

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

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M.S., Appellant )  
and ) Docket No. 19-0692  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: November 18, 2019  
Atlanta, GA, Employer )  
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)

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 11, 2019 appellant, through counsel, filed a timely appeal from a January 9, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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<sup>1</sup> 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<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUE**

The issue is whether appellant has met his burden of proof to modify a November 18, 2015 loss of wage-earning capacity (LWEC) determination.

### **FACTUAL HISTORY**

On December 21, 2012 appellant, then a 51-year-old sales service associate/distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 4, 2012 he injured his lower back while lifting a bucket of flats while in the performance of duty. He stopped work on December 15, 2012. OWCP accepted the claim for intervertebral disc disorder with myelopathy lumbar region, L5-S1, left. On June 19, 2013 appellant underwent OWCP-approved surgical intervention for left L5-S1 disc herniation causing L5-S1 nerve root compression. OWCP paid appellant compensation on the supplemental rolls commencing February 9, 2013 and on the periodic rolls commencing May 5, 2013.<sup>4</sup>

On April 1, 2015 appellant returned to work at the employing establishment in a full-time, limited-duty capacity as a sales solution team member with wages of \$56,971.00 per year. The job involved contacting customers by telephone (intermittent six to eight hours), light data input (intermittent four hours), answering telephones (intermittent six to eight hours), and back office administrative assistance defined duties (intermittent eight hours). The job was sedentary in nature and involved sitting in an office chair with supportive back, occasional standing, simple grasping and pushing/pulling computer mouse, fine manipulation of keyboard, with lifting no more than five pounds, and speaking on the telephone.

By decision dated November 18, 2015, OWCP found that appellant's position on the sales solution team fairly and reasonably represented his wage-earning capacity. It noted that he had performed the position for more than 60 days. OWCP also found that, as his actual earnings met or exceeded the current wages of the job he held on the date of injury, appellant had no loss in earning capacity. Thus, it terminated appellant's wage-loss compensation benefits. Appellant's entitlement to medical benefits continued.

In a March 16, 2017 duty status report (Form CA-17), Dr. Zouheir A. Shama, a general surgeon, diagnosed left lumbar disc disorder with myopathy. He opined that appellant could work

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the January 9, 2019 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.*

<sup>4</sup> The record reflects that OWCP had accepted a prior July 28, 2005 claim under OWCP File No. xxxxxx915 for herniated nucleus pulposus at L5-S1.

eight hours a day and five days a week with a 25-pound lifting restriction. Dr. Shama noted that appellant should have consecutive days off and would need a break every hour from standing and sitting.<sup>5</sup>

Appellant stopped work again on March 31, 2018. On April 13, 2018 he filed a claim for compensation (Form CA-7), for disability from work commencing March 31, 2018 and continuing. A March 30, 2018 PS Form 3971 (Request for or Notification of Absence) noted “IOD -- No Accommodations.”

In an April 24, 2018 development letter, OWCP informed appellant that it appeared he was requesting modification of its November 18, 2015 LWEC determination. It advised him of the criteria for modifying a formal LWEC determination, including showing that there was a material change in the nature and extent of his injury-related condition, that he had been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous. OWCP afforded appellant 30 days to submit additional evidence in support of his claim.

In a February 20, 2018 reevaluation note, Dr. Shama diagnosed lumbar degenerative disc changes, left leg sciatica symptoms and extending to left foot, continuous pain status post June 18, 2013 left hemilaminectomy, and left lumbar disc myelopathy.

In a March 29, 2018 duty status report (Form CA-17), Dr. Shama related a diagnosis of left lumbar disc disorder with myelopathy, noted that appellant could not return to his date-of-injury position, but indicated that appellant could sit for up to eight hours, and stand intermittently for eight hours a day. He also indicated that appellant should have two consecutive days off and would need a break from standing/sitting. No weight restrictions were provided.

Progress notes dated April 18 and May 16, 2018 signed by Stephanie Stagner, a nurse practitioner, were also submitted.

