United States Department of Labor
Employees' Compensation Appeals Board

W.E., Appellant	)	
and	)	**Docket No. 20-0979**
	)	**Issued: October 20, 2021**
U.S. POSTAL SERVICE, COLLEGE PARK POST OFFICE, College Park, GA, Employer	)	

Appearances:
Joanne Wright, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 4, 2020 appellant, through her representative, filed a timely appeal from a December 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 OWCP received additional evidence following the December 5, 2019 decision. 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 her burden of proof to modify OWCP's December 2, 2004 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On December 15, 1999 appellant, then a 39-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 6, 1999, she sustained an emotional condition when she was robbed at gunpoint while delivering mail in an apartment building in the performance of duty. She stopped work on December 6, 1999. OWCP accepted the claim for unspecified reaction to stress.

Appellant received treatment from David B. Rush, PhD., a licensed clinical psychologist. In progress notes dated December 17, 1999 to January 12, 2000, Dr. Rush advised that appellant should not return to delivering mail, as it would lead to an increase in her level of anxiety.

Appellant returned to work as a modified city carrier on January 18, 2000.

In a report dated November 7, 2001, Dr. Paris A. Souval, a family practitioner, noted that he had treated appellant since the employment injury in December 1999. He noted that he did not recommend that appellant return to full duty on her route, or on any route, but that he would recommend that she attempt certain tasks towards returning to full status. Dr. Souval related that appellant had mentioned that she had some problems when she had to perform Express Mail curbside delivery as well as delivery to some business locations.

In a report dated May 3, 2002, Dr. Rush related that it was not appropriate for appellant to return to delivering mail, that her hours should not be changed to the late afternoon or evening, and that he did not recommend that her duty station be moved to the other side of town, as these actions would increase her stress level and possibly her anxiety.

Due to a lack of limited-duty work, appellant stopped work on May 9, 2002.

On May 20, 2002 the employing establishment offered appellant a limited-duty assignment as a modified city carrier, Level 1, step 0, $42,635.00 annually and $20.50 hourly. The hours of the assignment were from 6:00 a.m. to 2:50 p.m., with off days listed as Sunday and Wednesday. The duties of the position included priority hub run to North Atlanta and hub to Doraville, long life vehicle (LLV) vehicle provided, casing mail on routes, P.O. Box section, clerical work (certified mark ups, *etc*.) process computer forwarding systems (CFS) and Internal Revenue Service (IRS) mail, deliver express mail and deliver to business, but no neighborhood delivery collection box units, (NDCBU's). The physical requirements included walking, standing, sitting intermittently, fine manipulation and simple grasping with hands. The physical restrictions noted indicated that appellant could not be exposed to apartment mail delivery and she was advised to perform all duties within her physician's limitations. The limited-duty assignment was available as of May 25, 2002. Although appellant rejected the offer on May 28, 2002 she accepted the assignment and returned to work as a modified city carrier on June 10, 2002.

By decision dated December 2, 2004, OWCP found that the actual wages of the modified city carrier position that appellant began on June 10, 2002, fairly and reasonably represented her

wage-earning capacity. It noted that, "Your actual wages meet or exceed the wages of the job held when injured, and no loss of wages has occurred." OWCP explained that appellant's entitlement to compensation for wage loss was terminated according to the provisions of 5 U.S.C. § 8115.

In a March 5, 2012 report, Dr. Rush noted that he saw appellant on a monthly basis related to the robbery, which occurred in December 1999. He opined that she continued to have problems with stressful situations and had recently experienced an increase in stress and anxiety due to a significant change in her work schedule. Dr. Rush advised that appellant's work duties should avoid unnecessary stress and pressure and she should be assigned to inside duties.

On March 21, 2012 the employing establishment offered appellant a new modified city carrier position. The duties of the position included answering telephones/recording appointments, and completing form and report *via* computer. All duties were to be performed indoors. The assignment location was changed to the Hapeville Branch. Appellant accepted the offer on April 3, 2012.

In a November 28, 2018 treatment note, Dr. Rush reiterated that he saw appellant on a monthly basis related to the robbery that occurred in December 1999, and that appellant continued to have problems with stressful situations. He advised that appellant's "work duties should avoid unnecessary stress and pressure and she should be assigned inside duties until further notice" and that appellant "recently presented with increases in stress and anxiety due to a significant change in her work schedule."

On December 21, 2018 appellant filed a claim for compensation (Form CA-7) for wage loss during the period November 28 through December 21, 2018.

