United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 22-0253**
	)	**Issued: August 22, 2022**
DEPARTMENT OF VETERANS AFFAIRS, MIAMI VA MEDICAL CENTER, Miami, FL, Employer	)	

Appearances:
Capp Peterson Taylor, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 8, 2021 appellant, through her representative, filed a timely appeal from an October 1, 2021 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 October 1, 2021 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 her burden of proof to modify a December 10, 1997 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 24, 1992 appellant, then a 35-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left toe, foot, and leg when a bed rail fell on her left leg and foot while in the performance of duty. OWCP accepted the claim for contusion of left toes, contusion of left foot, lesion of plantar nerve, left foot plantar fibromatosis, crushing injury of left foot, bunion, left foot, and post-traumatic osteoarthritis ankle and left foot. Appellant underwent OWCP-authorized surgery on her left foot/ankle on November 8, 1993, June 1, 1995, and December 2, 1996. She stopped work on November 24, 1992 and returned to work in a limited-duty position as an alternative-duty nursing assistant on January 27, 1997.[5]

By decision dated December 10, 1997, OWCP determined that the position of alternate-duty nursing assistant, a position appellant had worked in since January 27, 1997, fairly and reasonably represented her wage-earning capacity and terminated her wage-loss compensation benefits. Appellant resigned from her federal employment on August 4, 2000.

On May 19, 2015 appellant filed a claim for compensation (Form CA-7) for disability from work for the period August 4, 2000 to April 3, 2015. By decision dated July 9, 2015, OWCP reviewed the request for wage-loss compensation as a request for modification of the December 10, 1997 LWEC determination and denied modification as appellant had not met any of the three criteria for modifying the formal LWEC determination.

Appellant continued to request reconsideration of the July 9, 2015 decision. By decision dated May 7, 2018, the Board affirmed a December 2, 2016 OWCP decision, which found that appellant failed to meet her burden of proof to modify the December 10, 1997 LWEC determination as of August 4, 2000.[6] It found that the evidence of record did not establish that appellant's accepted work-related medical conditions had materially changed or worsened, the original LWEC determination was in error, or that she had been retrained or otherwise vocationally rehabilitated.

[4] Docket No. 16-1162 (issued February 8, 2017); Docket No. 17-0449 (issued May 7, 2018).

[5] OWCP granted appellant several schedule award compensations for permanent impairment of the left lower extremity, for a total award as of May 11, 2017 for 13 percent permanent impairment.

[6] *Id*.

On November 6, 2018 appellant, through counsel, requested that the acceptance of her claim be expanded to include chronic regional pain syndrome (CRPS) of the left lower extremity.

On March 25, 2019 OWCP accepted a consequential chronic pain syndrome (CPS), left leg.[7]

On August 26, 2019 appellant, through counsel, requested modification of OWCP's December 10, 1997 LWEC determination. In support of the request, counsel submitted medical reports from Tania C. Turbay, D.P.M., a podiatrist, who he contended described how appellant's conditions worsened as of October 11, 2018 due to the diagnosis of CPS, the newly accepted condition, and disabled appellant since October 11, 2018 from the alternate duty nursing position.

OWCP received reports from Dr. Turbay dated October 11, 2018 through September 16, 2019. In her August 22, 2019 report, Dr. Turbay detailed appellant's symptoms and her physical examination findings, which she indicated had continued since October 11, 2018, and were attributable to the diagnosis of CPS. She opined that the position of alternate-duty nursing assistant was not a position that appellant could have performed since at least October 11, 2018 due to the CPS, which has severely limited her ability to be on her feet for more than a few minutes per day and limited her ability to walk more than one to two blocks per day. Dr. Turbay further opined that appellant would not have been able to assist patients while getting in and out of bed or in the shower due to her inability to lift more than 10 pounds as it would put additional pressure on the left foot. She advised that appellant also required the ability to lie down intermittently at unpredictable intervals. Dr. Turbay predicted that appellant would miss work more than once per week due to the CPS.

Appellant also submitted reports from Dr. Joseph E. Mouhanna, a Board-certified anesthesiologist, dated September 16 through November 13, 2019. Dr. Mouhanna related that appellant had CPS, CRPS, left plantar nerve lesion, and closed left foot fracture. He prescribed a transcutaneous electrical nerve stimulation unit to reduce appellant's pain, increase blood flow, and decrease inflammation.

