

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

_____)
L.M., Appellant)
)
and) **Docket No. 20-1038**
) **Issued: March 10, 2021**
)
U.S. POSTAL SERVICE, POST OFFICE,)
Homerville, GA, Employer)
_____)

Appearances: Case Submitted on the Record
Paul H. Felser, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On April 16, 2020 appellant, through counsel, filed a timely appeal from an October 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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

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 October 30, 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to her accepted April 23, 2014 employment injury; and (2) whether appellant has met her burden of proof to modify OWCP's December 14, 2017 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On April 23, 2014 appellant, then a 62-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she sustained a left arm injury when she lifted a package and felt a twinge in her arm while in the performance of duty. She stopped work on April 24, 2014. OWCP accepted appellant's claim for left shoulder sprain and impingement of the left rotator cuff. It paid her wage-loss compensation for disability from work on the supplemental rolls commencing June 9, 2014 and on the periodic rolls commencing June 29, 2014.

The findings of left shoulder x-rays obtained on April 23, 2014 showed degenerative changes of the acromioclavicular joint with narrowing of the rotator interval. There was no acute fracture dislocation.

On October 9, 2014 appellant underwent OWCP-authorized left shoulder surgery, including major debridement of glenohumeral joint, biceps tenotomy, subacromial decompression, and distal clavicle resection.

The findings of a November 18, 2014 magnetic resonance imaging (MRI) scan of appellant's cervical region contained an impression of slight posterior disc bulges with minimal indentation of the anterior thecal sac at the C5-6 and C6-7, without neural foraminal stenosis.

In a report dated November 18, 2015, Dr. Brook G. Bearden, a Board-certified orthopedic surgeon, indicated that appellant could perform light-duty work with no lifting over 20 pounds with the affected left arm, and no outstretched or overhead arm use.

In a report dated May 18, 2016, Dr. Bearden again advised that appellant could return to light-duty work with no lifting over 20 pounds using the affected left arm, as well as no outstretched or overhead arm use.

In July 2016 OWCP referred appellant for participation in an OWCP-sponsored vocational rehabilitation program designed to return her to work.

In a January 4, 2017 report, Dr. Bearden indicated that appellant had a 20-pound lifting restriction and a prohibition from outstretched or overhead arm use. He noted no repetitive use of the left arm, including typing. After appellant's vocational rehabilitation counselor requested clarification of the typing restriction, Dr. Bearden clarified that appellant was able to engage in intermittent or occasional typing and data entry.

In a January 24, 2017 report, Dr. Terry Persaud, a Board-certified anesthesiologist, diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms, myofascial pain, depression, cervical disc bulge, and insomnia. He produced a similar report on September 25, 2017.

The attempt to return appellant to work was unsuccessful and, on October 11, 2017, her rehabilitation counselor selected the position of order clerk from the Department of Labor's *Dictionary of Occupational Titles* (DOT) as vocationally and medically suitable. The position (DOT No. 249-362.026) was clerical in nature and involved processing customers' orders for merchandise/materials by using a telephone, computer, and/or calculating machine. An order clerk was required to type data into a computer and to type or write out order forms by hand. The position was classified as sedentary and its physical requirements included occasionally lifting up to 10 pounds.⁴ A state labor survey revealed that the position was reasonably available in appellant's commuting area at an average weekly salary of \$313.85.

By notice dated October 24, 2017, OWCP advised appellant that it proposed to reduce her wage-loss compensation, under 5 U.S.C. § 8106 and 5 U.S.C. § 8115, because she had the capacity to earn \$313.85 in weekly wages in the constructed position of order clerk. It informed her that the opinion of Dr. Bearden represented the best assessment of her capacity to work and that her vocational rehabilitation counselor properly determined that she was vocationally and medically capable of working as an order clerk.

In a letter dated November 9, 2017, counsel argued that OWCP had not adequately considered that appellant had additional medical conditions which prevented her from working as a customer order clerk, including depression and anxiety.

Appellant submitted an October 18, 2016 report from Dr. Persaud who diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms, myofascial pain, depression, cervical disc bulge, and insomnia. He indicated that he would defer to Dr. Bearden regarding what component of her current condition was attributable to her April 23, 2014 injury. Dr. Persaud noted, "Additionally, it appears that her depression may have been precipitated by her current occupational injury and continues to require ongoing treatment."

In an October 18, 2017 report, Dr. Bearden indicated that appellant's medical condition had not changed. In an October 26, 2017 report, Dr. Persaud diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms, myofascial pain, depression, cervical disc bulge, and insomnia.

By decision dated December 14, 2017, OWCP issued an LWEC determination, reducing appellant's wage-loss compensation, effective December 15, 2017, based on her capacity to earn \$313.85 in weekly wages as a customer order clerk.

On December 26, 2017 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted a November 30, 2017 report from Dr. Persaud who diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear

⁴ Sedentary work, according to the DOT, involves sitting up to six hours in an eight-hour workday, but may involve walking or standing for brief periods of time up to two hours in an eight-hour workday. Occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday.

and acromioclavicular arthritis), muscle spasms, myofascial pain, depression, cervical disc bulge, and insomnia.

