

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

O.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lake Mary, FL, Employer**

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**Docket No. 19-1149
Issued: February 21, 2020**

Appearances:
Appellant, pro se
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 April 22, 2019 appellant filed a timely appeal from a November 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met her burden of proof to modify a July 21, 2015 loss of wage-earning capacity (LWEC) determination.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the November 2, 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.*

FACTUAL HISTORY

On July 19, 2013 appellant, then a 47-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 18, 2013 she picked up a tray and injured her left shoulder while in the performance of duty. She stopped work on July 19, 2013. OWCP accepted the claim for sprain of left shoulder and upper arm and left impingement syndrome and paid wage-loss compensation and medical benefits. Appellant returned to full-time, limited-duty employment on September 5, 2014. OWCP accepted a recurrence of disability for the period November 7, 2014 through April 4, 2015. On May 13, 2015 appellant returned to a permanent, full-time position as a limited-duty lobby director, which OWCP determined met her medical requirements. On July 13, 2015 she suffered a new injury and stopped work.³

By decision dated July 21, 2015, OWCP issued a formal LWEC determination finding that appellant's limited-duty lobby director position, effective May 13, 2015, fairly and reasonably represented her wage-earning capacity. It also found that she was entitled to wage-loss compensation benefits as her actual earnings as a limited-duty lobby director were less than her earnings from her date-of-injury position.

In a December 4, 2015 report, Dr. William Dinenberg, a Board-certified orthopedic surgeon and second opinion physician, noted that appellant was involved in a nonwork-related motor vehicle accident on November 19, 2015. He indicated that the November 19, 2015 motor vehicle accident had exacerbated her conditions and that she had a significantly worsened range of motion (ROM). Dr. Dinenberg opined that her ROM upon examination on that date did not accurately reflect her work-related conditions, but rather her November 19, 2015 motor vehicle accident.

In a July 20, 2016 duty status report (Form CA-17), Dr. Samy Bishai, an orthopedic surgeon, held appellant off work for four weeks due to reduced neck and left shoulder ROM and cervical disc syndrome. He continued to restrict her from work in CA-17 forms dated August 24, September 22, and November 11, 2016.

In a November 11, 2016 report, Dr. Bishai noted that appellant was previously at maximum medical improvement (MMI) from her injuries on October 7, 2014, but that the nonwork-related motor vehicle accident of November 19, 2015 had exacerbated her conditions. He indicated that appellant's injury was at MMI and that the aggravation of her left shoulder injury due to the auto accident had improved with treatment. In that report, as well as in a December 15, 2016 report, Dr. Bishai diagnosed internal derangement of the left shoulder, rotator cuff syndrome left shoulder, left shoulder impingement syndrome, internal derangement of the right shoulder, cervical disc syndrome with radiculopathy bilateral, bilateral carpal tunnel syndrome, herniated cervical disc at C6-7, and depression. He continued to opine that appellant was totally disabled from work because of her left shoulder and left upper extremity pain and problems.

³ Appellant worked 62 days as a limited-duty lobby director. Under File No. xxxxxx462, OWCP accepted a sprain of back, thoracic region.

On January 21, 2017 the employing establishment terminated appellant's employment due to her medical inability to perform the duties of her position.

On February 6, 2017 OWCP received Dr. Bishai's July 20 and August 24, 2016 reports which indicated that appellant's condition was unchanged since her last visit and that she continued to have pain and difficulty with ROM of her left shoulder joint. Dr. Bishai also opined that she could not work due to her left shoulder condition, severe pain, and ROM limitations. OWCP also received Dr. Bishai's September 22, 2016 report in which he opined that appellant was unable to work because of the injury to her left shoulder.

On March 24, 2017 appellant filed a wage-loss compensation claim (Form CA-7) for the period July 20, 2016 through November 30, 2017. In an April 5, 2017 development letter, OWCP requested that appellant submit medical evidence to support her claim for disability compensation benefits. Appellant was afforded 30 days to respond.

In a May 25, 2017 letter, appellant's then-counsel requested that OWCP consider whether she had sustained a consequential psychiatric injury.⁴

By decision dated June 16, 2017, OWCP denied appellant's claim for wage-loss compensation for the period July 20, 2016 through March 30, 2017 finding that the medical evidence submitted failed to provide an explanation as to how appellant's accepted conditions worsened on or after July 20, 2016 to render her totally disabled from work. It also noted that appellant was involved in a nonwork-related motor vehicle accident on November 19, 2015.

In an October 10, 2017 report, Dr. Mark A. Seldes, a Board-certified family practitioner, diagnosed internal derangement of the left shoulder joint, rotator cuff syndrome of the left shoulder, left shoulder impingement syndrome, internal derangement of the right shoulder, cervical disc syndrome with bilateral radiculopathy, bilateral carpal tunnel syndrome, herniated cervical disc at C6-7, and depression. He indicated that appellant's left shoulder condition continued to slowly deteriorate although it was relatively stable since her last appointment. Dr. Seldes opined, in his report and a CA-17 of October 10 and November 13, 2017, that appellant was unable to work due to the severe limits of her ROM and pain in the left shoulder joint. He further indicated, in his November 13, 2017 report, that appellant's examination had not changed and that she was at MMI.