In a February 7, 2020 letter, OWCP advised appellant that additional evidence was necessary to support her claim. It explained that she would be referred for a second opinion examination to determine her current work capacity, causally related to her accepted conditions from her November 24, 1992 work-related injury.

On March 4, 2020 OWCP referred appellant, along with an updated March 4, 2020 statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Jon D. Donshik, a Board-certified orthopedic surgeon, for a second opinion examination.

In a June 11, 2020 report, Dr. Donshik related that, clinically, appellant appeared to have CPS and that she had x-ray evidence of post-traumatic arthritis of the left ankle and foot. He further related that appellant's toe and foot contusion had resolved, and that she had no evidence of plantar nerve lesion or plantar fibromatosis of the left foot. Dr. Donshik found that appellant's disability appeared to be related to the reduced range of motion of the left ankle and left great toe. He concluded that appellant should be capable of performing the alternate-duty nursing assistant

[7]. On March 29, 2019 appellant, through counsel, continued to request expansion of the acceptance of the claim to include CRPS.

position without restriction, and that appellant did not require further medical treatment, work hardening or a work capacity evaluation.

In an August 5, 2020 development letter, OWCP advised appellant that the evidence of file was insufficient to support modification of the LWEC determination. It advised her of the evidence needed to support modification of OWCP's December 10, 1997 LWEC determination and afforded her 30 days to submit the requested evidence.

In September 3 and 25, 2020 letters, counsel argued that an August 29, 2020 functional capacity evaluation (FCE) demonstrated that appellant was capable of only sedentary work, not the LWEC position. In support, he submitted a functional capacity summary signed by a physician with an illegible signature on August 25, 2020, and an August 29, 2020 FCE and a detailed narrative report describing the FCE results from S. Rob Oyer. Mr. Oyer concluded that appellant did not demonstrate a residual functional capacity at even a sedentary classification level. He concluded that she would not be able to perform the essential functions of a nursing assistant, nor a modified position that would require activities beyond her demonstrated capacity.

OWCP also continued to receive progress reports from Dr. Mouhanna.

On November 18, 2020 OWCP found that a conflict existed in the medical opinion between Dr. Turbay, appellant's treating physician, and Dr. Donshik, the second opinion physician, regarding appellant's ability to perform the alternate-duty nursing assistant position. It noted that Dr. Turbay had opined in her August 22, 2019 letter that appellant could not perform the position since at least October 11, 2018 and that she had new restrictions due to the more recent acceptance CPS. Dr. Donshik, in his June 11, 2020 report, opined that appellant should be capable of performing the LWEC position without restrictions, and she did not require work hardening or work capacity evaluation. On November 30, 2020 OWCP referred appellant, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to Dr. Peter F. Merkle, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a January 28, 2021 report, Dr. Merkle noted that he had reviewed the SOAF and medical evidence of record. He then related that appellant had multiple issues including an underlying condition of first metatarsal fracture, hallux valgus with varus deformity of the second and third toes, flexible hammertoes of the second and third toes, sensory changes of the great toe, and possible Lisfranc injury as evidenced by arthritis at the base of the second metatarsal and widening of the fourth metatarsocuboid joint. Dr. Merkle opined that appellant could perform sedentary work. He noted that "her condition has been aggravated by what appears to be a lumbar radiculopathy and her diabetes, which appears to be causing some evidence of neuropathy." Dr. Merkle also opined that, based on her current findings, she would be unable to ambulate any substantial distance, but he also noted that he had observed her walk approximately 50 feet from the examination room to her car when she was unaware of being observed, during which she displayed no supination of the forefoot, she spent equal time in stance phase on both feet, and she was able to transfer from the left foot to the right entering her vehicle without evidence of antalgia. He concluded that appellant warranted further evaluation with surveillance.

In an April 29, 2021 letter, OWCP requested that Dr. Merkle clarify his January 28, 2021 report, based upon review of the SOAF. It asked that he explain with medical rationale whether appellant could perform the alternate nursing assistant position without restrictions.

In an April 29, 2021 addendum report, Dr. Merkle listed specific tasks he believed appellant was capable of performing. He related that appellant was capable of: shaving patients; taking vital signs, blood pressure, weights, and conducting orientations; walking short distances (not more than 100 feet at a time) to answer call lights, telephones and run errands; assist with paperwork; tidy patient rooms; sit with nonviolent confused or depressed patients; perform urine testing, set up oxygen and respiratory equipment; apply uncomplicated dressings; and apply hot and cold compressions.

