United States Department of Labor
Employees' Compensation Appeals Board

E.K., Appellant	)	
and	)	**Docket No. 20-1028**
	)	**Issued: July 6, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Hartly, DE, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 14, 2020 appellant, through counsel, filed a timely appeal from a November 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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 this case.[3]

[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.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the November 5, 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.*

ISSUE

The issue is whether appellant has met his burden of proof to modify OWCP's July 27, 2016 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On February 4, 2009 appellant, then a 42-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment, including lifting up to 70 pounds of mail, sorting and delivering the mail over nine hours a day, caused or aggravated a C6-7 disc bulge. He stopped work on October 24, 2007.[4] OWCP accepted the claim for herniated disc C6-7.

Appellant returned to full-time, light-duty work on February 13, 2010. OWCP initially paid her compensation on its supplemental rolls. As of April 20, 2013, the employing establishment could not accommodate appellant's March 19, 2013 work restrictions which were provided by Dr. Robert Smith, a Board-certified orthopedic surgeon and second opinion physician. OWCP paid appellant compensation on the periodic rolls effective June 30, 2013.

On July 2, 2014 appellant accepted a May 23, 2014 part-time modified limited-duty assignment as a modified window clerk, which involved , distribution of mail (not to exceed 10 pounds), and additional duties assigned daily not to exceed limits. The duties required standing/sitting/walking up to 4 hours, lifting/pulling/pushing no more than 10 pounds up to 4 hours. The assignment also indicated that there was no stooping or climbing, no lifting above shoulders, and no bending. Appellant's work hours were 1:00 p.m. through 5:00 p.m. Monday, Tuesday, Thursday, Friday, and Saturday with scheduled days off on Sunday and Wednesday.

On July 21, 2014 the employing establishment notified appellant of a schedule and job duties change, effective July 28, 2014. It noted that he would keep the same schedule, but he would perform passport appointments/customer pickups from 1:00 p.m. through 2:30 p.m. and would perform duties as assigned, and any additional as needed from 2:30 p.m. through 5:00 p.m. Appellant returned to work on July 28, 2014.

By decision dated July 27, 2016, OWCP found that the modified window clerk position appellant held since July 2, 2014 fairly and reasonably represented his wage-earning capacity. It further found that, as his actual earnings were less than the current wages of the job he held when injured, he was entitled to FECA wage-loss compensation for a 50 percent LWEC.

On April 5, 2017 OWCP received a claim for compensation (Form CA-7) for total disability due to the withdrawal of the light-duty position effective March 27, 2017. Along with the Form CA-7, it received a "priority for assignment sheet" dated April 3, 2017 and physical therapy reports dated April 18 and 26, 2017.

[4] Under OWCP File No. xxxxxx662, OWCP accepted a cervical sprain and a herniated cervical disc at C5-6 due to an August 9, 2000 traumatic injury. Appellant underwent an anterior cervical decompression at C5-6 with interbody fusion on September 17, 2001. He returned to modified duty and then to full-time regular duties as a rural carrier on August 7, 2002. Appellant's claims have not been administratively combined.

In a May 3, 2017 development letter, OWCP advised appellant that his claim for wage-loss compensation for the period March 27, 2017 onward was considered a request for modification of his formal LWEC decision. It advised him of the deficiencies in his claim and informed him of the three criteria to establish modification of an LWEC. OWCP afforded appellant 30 days to submit the necessary information.

Appellant continued to submit Form CA-7 claims for compensation and physical therapy notes. He also submitted a June 1, 2017 recurrence claim (Form CA-2a) alleging a recurrence of disability as no work was available commencing March 24, 2017.

In a letter to the employing establishment dated July 3, 2017, OWCP noted that the evidence of file indicated that appellant's limited-duty assignment may have been withdrawn in whole or in part effective March 23, 2017. It requested that the employing establishment provide all medical evidence in its possession, all official documentation related to the position appellant had been working, and a written statement addressing whether the position on which the LWEC rating was based was a bona fide position at the time of the LWEC rating. The employing establishment was afforded 30 days to provide the requested information.

In a July 12, 2017 letter, M.B., a Heath and Resource Management Specialist, indicated that appellant was working a limited-duty job for four hours a day, which was the basis of his LWEC determination. However, on March 24, 2017, he noted that there was no work available for appellant in his assigned office with his limitations. M.B. indicated that there was no change in appellant's medical condition or his ability to work four hours a day; rather, other clerks were entitled to that work.

By decision dated August 24, 2017, OWCP accepted appellant's claim for a recurrence of disability effective March 24, 2017 as no was available within his restrictions as of that date.

OWCP continued to receive Form CA-7 claims for compensation. It also received a copy of appellant's May 23, 2014 offer of modified assignment and a September 2, 2017 PS Form 50, which noted his position title as a rural carrier.

By decision dated January 11, 2018, OWCP denied modification of its July 27, 2016 LWEC determination as no basis for modifying the LWEC determination had been established. It noted that, when a formal LWEC is in place and a light-duty assignment is subsequently withdrawn, the LWEC determination remained in effect unless a basis for modifying the LWEC determination was established.

Appellant requested reconsideration on August 7, 2018. In a July 27, 2018 statement and on a copy of the July 27, 2016 LWEC decision, he noted that he was "never a window clerk nor was he trained." Appellant also indicated that his form PS 50's indicated that he was a rural carrier. He noted that that he was taken off work on December 12, 2014 due to increased pain in his neck which indicated a change in his condition. Appellant also indicated that he could no longer do any job which requires him to stand for any period of time.

