 1, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

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 the case.[3]

ISSUE

The issue is whether appellant has met her burden of proof to establish that modification of her May 9, 2012 loss of wage-earning capacity (LWEC) determination was warranted.

FACTUAL HISTORY

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

On May 17, 2010 appellant, then a 49-year-old psychiatric practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2010 she sustained a low back injury when she transferred a patient from a chair to a bed while in the performance of duty. She stopped work on May 9, 2010 and returned to full-time, limited duty on June 5, 2010. On February 24, 2011 OWCP accepted the claim for herniated disc L5-S1 without myelopathy.

Appellant underwent authorized L5-S1 microdiscectomy on January 24, 2011. OWCP paid her wage-loss compensation and medical benefits on the supplemental rolls commencing January 24, 2011. Appellant returned to work on June 7, 2011 as a medical support assistant, a modified position which required some bending, walking, standing, and carrying items including supplies and mail.

By letter dated December 23, 2011, OWCP proposed to reduce appellant's wage-loss compensation benefits based upon her ability to earn wages as a medical support assistant. It afforded her 30 days to accept the position or provide an explanation of her reasons for refusal. By decision dated May 9, 2012, OWCP reduced appellant's wage-loss compensation based on her ability to earn wages as a medical support assistant, effective June 7, 2011. It found that the wages of a medical support assistant fairly and reasonably represented her wage-earning capacity. OWCP reduced appellant's wage-loss compensation benefits to reflect her LWEC. Appellant resigned from the employing establishment for personal reasons effective August 31, 2012.

On March 23, 2015 OWCP approved a L5-S1 fusion surgery, which appellant underwent on May 13, 2015.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the February 1, 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.*

[4] Docket No. 13-1290 (issued December 18, 2013).

On June 5, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of total disability on May 13, 2015 causally related to her original injury. On July 30, 2015 she filed a Form CA-7 claiming disability compensation for the period May 13 through July 1, 2015.

By development letter dated August 14, 2015, OWCP informed appellant that, to approve a recurrence for a closed period of disability following the May 13, 2015 lumbar fusion surgery, the medical evidence of record must establish that she was totally disabled from her prior sedentary position of medical support specialist. It further informed her that, since a formal LWEC determination had been issued in her case, her recurrence claim would be treated as a request for modification of the LWEC determination. OWCP informed appellant of the requirements for a modification of an LWEC determination and afforded her 30 days to provide the necessary evidence.

In a June 25, 2015 report, Dr. Kenan Aksu, D.O, a Board-certified orthopedic surgeon, indicated that appellant would be at maximum medical improvement one year after her May 13, 2015 lumbar fusion. In a September 9, 2015 attending physician's report (Form CA-20), he diagnosed lumbar spinal stenosis and displaced disc. Dr. Aksu noted that appellant had undergone surgeries on January 24, 2011 and May 13, 2015 and had chronic weakness of the right leg.

In an October 20, 2015 report, Dr. Michael S. Rosen, a Board-certified internist, diagnosed resolved fibromyalgia and osteoarthrosis. He noted that appellant complained only of occasional cramping of her calves and feet, but was otherwise asymptomatic particularly with her back and her radicular pain.

By decision dated November 20, 2015, OWCP denied modification of the May 9, 2012 LWEC determination and denied appellant's claim for disability compensation for the period May 13 through July 1, 2015.

On November 25, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A video conference hearing was held on March 4, 2016. Counsel asserted that appellant's recurrence claim should be accepted as she had remained off work recovering from her employment-related surgery.

OWCP continued to receive progress notes from Dr. Aksu. In a March 1, 2016 report, Dr. Aksu indicated that appellant was last evaluated on February 16, 2016, nine months postsurgery. He noted that she continued to take neuropathic and muscle relaxant medications to help with her ongoing leg and low back spasms which, while improved, continued to preclude her from returning to her presurgical activities. Dr. Aksu opined that appellant was totally disabled from her licensed practical nurse position and was unable to perform any gainful employment, including sedentary duty. He noted that he could not comment further about her disability until her one-year postsurgical follow-up.

By decision dated May 24, 2016, an OWCP hearing representative vacated OWCP's November 20, 2015 decision and remanded the case for further development to determine whether appellant was capable of resuming the duties of the medical support specialist, which provided the basis for the May 9, 2012 LWEC determination.

In a June 3, 2016 letter, OWCP requested that Dr. Aksu opine whether appellant could return to work as a medical support assistant on a full-time basis. A copy of the job description was provided.

In a June 16, 2016 note, Dr. Aksu recommended that appellant undergo a functional capacity evaluation (FCE). He noted that her electromyogram (EMG) showed evidence of chronic right and left L5 radiculopathies from the May 9, 2010 employment injury. An assessment of other intervertebral disc displacement, lumbosacral region was provided. A June 13, 2015 EMG noted moderate right side and mild left side chronic L5 nerve root irritation.

On August 23, 2016 appellant underwent an FCE which indicated that she was capable of functioning at a light physical demand level for an eight-hour workday. The evaluator noted that she demonstrated inconsistent performance throughout testing.

