United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 23-0457**
	)	**Issued: September 14, 2023**
U.S. POSTAL SERVICE, TEMPLETON POST OFFICE, Colorado Springs, CO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 15, 2023 appellant, through counsel, filed a timely appeal from a February 10, 2023 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.

[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*.

ISSUE

The issue is whether appellant has met his burden of proof to modify a May 3, 2022 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On April 2, 2020 appellant, then a 47-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a right ankle injury due to factors of his federal employment including the weightbearing activities of his job, including walking, standing, ascending/descending stairs, and lifting/carrying mail. He noted that he first became aware of his claimed injury on January 27, 2020 and first realized its relation to his federal employment on March 24, 2020. Appellant did not stop work.[3]

On July 9, 2020 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. John D. Douthit, a Board-certified orthopedic surgeon. It requested that Dr. Douthit provide an opinion regarding appellant's injury-related medical condition and his ability to work.

In a July 27, 2020 report, Dr. Douthit discussed appellant's factual and medical history, and advised that appellant presently complained of pain and swelling in his right ankle. He detailed the results of his physical examination, noting that appellant walked with a limp but exhibited no laxity when the right ankle was stressed. Appellant had full range of motion of all joints of his upper and lower extremities with the exception of his right ankle. Dr. Douthit indicated that appellant should not return to a job that required extensive walking and standing. In a July 27, 2020 work capacity evaluation (Form OWCP-5c), he diagnosed instability and traumatic arthritis of the right ankle, and indicated that appellant could perform sedentary work for eight hours per day with restrictions, including walking and standing for up to one hour per day, and lifting, pushing, and pulling up to 10 pounds for eight hours.

On August 4, 2020 OWCP requested that Dr. Douthit provide clarification of his July 27, 2020 opinion with respect to the nature of appellant's right ankle condition and his ability to work. In an August 6, 2020 report, Dr. Douthit indicated that the work-related damage to appellant's right ankle was permanent, and he should be permanently restricted from walking or climbing more than two hours per day.

By decision dated August 11, 2020, OWCP accepted appellant's claim for permanent aggravation of traumatic osteoarthritis of the right ankle.

[3] Appellant previously sustained a nonwork-related right ankle fracture/dislocation on August 7, 2018, which required open reduction and fixation surgery. He returned to work in February 2019.

Appellant stopped work in late-2020 and OWCP paid him wage-loss compensation on the supplemental rolls, effective November 2, 2020.[4]

On August 20, 2021 OWCP again referred appellant for a second opinion examination and evaluation to Dr. Douthit, and requested that he provide an opinion regarding appellant's injury-related medical condition and his ability to work.

In an October 11, 2021 report, Dr. Douthit discussed appellant's factual and medical history. He detailed the results of his physical examination, noting that appellant walked with a minimal limp without obvious pain. Appellant's right ankle was thickened and swollen. Dr. Douthit indicated that appellant was unlikely to benefit from further right ankle surgery, and opined that he would continue to experience pain and limited motion in his right ankle. He advised that appellant could return to work in a job that required minimal walking. In an October 11, 2021 Form OWCP-5c, Dr. Douthit diagnosed right ankle fracture and ankylosis of the right ankle/foot, and indicated that appellant could perform sedentary work for eight hours per day with restrictions, including walking and standing for up to one hour, and lifting, pushing, and pulling up to 20 pounds for eight hours.

On February 4, 2022 the employing establishment offered appellant a full-time job as a modified city carrier, a position which involved working customer inquiry cases, answering the telephone, and filing/shredding documents. The physical duties of the position included sitting for seven hours per day, walking for one hour, fine grasping/sorting for eight hours, and lifting, pushing, and pulling up to 20 pounds for eight hours. The modified city carrier position paid $976.21 per week and appellant began working in the position on February 7, 2022.

In an April 8, 2022 report, Dr. George Johnson, Board-certified in occupational medicine, noted that appellant presented complaining of ankle pain. He reported physical examination findings and diagnosed history of ankle surgery and closed fracture of the right ankle, but he did not comment on appellant's ability to work.

On April 27, 2022 the employing establishment advised OWCP that the current pay rate for appellant's date-of-injury position as a city carrier was $881.56.