In a December 14, 2018 e-mail from the employing establishment, R.W., a manager, explained that appellant was advised to report to the Lakewood Station for one day. He explained that she responded that it was "out of her comfort zone." R.W., explained that, if appellant could not report to Lakewood, he could not use her in "204B."

In a December 6, 2018 note, Dr. Rush indicated that appellant had an acute stress disorder with a work stoppage on November 28, 2018, and a tentative return to work on December 28, 2018.

On December 20, 2018 the employing establishment offered appellant another modified assignment at the Old National Post Office facility. The duties included indoor work up to four hours daily casing mail. Appellant responded that her estimated return to work date was not until February 1, 2019. She neither accepted nor refused the job offer.

In a December 27, 2018 report, Dr. Rush reiterated that he saw appellant for therapy on a weekly basis as she was still experiencing unspecified emotional issues that precluded her from returning to work. He advised that she was expected to return to work pending reevaluation on February 1, 2019.

On December 28, 2018 appellant filed a Form CA-7 for wage loss during the period December 22 through 28, 2018.

In a development letter dated January 8, 2019, OWCP noted that it had received appellant's CA-7 forms for the period November 28 through December 28, 2018. It advised that the medical evidence of record did not substantiate that her disability was caused by the accepted employment injury. OWCP indicated that, if a material worsening of an allowed condition was claimed, a supporting medical opinion should be provided. It also indicated that, if appellant was claiming a significant change in the work assignment, it "may constitute a new injury. As this was a one-time event that occurred during the work shift, a CA-1 should be file[d]." OWCP afforded her 30 days to provide evidence substantiating her claim.

Appellant continued to submit CA-7 forms for wage loss during the periods December 29, 2018 through February 22, 2019.

In a January 18, 2019 report, Dr. Rush noted appellant's history of injury and treatment. He related that she had colitis secondary to her stress and high blood pressure. Dr. Rush diagnosed post-traumatic stress disorder (PTSD), persistent depressive disorder, and unspecified adjustment disorder. He explained that appellant was seeking updated evidence of her level of function with regard to her claims for wage-loss compensation. Dr. Rush opined that she continued to experience symptoms of PTSD, including hypervigilance, exaggerated startle response, irritability, emotional reactivity, anger, and occasional nightmares and flashbacks. He advised that appellant was depressed a majority of the time, however, in spite of the persistent PTSD symptoms and dysthymic mood, she was able to maintain her employment, and denied any specific work performance problems. Dr. Rush related that a new acting manager hired several months prior was now harassing appellant in the workplace and that, ''It was for this reason that she requested to go on leave from her job." He explained that her depression and PTSD made it difficult to cope and her symptoms intensified in response to the harassment that she had been experiencing.

OWCP issued additional development letters on January 22, and February 1 and 19, 2019 in response to the additional claims for wage-loss compensation for the periods December 29, 2018 and continuing.

In a January 30, 2019 treatment note, Dr. Rush reiterated that he saw appellant on a monthly basis related to the robbery that occurred in December 1999. He noted that she continued to have problems with stressful situations and advised that her work duties should avoid unnecessary stress and pressure and she should be assigned inside duties until further notice. Dr. Rush advised that appellant "recently presented with increases in stress and anxiety due to a significant change in her work schedule."

By decision dated February 27, 2019, OWCP denied appellant's claim for compensation for the period November 28, 2018, and continuing. It found that she had not provided sufficient medical evidence to establish that she was disabled as a result of her accepted work-related medical conditions.

Appellant continued to submit Form CA-7 claims.

On March 26, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated April 2, 2019, OWCP denied appellant's claim for compensation for the period January 5, 2019 and continuing. It found that she had not provided sufficient medical

evidence to establish that her present medical conditions were the result of her December 6, 1999 employment injury.

Appellant continued to submit Form CA-7 claims.

In a March 13, 2019 statement, appellant indicated that she had worked on a detail for six years since 2012, but that it ended in January 2018, when a new supervisor arrived. She also stated that her passport office detail was ending as her assigned station did not have work for her. Appellant noted that she was assigned to a role supervising clerks, but it ended after three months due to a union grievance. She indicated that she was then assigned to the Hapeville Branch with a new supervisor and suffered stress related to constant changes in her schedule. Appellant explained that she preferred to open the employing establishment when others were there as opposed to closing, which typically involved leaving alone. On several occasions her supervisor would request that she open, but would show up later and relate that appellant was not supposed to open, but rather was to close that day. Appellant reported elevated blood pressure, elevated stress, headaches, sleep disturbance, chest pain, and depression secondary to having to close the employing establishment. She explained that when she was told to report to the Lakewood Station, she refused because it was a high crime area with drug activity and shootings. Appellant noted that despite informing her supervisor of her medical restrictions, she was told not to return to her current assignment, if she would not report to Lakewood Station. She explained that her condition was exacerbated by being sent to a location with a high crime level.