In a September 1, 2016 report, Dr. Aksu noted that appellant had fibromyalgia and spinal stenosis. He indicated that, while the FCE had indicated that she could perform light-duty work, he was not convinced that she would be able to sustain light-duty work for any gainful amount of time. Dr. Aksu opined that appellant was totally disabled and unable to perform any type of gainful employment due to her back injury which had resulted in two lumbar surgeries, the last of which was a lumbar fusion. He indicated that she still had spasms of her lower extremities which caused severe pain.

In a November 11, 2016 report, Dr. Aksu provided an assessment of other interverterbral disc displacement, lumbosacral region and pain in both lower extremities. He reported that the recent lumbar spine magnetic resonance imaging (MRI) scan revealed evidence of an L4-5 disc herniation towards the right-side which caused impingement on the right L5 nerve root. Dr. Aksu opined that the herniated disc was a result of adjacent segment degeneration from appellant's spinal fusion.

On November 29, 2016 OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of her employment-related disability.

In a December 19, 2016 report, Dr. Smith reviewed a statement of accepted facts (SOAF) and the medical record, including the November 2, 2016 MRI scan and presented examination findings. He indicated that appellant had a benign clinical examination from an objective standpoint and that her symptoms of disabling pain were out of proportion to the lack of clinical pathology. Dr. Smith indicated that the accepted L5-S1 disc herniation had been surgically treated and that the spinal segment had been successfully fused. Therefore, the accepted condition had resolved. Dr. Smith indicated that the current MRI scan findings were compatible with age-related degenerative disease unrelated to this claim. He further indicated that the most recent electrodiagnostic test available from 2014 showed some mild chronic changes consistent with prior surgery, but no evidence of axon loss that would produce weakness in the leg musculature. Dr. Smith noted that appellant had a mild injury-related disability and was capable of returning to full-time work as a medical support assistant. He indicated that no further treatment or testing was needed. In a December 19, 2016 work capacity form (OWCP-5c), Dr. Smith indicated that appellant was able to work with permanent restrictions of pushing, pulling, and lifting no more than 30 pounds in an eight-hour day.

OWCP determined that a conflict in medical opinion existed between Dr. Smith and Dr. Aksu regarding the nature and extent of appellant's injury-related disability and her ability to return to work as a medical support assistant. Appellant was referred to Dr. Prodromos Ververeli, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a February 27, 2017 report, Dr. Ververeli reviewed the SOAF and the medical record. He noted that objectively appellant had a nonanatomic distribution of sensory and paresthesia deficit, which did not correspond with a single or two nerve root involvement. Rather, it was more of a stocking glove distribution, which was nonanatomic for paresthesias. Additionally, appellant had objective findings of an inconsistent examination such as having giving way weakness when testing muscle strength in a seated position. Dr. Ververeli indicated that this did not correspond with her gait analysis and alternating single leg stance. Also, there was a discrepancy with observed gait within the examination room as opposed to when appellant was not observed, which showed a more normal gait. Dr. Ververeli noted a lack of correlation of objective findings of numbness and spasm. He indicated that appellant had osteoarthritis and was under the care of a rheumatologist with a diagnosis of fibromyalgia affecting soft tissue pain. Based on his examination findings, Dr. Ververeli opined that she was not totally disabled and could return to a sedentary employment position. To ease this transition, he recommended a period of one month at half days, then one month working six hours a day, and then a return to normal duty in the sedentary position as a medical support assistant. Dr. Ververeli also completed a work capacity evaluation form (OWCP-5c), noting that appellant was able to work with restrictions starting at four hours per day and gradually increasing in length to eight hours per day. He also indicated that she could not bend, push, pull, or lift more than 30 pounds every half hour and that she required a break every 2 to 4 hours for 15-minute duration.

Dr. Aksu continued to opine that appellant had chronic low back pain and bilateral lower extremity radicular symptoms.

In a May 23, 2017 report, Dr. Rosen updated appellant's diagnoses to include fibromyalgia, primary generalized osteoarthritis and low back pain.

By decision dated June 30, 2017, OWCP found that appellant was entitled to total disability benefits for the fixed period from May 13, 2015 through February 27, 2017 due to recovery from her May 13, 2015 lumbar surgery. It further found that the special weight of the medical evidence was afforded to Dr. Ververeli's February 27, 2017 opinion that she had recovered from her May 13, 2015 lumbar surgery to the point where she could return to work as a medical support assistant. OWCP denied entitlement for ongoing benefits from February 28, 2017 thereafter finding that appellant had not met her burden of proof to modify the May 9, 2012 LWEC determination.

On July 11, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on November 16, 2017.

In an August 11, 2017 report, Dr. Aksu noted appellant's report of severe symptoms. He diagnosed lumbar strain and recommended an epidural injection. In subsequent reports, Dr. Aksu noted appellant's progress since her epidural injection and recommended an increase in her activities as tolerated.

By decision dated February 1, 2018, an OWCP hearing representative affirmed OWCP's June 30, 2017 decision denying modification of the May 9, 2012 LWEC determination.