By decision dated May 3, 2022, OWCP reduced appellant's wage-loss compensation to zero, effective February 7, 2022, based on its determination that his earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity. It noted that the physical requirements of the position were within the October 11, 2021 work restrictions of Dr. Douthit, OWCP's referral physician. OWCP further indicated that, since appellant had demonstrated the ability to perform the duties of a modified city carrier for 60 days or more, this position was considered suitable to his partially-disabling condition. It advised that his actual earnings of $976.21 now exceeded the current wages of the job held when injured. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115, appellant's entitlement to compensation for wage loss ended the date he was reemployed with no loss in earning capacity, *i.e.*, February 7,

[4] OWCP paid appellant wage-loss compensation on the periodic rolls, effective November 7, 2021.

2022, and his compensation payments were terminated as of that date. OWCP noted that the decision did not affect coverage of appellant's medical benefits.

On July 26, 2022 appellant, through counsel, requested modification of the May 3, 2022 LWEC determination.

Appellant submitted an April 12, 2022 report from Dr. Jack L. Rook, a Board-certified physiatrist, who indicated that he agreed with Dr. Douthit's work restrictions of limiting appellant to walking for one hour per day and standing for one hour per day. Dr. Rook recommended that appellant undergo right ankle replacement surgery, but recommended that he follow Dr. Douthit's work restrictions "until a definitive procedure is performed and he recuperates from it." On June 14 and August 11, 2022 he again recommended that appellant undergo right ankle replacement surgery.

In a May 6, 2022 narrative report, Dr. Johnson noted that appellant presented complaining of increased pain in his right ankle and foot. He detailed his physical examination findings, noting that appellant had limited range of motion of the right ankle, and diagnosed history of ankle surgery and closed fracture of the right ankle. Dr. Johnson indicated that appellant could lift up to five pounds, push or pull up to 10 pounds, walk for a half hour per day, and stand for a half hour per day. Appellant could not stand or walk more than five minutes per hour, and could not engage in kneeling or squatting. Dr. Johnson provided similar findings in narrative reports dated August 2, and September 2 and 30, 2022. In the August 2, 2022 report, he indicated, "[Appellant] is not working because he refuses to work due to his injury. Regardless of his restrictions, [appellant] refused to return to work."

In May 6, August 2, and September 2 and 30, 2022 duty status reports (Form CA-17), Dr. Johnson listed a date of injury of January 27, 2020 and provided diagnoses "due to injury" of closed fracture of right ankle and history of right ankle surgery. He noted that appellant could work eight hours per day, five days per week, with restrictions of intermittently lifting up to five pounds, standing for five minutes per hour, and walking for five minutes per hour. In the May 6, 2022 duty status report, Dr. Johnson advised that appellant could not engage in kneeling or squatting, and needed to sit or stand as tolerated.

By decision dated November 1, 2022, OWCP determined that appellant failed to meet his burden of proof to modify the May 3, 2022 LWEC determination. It found that he did not meet any of the three criteria for establishing that such modification was warranted.

On November 21, 2022 appellant, through counsel, requested reconsideration of the May 3, 2022 decision.

In a November 10, 2022 report, Dr. Kenneth J. Hunt, a Board-certified orthopedic surgeon, reported physical examination findings and proposed right ankle surgery. November 11, 2022 x-rays of appellant's right ankle revealed interval breakage of a syndesmosis screw suggesting non-union of the syndesmosis arthrodesis; and radiolucency at the tibiotalar joint suggesting non-union at this location.

Appellant submitted narrative reports, dated November 17 and December 15, 2022, and January 26, 2023, in which Dr. Johnson diagnosed closed fracture of the right ankle and history of

right ankle surgery, and indicated that appellant could lift up to five pounds, push or pull up to 10 pounds, walk for a half hour per day, and stand for a half hour per day. He could not stand or walk more than five minutes per hour, and could not engage in kneeling or squatting.

In duty status reports, dated November 17 and December 15, 2022, and January 26, 2023, Dr. Johnson listed a date of injury of January 27, 2020 and provided diagnoses "due to injury" of closed fracture of the right ankle and history of right ankle surgery. He noted that appellant could work eight hours per day, five days per week, with restrictions of lifting up to five pounds, standing for five minutes per hour, and walking for five minutes per hour.

Appellant submitted an offer for a city carrier position from the employing establishment, which he signed on January 21, 2023. He also submitted an administrative form showing that he returned to work on that date.

