

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

D.H., Appellant	)	
	)	
and	)	Docket No. 21-0294
	)	Issued: November 5, 2021
U.S. POSTAL SERVICE, SUNMAN POST	)	
OFFICE, Sunman, IN, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 23, 2020 appellant, through counsel, filed a timely appeal from an October 7, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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 an 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.

<sup>2</sup> The record also contains a November 5, 2020 decision; however, counsel has not appealed from this decision. Therefore, the Board will not review it with this appeal.

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to modify OWCP's February 24, 2020 loss of wage-earning capacity (LWEC) determination, effective January 8, 2020.

## FACTUAL HISTORY

On August 23, 2004 appellant, then a 34-year-old mail rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 21, 2004 she strained her back when she lifted bags and boxes out of an all-purpose container (APC) while in the performance of duty. She stopped work on August 22, 2004.

OWCP accepted appellant's claim for lumbago, lumbar paraspinal spasm, disc herniation at L5-S1, lumbar spinal stenosis, and nerve root encroachment with free disc fragment. On December 10, 2004 appellant underwent a microscopic lumbar laminotomy and discectomy at L5-S1 on the left. OWCP paid her wage-loss compensation on the supplemental rolls as of October 6, 2004 and on the periodic rolls as of December 26, 2004. On July 10, 2006 appellant underwent re-exploration of L5-S1, left, with transforaminal lumbar interbody fusion and pedicle screw fixation.

On November 17, 2014 OWCP referred appellant for a second opinion examination with Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, to determine the extent of her employment-related conditions and her ability to return to her date-of-injury position.

In a December 19, 2014 report, Dr. Fisher noted appellant's history of injury and medical treatment. He related that there were no residuals of the lumbago and lumbar paraspinal spasms, which were soft tissue injuries that had resolved within two to three months after the injury. Dr. Fisher further noted that the disc herniation at L5-S1, spinal stenosis, and nerve root encroachment caused by a free disc L5-S1 fragment were treated appropriately with surgical procedures. He found that a 2014 magnetic resonance imaging (MRI) scan revealed residuals of the radiculopathy (sciatica), with pain/tenderness over the left buttock and posterior thigh, absent Achilles reflex on the left, 4+/5 decreased motor power of the left toe extensor, and positive straight leg raising on the left. Dr. Fisher opined that appellant had lumbar post-laminectomy syndrome, precipitated by the work injury and two surgical procedures. He advised that appellant was capable of working an 8-hour day, with 6 hours of frequent breaks, 1 hour walking, and 1 hour standing, a weight limitation of lifting/carrying 5 pounds frequently and 10 pounds occasionally, and avoiding bending/twisting at waist level. Dr. Fisher indicated these restrictions were permanent.

On January 16, 2015 OWCP referred appellant for participation in an OWCP-sponsored vocational rehabilitation program designed to return her to work.

The attempt to return appellant to work was unsuccessful and on June 19, 2015 her rehabilitation counselor selected the position of telephone sales representative from the Department of Labor's *Dictionary of Occupational Titles* (DOT) as vocationally and medically suitable. The position (DOT No. 299.357-014) was clerical in nature and with duties described as soliciting orders for merchandise or services over the telephone. The position was classified as

sedentary and its physical requirements included occasionally lifting up to 10 pounds.<sup>4</sup> A state labor survey revealed that the position was reasonably available in appellant's commuting area at an average weekly salary of \$404.00.

By notice dated February 9, 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 \$415.00 in weekly wages in the constructed position of telephone solicitor. It informed her that the opinion of Dr. Fisher 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 a telephone solicitor.

By decision dated March 30, 2017, OWCP reduced appellant's wage-loss compensation, effective April 2, 2017, based on her capacity to earn \$321.63 in weekly wages as a telephone solicitor. It noted that appellant worked 31 hours per week in her date-of-injury job as a rural carrier associate and, therefore, her earnings were prorated. OWCP modified the notice of proposed reduction to reflect that appellant was capable of earning \$321.63 per week (\$415.00/40 hours x 31 hours).

On April 17, 2017 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 2, 2017. By decision dated December 6, 2017, OWCP's hearing representative affirmed the March 30, 2017 LWEC determination.

On January 29, 2019 OWCP referred appellant for a second opinion examination with Dr. Thomas J. Cittadine, a Board-certified orthopedic surgeon, to determine the current status of appellant's disability.

