United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 20-0645**
	)	**Issued: April 29, 2021**
U.S. POSTAL SERVICE, POST OFFICE, River Grove, IL, Employer	)	

Appearances:
Stephanie Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On January 30, 2020 appellant, through counsel, filed a timely appeal from an August 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-0645.

On April 16, 1992 appellant, then a 30-year-old manual distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 14, 1992 she experienced sharp, stabbing pain down her back and right leg when lifting a heavy tub from a high belt and bent down to place it on a hand truck while in the performance of duty. She stopped work on April 15, 1992. OWCP accepted appellant's claim for lumbar strain and displacement of lumbar intervertebral disc without myelopathy. Appellant received wage-loss compensation for intermittent periods of total disability.

[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.

On June 4, 2000 appellant returned to part-time, modified-duty work as a modified distribution clerk, working four hours per day.[2] She stopped work on July 19, 2000 and subsequently filed claims for wage-loss compensation (Form CA-7) due to total disability for the period July 19 through 27, 2000 and commencing October 10, 2000.

By decision dated December 14, 2000, OWCP denied appellant's wage-loss compensation claims for total disability for the period July 19 through 27, 2000 and commencing October 10, 2000.

By decision dated December 15, 2000, OWCP issued a loss of wage-earning capacity (LWEC) determination based on appellant's actual earnings as a part-time modified distribution clerk. It found that she had worked in the position for over 60 days, commencing June 4, 2000, and that the employment fairly and reasonably represented her wage-earning capacity.[3] OWCP found that appellant had 51 percent LWEC and would be paid at the new gross compensation rate of $1,212.00.

Appellant remained off work and continued to receive wage-loss compensation on the periodic rolls based on the December 15, 2000 LWEC decision.

On January 6, 2003 OWCP referred appellant for vocational rehabilitation services. After completing the vocational rehabilitation program, which included a driver training course and certification and vehicle modification for hand controls, appellant accepted a modified job offer on July 6, 2004 as a part-time modified mail processor, effective July 10, 2004.

On July 20, 2004 appellant returned to part-time, modified-duty, working two hours per day as a modified mail processor. She stopped work again on July 29, 2004 and subsequently filed notice of recurrence (Form CA-2a) claiming disability from work for the period July 29 through August 12, 2004.

By decision dated February 3, 2005, OWCP denied appellant's recurrence of disability claim for the period July 29 through August 12, 2004.

On June 7, 2006 appellant filed another Form CA-2a claiming a recurrence of disability beginning December 16, 2004.[4]

By decision dated September 7, 2006, OWCP denied modification of the December 15, 2000 LWEC determination. It found that the medical evidence of record was insufficient to establish that appellant's April 14, 1992 employment injury had materially changed or worsened to the extent that she was totally disabled from work beginning December 16, 2004.

[2] On May 9, 2000 appellant accepted a part-time, modified-duty job offer as a modified distribution clerk. She began working two hours per day and gradually increased to working four hours per day.

[3] OWCP also noted that appellant stopped work from July 19 through 27, 2000 and beginning on October 10, 2000 and that it had denied appellant's wage-loss compensation claim for total disability.

[4] Appellant subsequently filed a Form CA-7 claiming wage-loss compensation for the period December 16, 2004 through June 3, 2006.

Appellant disagreed with the decision and filed multiple requests for reconsideration. By decisions dated September 17, 2007, November 21, 2008, February 22, 2010, May 23, 2011, August 21, 2012, November 15, 2013, April 9, 2015, June 30, 2016, and September 26, 2017, OWCP denied modification of its prior decisions.

On September 18, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence. She argued that the December 15, 2000 LWEC determination was erroneously issued retroactively and that the medical evidence was sufficient to establish modification of the original LWEC determination.

By decision dated August 14, 2019, OWCP denied modification of its prior decision finding that the original decision was not issued in error and that the medical evidence submitted was insufficient to establish that appellant's April 14, 1992 lumbar injury had materially changed.

The Board, having duly considered the matter, finds that this case is not in posture for decision.

OWCP's procedures provide that a formal LWEC should be left in place unless the claimant requests resumption of compensation for total wage loss. In this case, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal LWEC.[5] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements regarding the modification of a formal LWEC.[6] OWCP procedures provide, in pertinent part, that a formal LWEC determination 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 retrained or otherwise vocationally rehabilitated.[7] The procedure manual further indicates that it may be appropriate to modify a rating on the grounds that the claimant has been vocationally rehabilitated if the claimant is employed in a new job (a job different from the job for which he or she was rated) obtained with additional training, which pays at least 25 percent more than the current pay of the job for which the claimant was rated.[8]

In its August 14, 2019 decision, OWCP denied modification of its December 15, 2000 LWEC determination finding that the original decision was not issued in error and that the medical evidence submitted was insufficient to establish that appellant's April 14, 1992 lumbar injury had materially changed. OWCP did not, however, discuss whether modification of the December 15, 2000 LWEC determination was warranted because appellant had been vocationally rehabilitated.[9]

[5] 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); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

[6] *C.S.*, Docket No. 19-0660 (issued August 13, 2020); *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[7] FECA Procedure Manual, *supra* note 5 at Chapter 2.1501 (June 2013); *see J.M.*, Docket No. 18-0196 (issued July 12, 2018).

[8] *Id.* at Chapter 2.1501.5(c) (June 2013).

[9] *See J.C.*, Docket No. 16-1217 (issued October 11, 2017) (the Board found that OWCP had properly modified an October 21, 2011 wage-earning capacity determination on the basis that appellant had been retrained and obtained a new job position).

As noted above, modification of a formal LWEC may be warranted when the claimant has been retrained or otherwise vocationally rehabilitated.[10] In this case, the evidence of record indicates that appellant underwent vocational rehabilitation in 2003 and started a new position as a modified mail processor in July 2004. The Board therefore finds that OWCP should have developed the evidence in accordance with its procedures in order to determine whether modification of the December 15, 2000 LWEC determination was warranted based on the third criteria.[11] The Board will therefore remand the case to OWCP for proper adjudication, to be followed by issuance of a *de novo* decision.

IT IS HEREBY ORDERED THAT the August 14, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: April 29, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[10] *Supra* notes 7 & 8.

[11] *See W.S.*, Docket No. 08-1797 (issued December 23, 2008) (the Board reversed OWCP's decision modifying its prior wage-earning capacity determination finding that although OWCP had properly determined that appellant had been vocationally retrained, it improperly compared appellant's new earnings with those of his date-of-injury position rather than the wage-earning capacity position); *see also Lee Z. Watson*, Docket No. 04-2176 (issued March 1, 2005) (the Board found that OWCP had improperly modified its March 5, 1996 LWEC determination because it did not properly investigate whether appellant had been successfully retrained).