In support of his request, appellant submitted multiple PS Forms 50 dated July 28, 2014 through August 3, 2018 which noted his position title of rural carrier, physical therapy reports; a March 7, 2014 capacity evaluation from Dr. Lyndon B. Cagampan, a physical medicine and

rehabilitation specialist, who related that appellant could work for four hours a day, with lifting restricted to 10 pounds; and an April 2, 2015 report from Dr. Cagampan, which indicated that appellant was excused from work, if a sitting job was not available on a part-time basis with restrictions of lifting no more than 10 pounds and no frequent twisting and turning of his head.

In a May 31, 2018 work capacity evaluation (Form OWCP-5c), Dr. Nazim Ameer, a Board-certified anesthesiologist, indicated that appellant had right upper extremity weakness and worsening of radicular pain with activity. He opined that appellant could not perform his usual job, but could work for four hours a day with restrictions secondary to pinched nerves of the neck and decreased muscle strength of the right upper extremity.

By decision dated November 23, 2018, OWCP denied modification of its January 11, 2018 decision, finding that appellant's arguments were insufficient to modify or terminate the LWEC decision. It noted that, while his PS-50 forms correctly noted his permanent and ongoing title of rural carrier, it did not affect nor invalidate the LWEC decision, which noted his modified assignment as a modified window clerk. OWCP also found that appellant worked in the modified position until March 7, 2017,[5] not because his physical condition had worsened, but because the position itself was no longer available due to staffing reasons.

On July 18, 2019 OWCP expanded the acceptance of the claim to include the additional condition of cervical radiculopathy.

On August 9, 2019 appellant, through counsel, requested reconsideration of the July 27, 2016 LWEC determination.

In progress notes dated May 30, June 27, and July 25, 2019, Dr. Ameer noted that appellant had back pain and normal gait. He provided assessments of lumbar radiculopathy, sacroiliitis, and lumbar facet syndrome. Dr. Ameer indicated that appellant's condition was permanent.

In an August 16, 2019 Form OWCP-5c, Dr. Ameer indicated that appellant had right upper extremity weakness and worsening of radicular pain with activity. He opined that appellant could not perform his usual job, but could work four hours a day with restrictions secondary to pinched nerves of the neck and decreased muscle strength of the right upper extremity. Appellant's previous restrictions of pushing/pulling/lifting no more than 10 pounds for 4 hours and no lifting above the shoulder remained the same, but walking was further restricted to no more than two hours.

By decision dated November 5, 2019, OWCP denied modification of its November 23, 2018 decision. It noted that OWCP's August 24, 2017 recurrence decision was issued prematurely.

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

[5] This date appears to be a typographical error as the employing establishment withdrew appellant's modified position effective March 24, 2017.

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.[6] 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.[7] Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, or a temporary position when the position held at the time of injury was permanent.[8]

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.[9] 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]."[10] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[11]

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 should modify its decision according to the established criteria for modifying a formal LWEC determination.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant has established that OWCP's July 27, 2016 loss of LWEC determination was issued in error.

The evidence of record reflects that the employing establishment offered appellant a modified window clerk position on May 23, 2014 working 20 hours per week, which was to be

[6] *M.S.*, Docket No. 19-0692 (issued November 18, 2019); *E.W.*, Docket No. 14-0584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

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

[8] *See M.S.*, *supra* note 6; *James D. Champlain*, 44 ECAB 438, 440-41 (1993); *id.* at Chapter 2.815.5c (June 2013).

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

[10] *Supra* note 7 at 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).

[11] *See J.A.*, Docket No. 18-1586 (issued April 9, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

[12] *See M.S.*, *supra* note 6; *C.P.*, Docket No. 11-1459 (issued February 7, 2012); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

available as of May 30, 2014. Appellant accepted this position on July 2, 2014. However, on July 21, 2014 the employing establishment issued a schedule and job duties change, which indicated that he would perform passports appointments and customer pickup from 1:00 p.m. until 2:30 p.m., and then perform other duties as assigned including second notice, clearing accountables and additional as needed. In the LWEC determination dated July 27, 2016, OWCP found that the position appellant accepted on July 2, 2014 fairly and reasonably represented his wage-earning capacity.

The Board has previously explained that an offered limited-duty position will not be considered to be temporary if it is to remain in effect indefinitely unless the employee's restrictions change or he returns to full duty; and the employee performed the duties of the modified job offer for at least 60 days prior to the wage-earning capacity determination.[13]

The Board finds that the position appellant accepted on July 2, 2014 was a temporary position. Appellant did not perform the duties of the modified-limited duty position he accepted on July 2, 2014 for more than 60 days before the job duties were changed. The job duties change reflects that the position offered on May 23, 2014 and which he accepted on July 2, 2014, was not in fact a permanent position.

The Board finds that, for these reasons, appellant has met his burden of proof to modify OWCP's July 27, 2016 LWEC determination as it was erroneously issued.

Accordingly, the Board finds that appellant has met his burden of proof to modify the July 27, 2016 LWEC determination.

[13] *K.B.*, Docket No. 20-0358 (issued December 10, 2020).

CONCLUSION

The Board finds that appellant has met his burden of proof to modify OWCP's July 27, 2016 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 6, 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