On December 7, 2017 appellant filed an additional wage-loss compensation claim (Form CA-7) for the period July 20, 2016 through November 30, 2017.

In a December 11, 2017 report, Dr. Seldes again indicated that appellant's condition remained relatively stable, if not slowly deteriorating. He also noted that there was a strong

⁴ In support of the consequential psychiatric claim, OWCP received a December 1, 2014 report, signed on April 25, 2017, in which Dr. Gary Arthur, a Board-certified psychiatrist, opined that appellant's depression was caused by her pain and degree of disability and that she was totally disabled. He indicated that appellant had no change in her condition or disability on April 25, 2017. OWCP has not developed whether appellant sustained a consequential psychiatric injury and therefore that matter is not presently before the Board on the present appeal.

possibility that appellant would continue to develop problems with her left shoulder, such as adhesive capsulitis.

In a development letter dated December 19, 2017, OWCP informed appellant that since a formal LWEC determination had been issued in her case, her wage-loss compensation claim would be treated as a request for modification of the LWEC determination. It informed her of the requirements for modification of an LWEC determination. Appellant was afforded 30 days to provide the necessary evidence.

On January 9, 2018 OWCP received appellant's undated statement in which she indicated that she had completed vocational rehabilitation and had worked at two job offers. However, appellant explained that she was removed from employment when the employing establishment could no longer accommodate her medical restrictions related to the July 18, 2013 employment injury.

In January 22 and February 15, 2018 reports, Dr. Seldes continued to note that appellant's condition was relatively stable, although she had difficulties with limited ROM in her left shoulder.

By decision dated March 15, 2018, OWCP denied modification of the July 21, 2015 LWEC determination.

On March 21, 2018 appellant, through her then-counsel, requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on August 1, 2018. Appellant reiterated that she had been terminated when the employing establishment could no longer accommodate her work-related restrictions.

In intermittent medical reports from April 16 through October 2, 2018, Dr. Seldes provided the additional diagnosis of left shoulder acromioclavicular arthritis. He continued to opine that appellant's left shoulder condition remained relatively stable, but painful with progressive deterioration in her ROM. In his May 22, 2018 report, Dr. Seldes opined that appellant was disabled because of the disease process affecting her wrists and hands as well as her shoulders and neck. He recommend that she apply for disability retirement. In his June 27, July 31, and October 2, 2018 reports, Dr. Seldes opined that appellant had developed right shoulder pain and impingement as a consequential injury to her accepted left shoulder and upper arm condition.

By decision dated November 2, 2018, an OWCP hearing representative affirmed OWCP's March 15, 2018 decision denying modification of the July 21, 2015 LWEC determination.⁵

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.⁶ Generally, wages actually earned are the best measure of wage-earning capacity and, in

⁵ By decision dated July 30, 2018, OWCP awarded appellant a schedule award for 24 percent permanent impairment of the left arm. The award ran for 74.88 weeks for the period May 28, 2018 through November 3, 2019.

⁶ 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

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.⁷ 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.⁸ 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.⁹ Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.¹⁰

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.¹¹ 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]."¹² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to modify the July 21, 2015 LWEC determination.

Appellant does not assert that modification of her LWEC determination is warranted because she has been retrained or otherwise vocationally rehabilitated.

In reaching its determination of appellant's LWEC, OWCP properly found that appellant had received actual earnings as a limited lobby director for more than 60 days in that she had been working in the position since May 13, 2015 when OWCP issued its July 21, 2015 LWEC

⁷ See *J.A.*, Docket No. 18-1586 (issued April 9, 2019).

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

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

¹⁰ See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹¹ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.812.9(a) (June 2013); *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹³ *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

decision.¹⁴ It also properly found that appellant's actual wages fairly and reasonably represented her wage-earning capacity. The record does not establish that the limited lobby director position constituted part-time, sporadic, seasonal, or temporary work.¹⁵ Moreover, the record does not reveal that the position was a make-shift position designed for appellant's particular needs.¹⁶ Appellant stopped work because she claimed a new traumatic injury. Therefore, the Board finds that she has not met her burden of proof to establish that the original determination was erroneous.

Thus, appellant must establish a material change in the nature and extent of the injury-related condition by establishing that the current medical evidence demonstrates a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.¹⁷ She asserts that she cannot perform the selected position due to her present medical conditions and that she was terminated as the employing establishment could not accommodate her medical restrictions.

In support of appellant's request to modify the LWEC determination, she has submitted numerous reports from Dr. Bishai and Dr. Seldes. The record reflects that following the July 21, 2015 LWEC determination appellant stopped work and claimed a traumatic injury. She was also involved in a nonwork-related motor vehicle accident on November 19, 2015.