Appellant continued to submit Form CA-7 claims.

In a March 18, 2019 report, Dr. Rush repeated his prior findings regarding appellant's medical conditions and advised that there was a recent and significant change in her work schedule due to "a request that [appellant] work in an area that is a high crime area and significantly increased her anxiety knowing she would need to work in this area."

On April 1, 2019 appellant accepted an offer of modified work as a modified city carrier, to case mail, with "indoor work only" at the Old National Post Office, under protest.

On April 30, 2019 appellant reported to OWCP that she had presented to work on March 23, 2019, however, she was told that the employing establishment had no work available.

In a letter dated May 28, 2019, OWCP's Branch of Hearings and Review requested that the employing establishment provide comments or documents it believed to be relevant and material to appellant's claim. The employing establishment did not respond.

By decision dated July 9, 2019, OWCP's hearing representative affirmed the February 27, 2019 decision, finding that none of the three required tests for modifying an LWEC decision had been met. The hearing representative explained that there was no evidence that the December 2, 2004 decision was issued in error, no evidence of a worsening in the allowed condition, and no evidence that appellant was vocationally rehabilitated. The hearing representative found that appellant had declined a temporary assignment at another location the prior November and had not returned to work since then. The hearing representative noted that appellant indicated that she was subjected to harassment from a new supervisor and that appellant was advised that this appeared to be a claim for a new injury and she could file a new claim.

On September 19, 2019 appellant requested reconsideration. She indicated that she was submitting new evidence and included the offer of a modified assignment dated March 26, 2019, and signed on April 1, 2019. Appellant argued that the LWEC determination should be modified as it was erroneous. She listed her various work assignments and noted that the modified job offered on March 26, 2019, was for only two to four hours per day and she was capable of working eight hours per day. Appellant referred to various prior Board decisions for the premise that wage-earning capacity was a measure of the employee's ability to earn wages in the open labor marker under normal employment conditions. She also referred to prior Board decisions to support her argument that the offered position was an odd-lot or makeshift position. Appellant argued that the positions offered to her were not actual "*bona fide*" positions, but rather "*ad hoc*" jobs consisting of various sub-duties created for her, based on her medical restrictions. She cited to the "odd-lot doctrine" and argued that her job was odd-lot because it was not regularly and continuously available under normal employment conditions.

In a September 6, 2019 report, Dr. Rush repeated that he saw appellant on a monthly basis related to a robbery that occurred in December 1999. He opined that she continued to have problems with stressful situations, which impacted her anxiety and other medical issues. Dr. Rush noted that appellant recently presented with an increase in stress and anxiety due to a significant change in her work schedule. He advised that she should avoid stress and pressure and only be assigned to inside duties.

In a September 20, 2019 report, Dr. Rush repeated his prior findings. He also related that appellant continued to be in a "non-pay status," which exacerbated her medical conditions. Dr. Rush noted that her work status had changed since December 2018, and caused an increase in stress and anxiety due to the "significant changes in her work schedule."

In a November 1, 2019 report, Dr. Rush repeated his findings, advised that appellant's work duties should avoid unnecessary stress and pressure and she should be assigned inside duties until further notice, and noted that she presented with increases in stress and anxiety due to a significant change in her work schedule.

By decision dated December 5, 2019, OWCP denied modification of the July 9, 2019 decision. It found that appellant had not established that the December 2, 2004 LWEC determination was issued in error, no evidence of a worsening of the accepted condition, and no evidence that she had been vocationally rehabilitated. OWCP concluded that she had not established that modification of the December 2, 2004 LWEC determination was warranted.

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.[4] 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

[4] 5 U.S.C. § 8115(a); *see K.B.*, Docket No. 20-0358 (issued December 10, 2020); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

employee's wage-earning capacity, must be accepted as such measure.[5] 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.[6] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[7]

OWCP's procedures provide guidelines for determining wage-earning capacity based on actual earnings. Reemployment may not be considered representative of the injured employee's wage-earning capacity when an injured employee who has been released to full-time work is working less than full-time hours, the job is temporary where the employee's job when injured was permanent, and the job represents permanent seasonal employment in an area where year-round employment is available (unless the employee was a career seasonal or temporary employee when injured).[8] In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.[9]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original determination was in fact erroneous, there is a material change in the nature and extent of the injury-related condition, or the employee has been retrained or otherwise vocationally rehabilitated.[10] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[11]

ANALYSIS

The Board finds that appellant has not met her burden of proof to modify OWCP's December 2, 2004 LWEC determination.