In a March 19, 2019 report, Dr. Cittadine noted appellant's history of injury and treatment. He examined appellant, provided findings, and opined that appellant continued to have work-related conditions that precluded her from performing the duties of a rural carrier. Dr. Cittadine also indicated "[a]t this time I do not think she could even do a sedentary job given her poor level of function and the large amounts of medications that she needs to control her pain." He further advised that she "would need the opinion of a spine surgeon for reevaluation of her overall situation. Even if there is a good surgical option for improvement, it appears that she will need long-term pain management."

In a letter dated May 22, 2019, counsel noted that Dr. Cittadine indicated that appellant could not perform sedentary work and argued that this was a material change in appellant's medical condition, such that the LWEC determination should be modified. He requested that OWCP advise whether appellant would receive wage-loss compensation for temporary total disability at the full rate.

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<sup>4</sup> 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 one-third of the time during the workday.

On September 30, 2019 appellant, through counsel, requested modification of the March 30, 2017 LWEC determination. He argued that the March 19, 2019 report of the second opinion physician, Dr. Cittadine, established a basis for modification.

On November 6, 2019 OWCP requested clarification from Dr. Cittadine regarding whether appellant was medically capable of working in the telephone solicitor position. It noted his March 19, 2019 opinion that appellant could not perform her date-of-injury rural carrier position and that at this point he did not believe that appellant could even perform sedentary job duties.

In a November 18, 2019 report, Dr. Cittadine indicated that, based on his examination of March 19, 2019, he thought that realistically appellant would have great difficulty performing a job on a regular basis for even part of a day. He also related that it was unlikely that appellant would be able to drive to a job, would probably have to work from home, and even work from home would be difficult as she could only sit for short periods at a time. Dr. Cittadine noted that he did not have any follow-up information since his examination eight months prior and he could see her for a reevaluation.

On November 21, 2019 OWCP notified appellant that she was being referred back to Dr. Cittadine for a second opinion examination.

In a January 8, 2020 report, Dr. Cittadine noted that he saw appellant to clarify the extent of appellant's ability to work in a limited-duty sedentary capacity as a telephone solicitor. He indicated that, since he last saw appellant, there was no improvement in her overall condition, rather it had worsened, as she was having increased back pain, with radiating pain down the back of each leg to her foot, the right side worse than the left, and constant pain at the 8/10 level. Dr. Cittadine noted that appellant's sister had moved in permanently to assist her, as appellant's husband was a truck driver and gone frequently. He related that appellant no longer drove, could not bend over to do any household chores, and was constantly in pain, and lying in bed with her legs raised on a pillow. Dr. Cittadine also related that appellant did not leave the house except for necessary appointments, was unable to stand unassisted unless using a cane or walker, had difficulty getting up from a chair, had fallen several times, and could not get up from the floor by herself. He reviewed May 22, 2019 x-rays of the cervical spine, which revealed significant degenerative disc narrowing at C5-6, with anterior subluxation of C5-6, and degenerative changes at C6-7. Dr. Cittadine also noted a cervical MRI scan on June 20, 2019 showed significant degenerative changes at C3-4, C4-5 and C5-6 and a May 14, 2019 MRI scan of the lumbosacral spine showed significant pathology at L3-4 and L4-5, with neural foraminal encroachment on the right worse than the left. He diagnosed status post-lumbar discectomy for disc rupture L5-S1 on December 10, 2004, status post-lumbar re-exploration for recurrent disc L5-S1 and instrumental fusion L5-S1 on July 10, 2006, failed back syndrome, chronic pain syndrome, opioid addiction secondary to chronic pain, and bilateral lower leg radiculopathy. Dr. Cittadine also noted that the diagnostic tests revealed worsening lumbar disc pathology at L3-4 and L4-5 and significant cervical disc/degenerative pathology at multiple levels. He opined that appellant was unable to function in her previous job as a telephone solicitor based on his current and previous examination, and in her current condition was unable to work in any capacity.

By decision dated February 24, 2020, OWCP modified the March 30, 2017 LWEC determination, effective January 8, 2020, the date of Dr. Cittadine's report. It found that the

January 8, 2020 report of Dr. Cittadine supported a material worsening of appellant's accepted work-related medical conditions and her inability to perform any work, including the position of a telephone solicitor.

