

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

D.R., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, West Palm Beach, FL,)
Employer)

Docket No. 18-1197
Issued: April 30, 2020

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 24, 2018 appellant, through counsel, filed a timely appeal from an April 16, 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 Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issue is whether appellant has met her burden of proof to establish modification of the July 28, 2017 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On August 16, 2006 appellant, then a 49-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2006 she experienced left shoulder and neck pain after pulling bags onto a carousel while in the performance of duty. She stopped work on August 16, 2006 and returned to work with restrictions on June 8, 2008. OWCP accepted the claim for left shoulder sprain, displacement of a cervical intervertebral disc without myelopathy, bulging discs, and brachial neuritis or radiculitis.

By decision dated January 21, 2009, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified transportation security officer, effective June 8, 2008, fairly and reasonably represented her wage-earning capacity.

Appellant was terminated from her position at the employing establishment as medically unable to perform the full range of functions required in her position effective March 2, 2012.

Appellant subsequently filed several claims for compensation (Form CA-7) for ongoing disability.⁴

By decision dated June 25, 2012, OWCP modified the January 21, 2009 LWEC determination as the evidence substantiated that she had sustained a recurrence of disability. It found that the job upon which it had based its LWEC determination was not a permanent position. In a separate letter of even date, OWCP advised appellant that it would pay her wage-loss compensation for total disability on the periodic rolls effective March 3, 2012.

In a report dated June 10, 2013, Dr. Craig Lichtblau, a Board-certified physiatrist, opined that appellant could work eight hours per day with restrictions of no bending repetitively at the waist, kneeling, squatting, climbing, pushing, pulling, running, or jumping. He advised that she should reach overhead infrequently and that she should change positions from sit-to-stand and *vice*

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the April 16, 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 By decision dated May 9, 2012, OWCP denied appellant's claim for a schedule award.

versa frequently at will for positional comfort. Dr. Lichtblau completed a functional capacity evaluation (FCE) report dated August 29, 2012 containing the same restrictions.

On March 11, 2013 Dr. Paul D. Seltzer, an osteopath specializing in orthopedic surgery serving as an OWCP second opinion physician, opined that appellant had continued residuals of her cervical disc herniation and radiculitis. He opined that she could work with restrictions regarding lifting, pushing, and pulling. Dr. Seltzer noted that appellant was a candidate for vocational rehabilitation services.

On September 4, 2013 OWCP referred appellant for vocational rehabilitation services. Appellant completed training in computer skills as of April 22, 2014, with viable job goals of customer service representative and receptionist, positions listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) bearing DOT No. #239.362-014 and No. #237.367-038, respectively. The vocational rehabilitation counselor provided job placement assistance beginning June 2014.⁵

On July 21, 2016 OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated August 24, 2016, Dr. Lotman advised that due to appellant's cervical and left shoulder pathology, she was unable to return to her date-of-injury position as a transportation security screener. In an attached work capacity evaluation (Form OWCP-5c) report, he indicated that she had work restrictions of no reaching above the shoulder, climbing, or bending/stooping, as well as no pushing, pulling, or lifting more than 2 hours per day of up to 20 pounds.

On February 15, 2017 the vocational rehabilitation counselor completed a job classification (Form CA-66) for the position of customer complaint clerk. The position required occasional reaching, handling, and fingering. In a vocational rehabilitation memorandum dated February 16, 2017, OWCP's vocational rehabilitation specialist noted that the positions of customer complaint clerk, appointment clerk, receptionist, and other similar full-time sedentary jobs remained both vocationally suitable and were in sufficient numbers that they were reasonably available in her local area.

In a letter dated June 14, 2017, OWCP notified appellant of its proposed reduction in her wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised that the medical evidence of record established that she was only partially disabled. OWCP found that the position of customer complaint clerk was medically and vocationally consistent with her medical limitations, skills and work experience. It determined that appellant was capable of earning wages at the rate of \$398.40 per week as a customer complaint clerk and that the position was reasonably available within her commuting area. OWCP provided an attachment detailing the application of

⁵ In a letter dated August 6, 2014, OWCP requested that Dr. Lichtblau clarify whether appellant was able to perform the duties of a customer service representative or receptionist. On August 28, 2014 Dr. Lichtblau confirmed that appellant was able to work as a receptionist, appointment clerk, and information clerk within her medical restrictions of performing occasional fingering/typing for eight hours a day in a sedentary position.

the *Shadrick* formula.⁶ It afforded appellant 30 days to submit evidence and argument if she chose to contest the proposed action.

In a report dated June 29, 2017, Dr. Lichtblau advised that appellant could work within the restrictions set forth in the August 29, 2012 FCE. He indicated that she could perform light-duty employment alternating sitting and standing as needed and avoiding repetitive bending, kneeling, squatting, crawling, climbing, running, and jumping.

By decision dated July 28, 2017, OWCP reduced appellant's compensation effective July 29, 2017 based on her capacity to earn wages as a customer complaint clerk at the rate of \$398.40 per week. It found that the evidence of record demonstrated that she was vocationally and physically capable of working as a customer complaint clerk.

On August 16, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

On November 28, 2017 OWCP authorized arthroscopic left shoulder surgery. On November 30, 2017 Dr. Ryan Simovitch, a Board-certified orthopedic surgeon, performed a left shoulder rotator cuff repair, subacromial decompression with acromioplasty, and debridement.

The hearing was held on January 5, 2018. At the hearing, counsel argued that appellant's recent surgery qualified as changed circumstances warranting a modification of the LWEC determination of July 28, 2017 while she recovered from surgery. The hearing representative noted that there was no medical evidence of record addressing the period of disability related to surgery. She held the case file open 30 days for submission of additional evidence.