Dr. Bishai placed appellant in total disability status in duty status and medical reports dated from July 20 through November 11, 2016 due in part to reduced ROM of her left shoulder. However, he failed to provide an opinion regarding causal relationship other than generally noting injury to her left shoulder.¹⁸ In his November 11, 2016 report, Dr. Bishai noted that while appellant was previously at MMI from her injuries on October 7, 2014, a November 19, 2015 nonwork-related motor vehicle accident had exacerbated her conditions. He indicated that appellant's injury was again at MMI. Dr. Bishai provided several diagnoses to the left shoulder, including internal derangement, rotator cuff syndrome and impingement syndrome, along with other conditions. He opined that she was totally disabled because of her left shoulder and left upper extremity pain and problems. Dr. Bishai's opinion does not support modification of the LWEC determination as he failed to provide a clear opinion as to why appellant could not work on a full-time basis as a limited lobby director, the position on which the determination had been based, due to the accepted employment conditions of left shoulder and upper arm sprain and left shoulder impingement syndrome.¹⁹ With regard to the additional conditions, appellant has the

¹⁴ See *J.A.*, *supra* note 7.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

¹⁶ *Id.*

¹⁷ *Supra* note 8 at Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3(a)(2) (June 2013).

¹⁸ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁹ See *D.R.*, Docket No. 16-0528 (issued August 24, 2016) (a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining the relationship between a given employment activity and a diagnosed medical condition).

burden of proof to submit evidence to establish additional conditions not accepted or approved by OWCP resulted from the employment injury through the submission of reasoned medical evidence.²⁰

Dr. Seldes submitted reports from October 10, 2017 onwards. He diagnosed internal derangement of the left shoulder joint, rotator cuff syndrome of the left shoulder, left shoulder impingement syndrome, internal derangement of the right shoulder, cervical disc syndrome with bilateral radiculopathy, bilateral carpal tunnel syndrome, herniated cervical disc at C6-C7, and depression. Dr. Seldes opined that appellant's left shoulder condition was relatively stable and slowly deteriorating. He also opined that appellant was unable to work due to the severe limited ROM and pain in the left shoulder joint and that she reached MMI on November 13, 2017. However, the reports from Dr. Seldes do not support modification of the LWEC determination as he failed to provide a clear opinion as to why appellant could not work on a full-time basis as a limited lobby director, the position on which the determination had been based.²¹ Dr. Seldes also failed to describe appellant's accepted conditions nor did he explain how they worsened to the point that she could not work on a full-time basis as a limited-duty lobby director.

In intermittent medical reports from April 16 through October 2, 2018, Dr. Seldes provided additional diagnosis of left shoulder acromioclavicular arthritis, but offered no opinion on causal relationship.²² In his May 22, 2018 report, he opined that appellant was disabled, in part, because of the disease process affecting her shoulders, but provided no explanation as to why or how appellant's employment injury had been aggravated without intervening or preexisting conditions related to her continuing left shoulder condition. In a case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.²³ In June 27, July 31, and October 2, 2018 reports, Dr. Seldes also opined that appellant had developed right shoulder pain and impingement as a consequential injury to her left shoulder. However, he failed to provide medical rationale explaining why or how there had been a worsening of the accepted left shoulder conditions and her current inability to perform the position on which the LWEC determination was based. Thus, Dr. Seldes' opinions are insufficient to require modification of the LWEC determination as he failed to provide a clear opinion, supported by medical rationale, which explained how appellant's inability to perform her employment duties as a limited lobby director was causally related to an accepted condition.²⁴

The Board thus finds that appellant has not met her burden of proof to establish a material change in the nature and extent of her injury-related condition, that the original determination was

²⁰ See *V.B.*, Docket No. 12-599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

²¹ See *D.R.*, *supra* note 19.

²² See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, *supra* note 18.

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

²⁴ See *D.R.*, *supra* note 19.

in fact erroneous, or that she was vocationally rehabilitated. Appellant has therefore not met her burden of proof to establish that the July 21, 2015 LWEC determination should be modified.

On appeal appellant asserts that the LWEC does not apply to her. As indicated above, once a wage-earning capacity of an injured employee is determined, modification of such 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.²⁵ As explained above, appellant has not established a basis to require modification of OWCP's LWEC determination.

Appellant may request modification of the July 21, 2015 LWEC determination, supported by new evidence or argument, at any time before OWCP.²⁶

CONCLUSION

The Board finds that appellant has not met her burden of proof to modify the July 21, 2015 LWEC determination.

²⁵ 20 C.F.R. § 10.511; *see E.H.*, Docket No. 17-0963 (issued August 24, 2018); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

²⁶ *J.A.*, *supra* note 13; *S.J.*, Docket No. 19-0186 (issued August 2, 2019).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2020
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