During the hearing held on June 18, 2018, counsel argued that OWCP had not adequately considered all of appellant's conditions in assessing the suitability of the order clerk position, especially with respect to her depression and anxiety conditions. Counsel claimed that the acceptance of appellant's claim should be expanded to include additional conditions causally related to the accepted April 23, 2014 employment injury, particularly those related to her emotional and cervical conditions.

In a July 11, 2018 report, Dr. Wendy Vandemark, a Board-certified psychiatrist, opined that, due to psychological factors and pain, appellant was completely unable to work. She advised that appellant's current diagnoses were mood disorder and generalized anxiety, and that her symptoms included depression, anxiety, crying spells, not leaving her home except for doctor's appointments, chronic pain, fatigue, lack of good hygiene, trouble sleeping, and trouble focusing.

By decision dated September 4, 2018, OWCP's hearing representative affirmed the December 14, 2017 LWEC determination. The hearing representative further found that appellant had not submitted sufficient medical evidence to establish that the acceptance of her claim should be expanded to include additional conditions causally related to the accepted April 23, 2014 employment injury.

On September 3, 2019 appellant, through counsel, requested reconsideration of the September 4, 2018 decision.

Appellant submitted additional medical evidence in support of her claim that the December 14, 2017 LWEC determination should be modified. In an October 23, 2018 report, Dr. Persaud diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms, myofascial pain, depression (requiring ongoing psychiatric treatment), cervical disc bulge, and insomnia.

In September 18, 2018 and August 6, 2019 reports, Dr. Bearden diagnosed left rotator cuff capsule strain and discussed appellant's medical treatment. In an August 22, 2019 report, Dr. Persaud diagnosed chronic left shoulder pain status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), cervical degenerative disc disease (with C2-3, C4-5, C5-6 and C6-7 disc bulges), muscle spasms, myofascial pain, insomnia, and depression.

By decision dated October 30, 2019, OWCP denied modification of the September 4, 2018 decision.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

⁵ *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

The medical evidence required to establish causal relationship between a claimed specific condition and/or period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

The Board has held that when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.⁷ However, the normal progression of untreated disease cannot be stated to constitute “aggravation” of a condition merely because the performance of normal work duties reveals the underlying condition.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to the accepted April 23, 2014 employment injury.

In a July 11, 2018 report, Dr. Vandemark noted that appellant’s current diagnoses were mood disorder and generalized anxiety, and that her symptoms included depression, anxiety, crying spells, not leaving her home except for doctor’s appointments, chronic pain, fatigue, lack of good hygiene, trouble sleeping, and trouble focusing. The case record also contains a series of reports in which Dr. Persaud diagnosed conditions other than the accepted left shoulder sprain and left rotator cuff impingement. In an October 18, 2016 report, he diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms, myofascial pain, depression, cervical disc bulge, and insomnia. Dr. Persaud indicated that he would defer to Dr. Bearden regarding what component of her current condition was attributable to her April 23, 2014 injury. He noted, “[a]dditionally, it appears that her depression may have been precipitated by her current occupational injury and continues to require ongoing treatment.” In a November 30, 2017 report, Dr. Persaud diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms and myofascial pain, depression, cervical disc bulge, and insomnia. In an August 22, 2019 report, he diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), cervical degenerative disc disease (with C2-3, C4-5, C5-6, and C6-7 disc bulges), muscle spasms and myofascial pain, insomnia, and depression.

Although Dr. Persaud suggested in his October 18, 2016 report that appellant’s depression was related to the April 23, 2014 employment injury, his opinion in this regard is of limited probative value because it is speculative in nature.⁹ The Board finds that these reports are of no probative value regarding appellant’s expansion claim because they do not contain an opinion on causal

⁶ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁷ *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

⁸ *Id.*

⁹ See *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

relationship. The reports do not contain a clear opinion that the observed conditions were casually related to the April 23, 2014 employment injury. The Board has held that medical evidence that does not offer a clear opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁰ Therefore, the submission of these reports are insufficient to establish appellant's expansion claim.

As the medical evidence of record is insufficient to establish causal relationship between appellant's additional diagnosed conditions and the accepted employment injury, the Board finds that she has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.¹¹ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.¹² An employee's actual earnings generally best reflect his or her wage-earning capacity.¹³ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹⁴ But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his or her disabled condition.¹⁵

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹⁶ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹⁷ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's

¹⁰ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹¹ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

¹² 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹³ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹⁴ *Id.*

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

¹⁶ *M.A.*, 59 ECAB 624, 631 (2008).

¹⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

limitations from both injury-related and preexisting conditions, but not limitations attributable to post-injury or subsequently acquired conditions.¹⁸

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.¹⁹ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.²⁰ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.²¹

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.²² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to modify OWCP's December 14, 2017 LWEC determination.