In a May 18, 2021 letter, counsel noted that, as Dr. Merkle had opined in his January 28, 2021 report that appellant could only perform sedentary duties, she was incapable of performing the standing requirements of the LWEC position.

On June 16, 2021 OWCP again requested clarification from Dr. Merkle. In a June 22, 2021 addendum, Dr. Merkle indicated that he reviewed all records including the February 29, 2020 FCE and that his findings remained the same.

OWCP continued to receive reports from Dr. Turbay and Dr. Mouhanna noting appellant's medical conditions.

By decision dated October 1, 2021, OWCP denied appellant's request for modification of its original December 10, 1997 LWEC determination because the evidence did not substantiate that any of the three criteria for modifying a formal LWEC were met. It listed, but did not discuss, the medical evidence of record received after Dr. Donshik's second opinion report dated May 24, 2020.

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.[8] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[9]

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

[8] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

[9] *See B.H.*, Docket No. 21-0892 (issued November 29, 2021); *M.K.*, Docket No. 17-1852 (issued August 23, 2018).

[10] *See B.H., id.; J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[11] *See T.D.*, Docket No. 20-1088 (issued June 14, 2021); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.[12]

ANALYSIS

The Board finds that this case is not in posture for a decision.

OWCP initially accepted appellant's November 24, 1992 traumatic injury claim for contusion of left toes, contusion of left foot, lesion of plantar nerve, left foot plantar fibromatosis, crushing injury of left foot, bunion, left foot, and post-traumatic osteoarthritis, ankle and left foot. In its December 10, 1997 decision, it found that appellant's actual earnings in the modified position of alternate-duty nursing assistant fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation to zero based on these actual earnings. On March 25, 2019 almost 23 years later, OWCP accepted a consequential chronic pain syndrome. It subsequently found a conflict in medical evidence between appellant's treating physician, Dr. Turbay, and the second opinion physician, Dr. Donshik, with regard to appellant's ability to perform the LWEC position and referred appellant to Dr. Merkle, serving as the impartial medical examiner (IME), who provided a January 28, 2021 report and addendum reports dated April 29 and July 6, 2021.

Appellant requested modification of the 1997 LWEC determination after OWCP accepted the additional condition of consequential left lower extremity CPS. While OWCP listed this condition in the March 4, 2020 SOAF it provided to Dr. Merkle for review, OWCP did not indicate a procedural history in the SOAF that reflected the recent acceptance of this additional condition.

In his January 28, 2021 report, Dr. Merkle noted all of appellant's accepted conditions. But he did not specifically address the CPS condition. He did not discuss whether appellant had continuing residuals of the recently accepted condition or whether it caused appellant any further disability. As OWCP developed the LWEC modification issue by referral to Dr. Merkle, it should have obtained an opinion from Dr. Merkle, which specifically addressed the impact of appellant's recent CPS accepted condition and her ability to perform the position, which was the basis of the LWEC determination. Although it is a claimant's burden of proof to establish modification of the LWEC, OWCP is not a disinterested arbiter, but, rather, shares responsibility in the development of the evidence. It shares responsibility to see that justice is done.[13] In a case where OWCP "proceeds to develop the evidence and to procure evidence, it must do so in a fair and impartial manner."[14]

The Board finds that Dr. Merkle's reports did not adequately address whether the additional condition of consequential left lower extremity CPS would disable appellant from the alternate-duty nursing assistant position.

Further, OWCP did not provide an adequate decision with findings of facts and a statement of reasons regarding all of the medical evidence of record. In the October 1, 2021 decision denying modification of the LWEC determination, it noted that Dr. Merkle's reports, and other evidence

[12] 20 C.F.R. § 10.126.

[13] *M.T.*, Docket No. 19-0373 (issued August 22, 2019).

[14] *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

had been received after Dr. Donshik's second opinion examination, but it did not make findings based upon Dr. Merkle's report or this additional evidence. In this case, further findings by OWCP are required.[15]

The case must be returned to OWCP for preparation of a new SOAF, which identifies the date OWCP accepted the condition of consequential left lower extremity CPS. OWCP shall thereafter refer appellant to a new IME for an impartial medical evaluation. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds the case not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded in accordance with this decision.

Issued: August 22, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[15] *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *L.C.*, Docket No. 12-978 (issued October 26, 2012); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).