On August 28, 2020 counsel requested reconsideration of the February 24, 2020 decision. He noted that he agreed with the modification; however, he argued that the effective date should be the date of Dr. Cittadine's March 19, 2019 report.

By decision dated October 7, 2020, OWCP denied modification of its February 24, 2020 LWEC determination. It explained that it was not until January 8, 2020, that it was able to establish that the criteria for modification were satisfied.

### **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.<sup>5</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup> OWCP's regulations and procedures contain provisions regarding the modification of a formal LWEC.<sup>7</sup> 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.<sup>8</sup> It further provides that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met.<sup>9</sup>

### **ANALYSIS**

The Board finds that appellant has met her burden of proof to modify OWCP's February 24, 2020 LWEC determination, effective March 19, 2019.

Appellant and her counsel do not disagree with the February 24, 2020 LWEC determination insofar as it determined that the March 30, 2017 LWEC determination should be modified. Rather, they argue that the effective date of the February 24, 2020 LWEC determination was in error, as it should reflect the date of Dr. Cittadine's first report on March 19, 2019.

In his March 19, 2019 report, Dr. Cittadine, OWCP's second opinion physician, opined that appellant could not perform the duties of a rural carrier, and he related that appellant could

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<sup>5</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>6</sup> *S.V.*, Docket 19-1521 (issued February 22, 2021); *W.R.*, Docket No. 18-1782 (issued May 29, 2019); *L.T.*, Docket No. 18-0797 (issued March 4, 2019); *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>7</sup> 20 C.F.R. § 10.511; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013); see also *C.S.*, Docket No. 18-1610 (issued April 25, 2019).

<sup>8</sup> *Id.* at Chapter 2.1501.3(a) (June 2013); see *C.S.*, *id.*

<sup>9</sup> *Id.* at Chapter 2.1501.4 (June 2013); see *J.A.*, Docket No. 18-1586 (issued April 9, 2019); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

not even perform a sedentary job given her poor level of function and large amounts of medication she needed to control her pain. Since the telephone solicitor position which was basis of appellant's LWEC determination was a sedentary position, OWCP requested that Dr. Cittadine clarify whether she could perform the duties of the telephone solicitor position. In his November 18, 2019 report, Dr. Cittadine related that, based upon his March 19, 2019 examination, realistically appellant would have great difficulty trying to work on a regular basis even for part of a day. He also noted it was unlikely that appellant would be able to drive to a job, she would probably have to work from home, and it would be difficult as she could only sit for short periods at a time. Dr. Cittadine explained that he did not have any follow-up information since his examination eight months prior and that he would see appellant for a re-evaluation, if necessary. Thereafter, he saw appellant on January 8, 2020 to clarify the extent of appellant's ability to work in a limited-duty sedentary capacity as a telephone solicitor. Dr. Cittadine examined appellant, provided findings and opined that appellant was unable to function in her previous job as a telephone solicitor based upon his March 19, 2019 examination, as well as her current examination. He noted that appellant's physical examination on that day was limited because of her marked pain and decreased mobility. Dr. Cittadine thereafter reviewed an MRI scan from May 14, 2019 which demonstrated significant pathology at L3-4 and L4-5 with neural foraminal encroachment worse on the right.

The Board finds that Dr. Cittadine consistently opined since March 19, 2019 that appellant could not perform sedentary work duties. This finding was corroborated by his supplemental reports. In his November 18, 2019 supplemental report, Dr. Cittadine referred back to his March 19, 2019 findings and again related that appellant could not realistically perform any work. While OWCP found that he had first clarified that appellant's condition had worsened in his January 8, 2020 report, the Board finds that he in fact opined in this report that appellant could not perform the telephone solicitor position based upon his March 19, 2019 and his January 8, 2020 examination findings. Furthermore, Dr. Cittadine opined that appellant's lumbar condition had worsened were based upon his review of appellant's May, 14, 2019 MRI scan. The Board, therefore, finds that Dr. Cittadine's reports, read together, establish that appellant could not perform sedentary work as of March 19, 2019. OWCP should have, therefore, modified appellant's LWEC determination as of March 19, 2019, the date of Dr. Cittadine's initial report.

### **CONCLUSION**

The Board finds that appellant has met her burden of proof to modify OWCP's February 24, 2020 LWEC determination, effective March 19, 2019.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 7, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and modified in part.

Issued: November 5, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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