Appellant has not alleged that the modified position was improper as it was part-time, temporary or seasonal. Rather, she argued that the modified city carrier position she held since June 10, 2002, was constantly changed, makeshift, or odd-lot, and could not serve as the basis for the December 2, 2004 LWEC determination. The issue presented is whether the December 2, 2004 LWEC determination was proper when issued, based upon the modified work offer appellant

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

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

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

[8] *Supra* note 6 at Chapter 2.815.5c(2) (June 2013).

[9] *See A.J.*, Docket No. 10-0619 (issued June 29, 2010).

[10] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.3a (June 2013).

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

accepted on June 10, 2002. The modified work offers appellant refers to made after December 2, 2004 are irrelevant to this issue.

In evaluating whether an offered position was make-shift or odd-lot, the requirements of a *bona fide* position have been established by this Board[12] and these criteria have been met in this case. The modified city carrier offer was a formal offer and identified the position as Level 1, step O, $42,635.00 annually, and $20.50 hourly. The hours of the assignment were from 0600-1450 hours, with off days listed as Sunday and Wednesday. The duties of the position were identified and included priority hub run to North Atlanta and hub to Doraville, LLV provided; casing mail on routes; P.O. Box section; clerical work; process CFS; IRS mail; deliver express mail and deliver to businesses, but no NDCBU's. The physical requirements included walking, standing, sitting intermittently, fine manipulation, and simple grasping with hands. The position description indicated that appellant would not be exposed to apartment mail delivery and was advised to perform all duties within her physical limitations. The Board finds that position was a *bona fide* position and appellant has not submitted any evidence establishing that this position was make-shift or odd-lot.[13]

As appellant performed this position for at least 60 days prior to the wage-earning capacity determination, the Board finds that appellant has not established that the December 2, 2004 LWEC determination was erroneously issued.[14]

Appellant has also not established that her injury-related condition materially worsened such that she could not perform the duties of the modified position.[15] Dr. Rush noted that he treated appellant on a weekly basis following the work-related robbery on December 6, 1999. Appellant submitted numerous reports from Dr. Rush after 2004 in which he related that a change in appellant's work schedule increased her stress and anxiety, but he did not provide any medical findings to support an opinion that appellant's employment-related medical conditions had materially worsened. Therefore, these reports are insufficient to establish that the December 2, 2004 LWEC determination should be modified.[16]

In a report dated January 18, 2019, Dr. Rush opined that appellant continued to experience symptoms of PTSD, including hypervigilance, exaggerated startle response, irritability, emotional reactivity, anger, and occasional nightmares and flashbacks. He advised that appellant was depressed a majority of the time, however, in spite of the persistent PTSD symptoms and dysthymic mood, he related that appellant was able to maintain her employment, and denied any specific work performance problems. Dr. Rush further related that a new acting manager hired several months prior was now harassing appellant and that was the reason appellant was requesting leave from her job. He explained that appellant's depression and PTSD made it difficult to cope and her symptoms intensified in response to the harassment that she had been experiencing.

[12] *Supra* note 9.

[13] *Id*.

[14] *Supra* note 7.

[15] *See L.P.*, Docket No. 17-1624 (issued March 9, 2018); *Darletha Coleman*, 55 ECAB 143 (2003).

[16] *See M.G.*, Docket No. 19-1659 (issued August 18, 2020); *D.T.*, Docket No. 18-0174 (issued August 23, 2019).

Definition as to when modification of a formal LWEC determination should occur if the claimant's medical condition has materially changed is provided in OWCP's procedures. These procedures provide for modification of an LWEC determination when current medical evidence demonstrates a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability.[17] Dr. Rush related that appellant was able to perform her job duties, but stated that her symptoms had intensified due to harassment, the evidence at best suggests that appellant sustained a worsening of her condition due to an intervening injury. The reports from Dr. Rush, therefore, do not establish a worsening of appellant's accepted condition due to her accepted employment injury.

The Board also finds that there is no evidence of record to show that appellant has been retrained or otherwise vocationally rehabilitated such that modification of the December 2, 2004 LWEC determination is warranted.[18]

For these reasons, the Board finds that appellant has not met her burden of proof to modify OWCP's December 2, 2004 LWEC determination.

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 modify OWCP's December 2, 2004 LWEC determination.

[17] *Supra* note 10.

[18] *See J.A., supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.[19]

Issued: October 20, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

[19] In the event appellant is alleging a new injury with regard to anxiety and stress due to the change in work schedule and/or harassment, she may file a separate claim with OWCP.