OWCP received a copy of an April 21, 2018 job offer for a full-time modified sales and service distribution associate, with consecutive days off on Sunday and Monday. The duties of the position involved performing sales and customer duties service at retail window, distribute/sort scheme mail to carrier routes, and distribute/sort P.O. Box mail to customers for three to four hours a day and “process RFS mail” one to two hours a day. The position required continuous sitting, intermittent standing, and intermittent pushing/pulling up to eight hours a day. Appellant rejected

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<sup>5</sup> On March 16, 2017 the employing establishment offered appellant a full-time modified position as a sales and service distribution associate, effective March 18, 2017. Appellant rejected the position on March 22, 2017, claiming it violated his doctor’s recommendations for consecutive days off. He stopped work on March 23, 2017 and filed Form CA-7 claims for compensation for the period March 18, 2017 and continuing. By decision dated June 13, 2017, OWCP denied appellant’s claim for compensation for the period March 23, 2017 and continuing for a recurrence of disability. On June 23, 2017 appellant requested reconsideration of OWCP’s June 13, 2017 decision. In a July 17, 2017 development letter, OWCP advised appellant of the criteria for modifying a formal LWEC determination and afforded him 30 days to submit additional evidence. By decision dated September 27, 2017, it affirmed, the June 13, 2017 decision as modified, finding that appellant failed to meet his burden of proof to modify the November 18, 2015 LWEC determination.

the position indicating that his medical restrictions mandated that the physical work requirements be sedentary in nature.

By decision dated June 26, 2018, OWCP denied appellant's claims for compensation, finding that he had not met his burden of proof to modify the November 18, 2015 LWEC determination. It noted that Dr. Shama had increased appellant's weight limit to 25 pounds on his July 6, 2017 Form CA-17 and Dr. Shama's March 29, 2018 Form CA-17 was unclear as to whether appellant was at a sedentary or medium work capacity. OWCP indicated that the April 21, 2018 job offer was based on the March 29, 2018 Form CA-17, which fell within sedentary capacity.

Appellant continued to submit CA-7 claims for compensation claiming no accommodation for the period April 16, 2018 and continuing.

On July 10, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on November 5, 2018. He argued that the issue was a recurrence of disability as appellant experienced a change in his employment duties on March 30, 2018, when his job was no longer sedentary in nature and appellant would be required to stand while working.

OWCP received job offers dated July 9 and 12, 2018.<sup>6</sup>

Dr. Shama continued to submit Form CA-17 duty status reports, noting appellant's restrictions. On May 10, 2018 he related that appellant could lift from 5 to 10 pounds eight hours a day, sit for eight hours a day, and stand intermittently for eight hours a day. On August 28 and September 25, 2018 Dr. Shama related that appellant needed to take intermittent breaks between sitting and standing, and should have two consecutive days off.

OWCP also received progress notes dated from June 24 through September 6, 2018 from Dr. Chad Achilles, Board-certified in anesthesiology and pain medicine, and Dr. Rodrigo Duralde, Board-certified in anesthesiology. These reports related appellant's pain complaints and related that appellant was seen for routine evaluation and medication refill.

OWCP also received reports from Dr. Kamal C. Kabakibou, a Board-certified anesthesiologist, regarding appellant's work restrictions. In a report dated July 31, 2018, Dr. Kabakibou noted appellant's medical history. He related appellant's physical examination findings and diagnosed postlaminectomy syndrome and left side sciatica. Dr. Kabakibou concluded that appellant could perform light-duty work for eight hours a day, while sitting. OWCP also received progress notes from Dr. Kabakibou from August 28, 2018 through January 11, 2019 wherein he reiterated appellant's diagnoses and noted appellant's pain complaints.

Appellant continued to submit Form CA-7 claims for compensation for the period commencing September 1, 2018.

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<sup>6</sup> Appellant accepted the July 12, 2018 job offer on July 17, 2018.

By decision dated January 9, 2019, an OWCP hearing representative affirmed the June 26, 2018 OWCP decision denying appellant's claims for compensation for disability from work commencing March 31, 2018. He found that appellant had not established any of the criteria for modifying its formal November 18, 2015 LWEC determination.

### **LEGAL PRECEDENT**

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>7</sup> A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.<sup>8</sup> Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.<sup>9</sup>

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.<sup>10</sup> 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].”<sup>11</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>12</sup>

When a formal LWEC determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP

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<sup>7</sup> *E.W.*, Docket No. 14-0584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

<sup>9</sup> See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

<sup>10</sup> *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.814.9(a) (June 2013). See *M.F.*, Docket No. 18-0323 (issued June 25, 2019); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>12</sup> See *J.A.*, Docket No. 18-1586 (issued April 9, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

should modify its decision according to the established criteria for modifying a formal LWEC determination.<sup>13</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to modify the November 18, 2015 LWEC determination.