In a report dated January 22, 2018, Dr. Simovitch advised that appellant had undergone right shoulder surgery nine weeks earlier. He noted that she complained of continuing pain radiating into her neck. Dr. Simovitch discussed appropriate use of a sling and the necessary period of postoperative convalescence. Appellant also submitted operative reports and reports prior to her surgery on November 30, 2017.

By decision dated February 7, 2018, the hearing representative affirmed the July 28, 2017 LWEC determination finding that both the medical and vocational evidence supported that appellant had the ability to perform the position of customer complaint clerk. She noted that counsel had contended at the hearing that modification of the LWEC determination should be considered in view of her left shoulder surgery. The hearing representative found, however, that the relevant issue was whether appellant had established a recurrence of disability due to her surgery rather than modification of the LWEC determination. She instructed OWCP to develop the issue of whether she had experienced a period of disability subsequent to her surgery.

On March 2, 2018 appellant, through counsel, requested reconsideration of the February 7, 2018 decision. With the request, she submitted surgical records related to her procedure on November 30, 2017, including the previously-submitted operative report of that date, as well as

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

documents relating to the ordering of surgery and authorization by OWCP that were previously of record. Appellant also submitted numerous reports from physical therapists.

In a report dated March 12, 2018, Dr. Simovitch noted that appellant had been attending physical therapy. On examination, he found well-healed incisions with supple range of motion. Dr. Simovitch advised that appellant had slowly improved. He recommended that appellant return to Dr. Lichtblau for pain management.

By decision dated April 16, 2018, OWCP denied modification of its February 7, 2018 decision finding that the records submitted on reconsideration discussed appellant's November 30, 2017 arthroscopic surgery, and that a decision had not yet been issued regarding payment of compensation for a recurrence of temporary total disability due to the surgery.

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.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.⁹ OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.¹⁰ The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.¹¹ However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of an LWEC decision, such as where an employee has a demonstrated need for surgery.¹²

⁷ 5 U.S.C. § 8115(a); *O.H.*, Docket No. 17-0255 (issued January 23, 2018).

⁸ *O.H., id.*; *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ *B.G.*, Docket No. 17-0477 (issued September 20, 2017); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013). See *J.M.*, Docket No. 18-0196 (issued July 12, 2018).

¹¹ *Id.* at Chapter 2.1501.3(a).

¹² *Id.* at Chapter 2.1501.10(b); *Katherine T. Kreger*, *supra* note 8.

The burden of proof is on the party attempting to show a modification of the LWEC determination.¹³ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁴

ANALYSIS

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

By decision dated July 28, 2017, OWCP found that appellant could perform the duties of a customer complaint clerk, a sedentary position, and reduced her compensation to reflect her wage-earning capacity in that job. On November 30, 2017 appellant underwent an authorized left shoulder rotator cuff repair, subacromial decompression with acromioplasty, and debridement. In its February 7, 2018 decision, an OWCP hearing representative affirmed the July 28, 2017 decision. She discussed counsel's assertion at the hearing that appellant had established modification of the LWEC determination as her condition had changed due to her left shoulder surgery. The hearing representative found, however, that the issue of whether she had established disability after her surgery should be adjudicated as a recurrence of disability rather than as a request for modification of the LWEC determination. Following a request for reconsideration, on April 16, 2018 OWCP denied modification of its February 7, 2018 decision, noting that it was separately adjudicating the issue of whether appellant had established entitlement to a period of temporary total disability subsequent to her surgery.

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 condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.¹⁵ Appellant has the burden of proof to show that modification of the LWEC determination is warranted.¹⁶

Appellant has not alleged that the original LWEC determination was in error or that she was vocationally rehabilitated. Instead, she contended that the July 28, 2017 LWEC determination should be modified due to a change in her injury-related condition as a result of her November 30, 2017 shoulder surgery. OWCP found that the shoulder surgery would not constitute a circumstance warranting modification of an LWEC determination, but instead should be considered as a recurrence of disability. The Board finds, however, that the proper issue is whether the July 28, 2017 LWEC determination should be modified.

OWCP may accept a limited period of disability without modification of a formal LWEC determination.¹⁷ This occurs when there is a demonstrated temporary worsening of a medical

¹³ C.S., Docket No. 18-1610 (issued April 25, 2019); *Jennifer Atkerson*, 55 ECAB 317 (2004).

¹⁴ S.S., Docket No. 18-0397 (issued January 15, 2019); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

¹⁵ B.S., Docket No. 19-0515 (issued July 25, 2019).

¹⁶ *See L.P.*, Docket No. 17-1624 (issued March 9, 2018).

¹⁷ *S.J.*, Docket No. 16-1195 (issued January 4, 2017); *Katherine T. Kreger*, *supra* note 8.

condition of insufficient duration and severity to warrant modification of an LWEC determination.¹⁸ This narrow exception is only applicable for brief periods of medical disability.¹⁹ 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 [the LWEC] determination, *e.g.*, a brief recovery period after surgery or an injection with a subsequent day of disability.²⁰ However, if a formal LWEC determination has been issued, and the claimant requests resumption of compensation for total wage loss, OWCP should evaluate the request according to the customary criteria for modifying a formal LWEC determination.²¹

As appellant has submitted evidence that she may have sustained increased disability due to her left shoulder surgery, in accordance with its procedures OWCP must evaluate the evidence to determine if modification of the LWEC determination is warranted.²² On remand OWCP should consider the medical evidence and determine whether she has established that the July 28, 2017 LWEC determination should be modified. Following such further development of the case as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁸ *T.G.*, Docket No. 18-1064 (issued April 26, 2019).

¹⁹ *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

²⁰ *Supra* note 10 at Chapter 2.1501.4 (June 2013); *L.T.*, *id.*

²¹ *Id.*

²² See *Katherine T. Kreger*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 30, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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