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] If a formal LWEC determination has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, OWCP will need to evaluate the request according to the customary criteria for modifying a formal LWEC determination.[7]

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.[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

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

---

[5] 5 U.S.C. § 8115(a); *see C.C.*, Docket No. 18-1127 (issued January 29, 2019); *Mary Jo Colvert,* 45 ECAB 575 (1994); *Keith Hanselman,* 42 ECAB 680 (1991).

[6] *See Sharon C. Clement,* 55 ECAB 552 (2004). The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability from work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted. *Katherine T. Kreger,* 55 ECAB 633 (2004); *Sharon C. Clement,* 55 ECAB 552 (2004).

[7] *Katherine T. Kreger,* 55 ECAB 633 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modifications of Loss of Wage-Earning Capacity Decisions,* Chapter 2.1501.4 (June 2013).

[8] *See supra* note 5.

[9] *J.H.,* Docket No. 18-0535 (issued December 31, 2018).

[10] 5 U.S.C. § 8123(a); *R.C.,* 58 ECAB 238 (2006); *Darlene R. Kennedy,* 57 ECAB 414 (2006).

[11] *See D.W.*, Docket No. 18-0123 (issued October 4, 2018); *see also Gloria J. Godfrey,* 52 ECAB 486 (2001).

OWCP found that appellant sustained a limited recurrence of total disability for the period from May 13, 2015 through February 27, 2017, but that there was not a basis to modify the May 9, 2012 LWEC determination because she only sustained a closed period of recurrent disability following the authorized May 13, 2015 lumbar surgery. The Board has held that OWCP may accept a limited period of disability without modifying a formal wage-earning capacity determination.[12] This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.[13] OWCP procedures provide, "If the claimant is off work for a brief period due to his/her temporary inability to perform the duties of the rated position, this period of medical disability can be paid without modification of [LWEC] determination, *e.g.*, a brief recovery period after surgery or an injection with a subsequent day of disability."[14]

The Board finds that the evidence of record does not establish that appellant's period of total disability due to her accepted lumbar surgery had ended by February 27, 2017.

Following OWCP's June 3, 2016 letter inquiring whether appellant could return to work full time as a medical support assistant, Dr. Aksu recommended an FCE. The August 23, 2016 FCE indicated that she was capable of light-duty work. In his September 1, 2016 report, Dr. Aksu reviewed the FCE, but indicated that he was unconvinced that appellant would be able to sustain light-duty work for any gainful amount of time. He thus opined that she was totally disabled and unable to perform any type of gainful employment due to her back injury. Dr. Smith opined in his second opinion medical examination that appellant was medically able to return to her work as a medical support assistant on a full-time basis. Thereafter, OWCP properly referred her to Dr. Ververeli for an impartial medical examination pursuant to 5 U.S.C. § 8123.

Dr. Ververeli's opinion failed to establish that appellant's work-related disability had resolved following the May 13, 2015 fusion surgery such that she could return to her LWEC position.[15] In his February 27, 2017 report, he opined that she was not currently totally disabled and that she could return to work in the sedentary position of a medical support assistant with a transition period of working for one month at half days, then one month at six-hour days, and then a return to full-time work. This statement indicates that Dr. Ververeli believed that there was some deconditioning resulting from the employment injury such that appellant must return to work on a gradual basis. Such a transitional return to work or return to work on a gradual basis does not equate to a finding that the employment-related disability had ceased.[16]

Furthermore, Dr. Ververeli indicated that appellant should only walk one-half hour and needed fifteen-minute breaks every two hours and that she could not bend. However, the LWEC position was not entirely a sedentary position and required some walking and bending. Thus,

[12] *See Katherine T. Kreger, supra* note 7.

[13] *See supra* note 6.

[14] *Supra* note 7 at Chapter 2.1501.10 (June 2013). *See also Calvin G. Wilson,* Docket No. 97-1029 (issued March 8, 1999) wherein the claimant's brief period of total disability was noted to encompass less than three weeks.

[15] *See generally D.M.*, Docket No. 09-0684 (issued December 30, 2009).

[16] *See Lenore Bisman*, Docket No. 97-1873 (issued August 12, 1999).

Dr. Ververeli's opinion did not establish that appellant's work-related disability following the May 13, 2015 fusion surgery had resolved such that she could perform the medical support assistant position, on which her LWEC was based.[17]

As OWCP had undertaken development of the medical evidence, it was required to properly resolve the issue of whether appellant's recurrence of disability following the accepted March 23, 2015 surgery had resolved or whether her LWEC determination should be modified. The case will therefore be remanded to OWCP for further development.

On return of the case record, OWCP should prepare an updated SOAF that includes a detailed description of the medical support assistant position. It should secure a rationalized medical opinion from Dr. Ververeli as to whether appellant's temporary disability following the May 13, 2015 surgery actually ceased so that she could perform the duties of the medical support assistant position full time, or whether there was a material change in her employment-related condition that prevented her from performing the medical support assistant position, such that the LWEC determination should be modified. After such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[17] *See F.R.*, Docket No. 17-1711 (issued September 6, 2018); *H.W.*, Docket No. 15-1126 (issued August 15, 2016).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 14, 2019
Washington, DC

Christopher J. Godfrey, 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