The evidence of record reflects that appellant began performing the duties of a sales solution team member on or about March 30, 2015 and continued to perform such duties for almost two years until the position was abolished on March 20, 2017. There is no evidence of record to support that the LWEC determination was in anyway erroneous in nature. There is also no evidence that appellant has been retrained or otherwise vocationally rehabilitated.<sup>14</sup>

Additionally, there is no medical evidence of record to support that appellant sustained a material change in the nature or extent of his injury-related condition on and after March 31, 2018, when he stopped work, such that he could not perform the duties of the sedentary sales solution team member position, which was the basis of his LWEC.<sup>15</sup>

In a March 29, 2018 Form CA-17, Dr. Shama diagnosed left lumbar disc disorder with myelopathy. He noted that, while appellant was unable to perform his date-of-injury position, he was capable of performing sedentary work, with intermittent standing eight hours a day. OWCP thereafter continued to receive CA-17 forms from Dr. Shama. In a form dated May 10, 2018, Dr. Shama related that appellant could lift from 5 to 10 pounds for eight hours a day, sit for eight hours a day, and stand intermittently for eight hours a day. On August 28 and September 25, 2018 he related that appellant needed to take intermittent breaks between sitting and standing. Dr. Shama's reports do not establish, with medical rationale, that appellant had experienced a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.<sup>16</sup> He did not explain that appellant's medical condition after March 31, 2018 had worsened such that he could not perform the duties of the sedentary sales solution team member position, which allowed for occasional standing. These reports are thus insufficient to warrant modification of the LWEC determination.

Reports dated from June 24 through September 6, 2018 indicate that appellant was seen for pain medication refills by Drs. Achilles and Duralde. These reports do not provide any rationalized medical opinion that appellant's medical condition had materially worsened to cause

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<sup>13</sup> C.P., Docket No. 11-1459 (issued February 7, 2012); *Tamra McCauley*, 51 ECAB 375, 377 (2000); *T.M.*, *id.*

<sup>14</sup> *Supra* note 10.

<sup>15</sup> See *D.T.*, Docket No. 18-0174 (issued August 23, 2019).

<sup>16</sup> *Id.*

further disability; therefore, they are insufficient to establish that appellant's LWEC determination should be modified.<sup>17</sup>

OWCP also received a series of progress reports from Dr. Kabakibou, which related appellant's physical examination findings, and diagnosed postlaminectomy syndrome and left side sciatica. In his July 31, 2018 report, Dr. Kabakibou related that appellant could perform light duty, eight hours a day, while sitting. In his subsequent reports dated from August 28, 2018 through January 11, 2019, he noted appellant's pain complaints and reiterated his diagnoses. Insofar as Dr. Kabakibou related that appellant could perform light work, his reports indicate that appellant's condition had improved, rather than worsened. Again, as his reports did not establish that appellant sustained a material worsening of his accepted employment-related conditions, such that he was precluded from performing his LWEC position, they are insufficient to establish that the LWEC determination should be modified.<sup>18</sup>

Appellant also submitted reports signed solely by a nurse practitioner. These reports do not constitute competent medical evidence because nurse practitioners are not considered "physician[s]" as defined under FECA.<sup>19</sup> Consequently, the medical findings and/or opinions of a nurse practitioner will not suffice for purposes of establishing entitlement to compensation benefits.<sup>20</sup>

The Board finds that, for these reasons, appellant has not met his burden of proof to modify OWCP's November 18, 2015 LWEC determination based upon a material worsening of his accepted conditions.

On appeal counsel argues that the issue in this case concerns a recurrence of disability, not modification of an LWEC because appellant's LWEC position was withdrawn. OWCP's hearing representative found and the factual evidence of record supports that appellant was offered a new modified position, which effectively withdrew his sedentary position, effective March 31, 2018. OWCP procedures provide that, when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.<sup>21</sup> The Board has also previously explained that absent a showing that the wage-earning capacity should be modified, appellant has no disability under FECA and is not entitled to compensation for wage loss based on the withdrawal of his limited-

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<sup>17</sup> *Id.*

<sup>18</sup> B.S., Docket No. 19-0515 (issued July 25, 2019).

<sup>19</sup> See R.C., Docket No. 19-0376 (issued July 15, 2019); S.J., Docket No. 17-0783, n.2 (issued April 9, 2018) (a nurse practitioner is not a physician under FECA). A report from a nurse practitioner will be considered medical evidence only if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013). Under FECA the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law.

<sup>20</sup> See *id.*

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2(c) (June 2013).

duty position.<sup>22</sup> Accordingly, the Board finds that appellant has not met his burden of proof to modify the November 18, 2015 LWEC determination.

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 modify the November 18, 2015 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>22</sup> S.L., Docket No. 10-1478 (issued February 10, 2011); K.R., Docket No. 09-415 (issued February 24, 2010).