The Board finds that the opinion of Dr. Bearden, delineated in several reports produced in 2006 and 2007, represents the weight of the medical evidence with respect to appellant's ability to work in the constructed position of customer order clerk, and that appellant has not established that modification of the December 14, 2017 LWEC determination is warranted because the original determination was erroneous.²⁴ The Board further finds that Dr. Bearden provided an opinion of appellant's work capacity based on an accurate factual and medical background and he properly found that appellant could perform sedentary duty with a 20-pound lifting restriction and no outreaching/overhead work using the left arm. The selected position of order clerk was a sedentary position with occasional lifting of 10 pounds. It was clearly within the work restrictions

¹⁸ *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, *id.* at Chapter 2.816.4c (June 2013).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

²⁰ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n. 9 (2004); Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.816.6 (June 2013).

²¹ 20 C.F.R. § 10.403(d), (e); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

²² *C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

²³ *See T.M.*, Docket No. 08-0975 (issued February 6, 2009).

²⁴ *See supra* note 22.

provided by Dr. Bearden.²⁵ The Board thus finds that the probative medical evidence establishes the position was medically suitable.

The rehabilitation counselor confirmed that the order clerk position was vocationally suitable and was performed in appellant's commuting area.²⁶ The wages were reported as \$313.85 per week. OWCP applied the *Shadrick* formula to determine the LWEC. The earnings of \$313.85 was divided by the current pay rate for appellant's date-of-injury job, to determine the wage-earning capacity percentage. The pay rate for compensation purposes was then multiplied by the wage-earning capacity percentage. This amount was subtracted from the pay rate for compensation purposes to determine the LWEC.²⁷ The record does not contain any evidence of error with respect to these calculations. The Board accordingly finds that no error in the original December 14, 2017 LWEC determination has been established.

Moreover, the Board finds that appellant has not established that modification of the December 14, 2017 LWEC determination is warranted by submitting medical evidence demonstrating that, after issuance of the December 14, 2017 determination, there was a material change in the nature and extent of her accepted employment-related conditions such that she could no longer work as a customer order clerk.²⁸

After December 14, 2017, appellant continued to submit periodic reports from Dr. Persaud. In an October 23, 2018 report, Dr. Persaud diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), muscle spasms, myofascial pain, depression (requiring ongoing psychiatric treatment), cervical disc bulge, and insomnia. In an August 22, 2019 report, he again diagnosed chronic left shoulder pain, status post subacromial decompression (with rotator cuff tear and acromioclavicular arthritis), cervical degenerative disc disease (with C2-3, C4-5, C5-6, and C6-7 disc bulges), muscle spasms, myofascial pain, insomnia, and depression. Appellant also continued to submit reports of Dr. Bearden. In September 18, 2018 and August 6, 2019 reports, Dr. Bearden diagnosed left rotator cuff capsule strain and discussed appellant's medical treatment.

The Board notes that, although the reports of Dr. Persaud and Dr. Bearden mentioned appellant's left shoulder condition, they do not show that the April 23, 2014 employment injury worsened such that appellant could no longer perform the limited duties of the order clerk position upon, which her LWEC capacity was based. Dr. Persaud and Dr. Bearden did not provide an

²⁵ In a January 4, 2017 report, Dr. Bearden indicated no repetitive use of the left arm, including typing. After appellant's vocational rehabilitation counselor requested clarification of the ostensible typing restriction, Dr. Bearden clarified that appellant was able to engage in intermittent or occasional typing and data entry. There is no indication that the order clerk position required typing or data entry that was non-intermittent or engaged in beyond occasional frequency.

²⁶ See *supra* notes 19 and 20.

²⁷ See *Albert C. Shadrick*, *supra* note 21. See also 20 C.F.R. § 10.403(d), (e).

²⁸ See *supra* note 22.

opinion on whether the April 23, 2014 employment injury prevented appellant from working as an order clerk.²⁹

The Board finds that appellant did not provide any medical evidence establishing that an accepted employment-related condition prevented her from working as an order clerk. Therefore, she did not establish that modification of the December 14, 2017 LWEC determination is warranted on that basis. Appellant also has not demonstrated that modification of the December 14, 2017 LWEC determination is warranted because she has been retrained or otherwise vocationally rehabilitated.³⁰ For these reasons, appellant has not met her burden of proof to modify OWCP's December 14, 2017 LWEC determination.

On appeal, counsel argues that OWCP failed to adequately consider appellant's emotional condition in determining whether she was capable of working as an order clerk. However, the Board notes that there is no clear, probative evidence establishing that appellant's emotional condition preexisted the April 23, 2014 employment injury or that it developed as a consequence of the April 23, 2014 employment injury. Therefore, appellant's emotional condition would not be considered in determining whether she was capable of working as an order clerk.³¹

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 her burden of proof to expand the acceptance of her claim to include additional conditions causally related to the accepted April 23, 2014 employment injury. The Board further finds that appellant has not met her burden of proof to modify OWCP's December 14, 2017 LWEC determination.

²⁹ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018) (medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

³⁰ See *id.*

³¹ See *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 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