By decision dated February 10, 2023, OWCP denied modification of its November 1, 2022 decision.

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.[5] 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, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.[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

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

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

[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.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

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

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]

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the May 3, 2022 LWEC determination.

Appellant has not met any of the three criteria for establishing that modification of the May 3, 2022 LWEC determination is warranted. First, appellant has not shown that the original determination was, in fact, erroneous.[12] By decision dated May 3, 2022, OWCP properly reduced appellant's wage-loss compensation to zero, effective February 7, 2022, based on its determination that his earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity. At the time of this decision, appellant had demonstrated the ability to perform the duties of a full-time modified city carrier for 60 days or more, and therefore this position was considered suitable to his partially-disabling condition.[13] The October 11, 2021 work restrictions of Dr. Douthit, OWCP' referral physician, represented the best assessment of appellant's ability to work when he began working in the modified city carrier position on February 7, 2022. Dr. Douthit indicated that appellant could perform sedentary work for eight hours per day with restrictions, including walking for up to one hour per day, standing for up to one hour, and lifting, pushing, and pulling up to 20 pounds for eight hours. The Board notes that the physical requirements of the position were within the work restrictions provided by Dr. Douthit. Appellant's actual earnings of $976.21 as a modified city carrier exceeded the current wages ($881.56) of the job held when injured. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115, appellant's entitlement to compensation for wage loss ended the date he was reemployed with no loss in earning capacity, *i.e.*, February 7, 2022, and his compensation payments were properly terminated as of that date.

Second, appellant has not shown that a material change in the nature and extent of the accepted work injury prevented him from working in the position in which he was rated, *i.e.*, the position of modified city carrier.[14] Appellant submitted additional medical evidence after OWCP issued its May 3, 2022 LWEC determination, but this evidence does not establish a material change in the nature and extent of his accepted work injury such that he was prevented from working as a modified city carrier.

[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).

[12] *See supra* note 10.

[13] *See supra* notes 6 and 7.

[14] *See supra* note 10.

In narrative reports, dated May 6, August 2, and September 2 and 30, 2022, November 17 and December 15, 2022, and January 26, 2023, Dr. Johnson reported physical examination findings and diagnosed closed fracture of the right ankle and history of right ankle surgery. He indicated that appellant could lift up to five pounds, push or pull up to 10 pounds, walk for a half hour per day, and stand for a half hour per day. Appellant could not stand or walk more than five minutes per hour, and could not engage in kneeling or squatting. In the August 2, 2022 report, Dr. Johnson indicated, "[Appellant] is not working because he refuses to work due to his injury. Regardless of his restrictions he refused to return to work."

In duty status reports, dated May 6, August 2, September 2 and 30, November 17 and December 15, 2022, and January 26, 2023, Dr. Johnson listed a date of injury of January 27, 2020 and provided diagnoses "due to injury" of closed fracture of the right ankle and history of right ankle surgery. He noted that appellant could work eight hours per day, five days per week, with restrictions of intermittently lifting up to five pounds, standing for five minutes per hour, and walking for five minutes per hour. In the May 6, 2022 duty status report, Dr. Johnson also advised that appellant could not engage in kneeling or squatting, and needed to sit or stand as tolerated.

Although Dr. Johnson recommended increased work restrictions in the above-described reports, these reports are of limited probative value in supporting appellant's request for modification of the May 2, 2022 LWEC determination because Dr. Johnson did not provide a well-rationalized opinion that the restrictions were necessitated by the accepted employment injury. The Board has held that reports that do not contain medical rationale explaining how the accepted employment injury caused or contributed to the claimed disability are of limited probative value regarding causal relationship.[15] Therefore, this evidence is insufficient to establish a material change in the nature and extent of appellant's accepted work injury such that he was prevented from working as a modified city carrier.

Appellant submitted an April 12, 2022 report from Dr. Rook who indicated that he agreed with Dr. Douthit's work restrictions of limiting appellant to walking for one hour per day and standing for one hour per day. Dr. Rook recommended that appellant undergo right ankle replacement surgery, but recommended that he follow Dr. Douthit's work restrictions "until a definitive procedure is performed and he recuperates from it." On June 14 and August 11, 2022 he again recommended that appellant undergo right ankle replacement surgery. In a November 10, 2022 report, Dr. Hunt reported physical examination findings and proposed right ankle surgery. November 11, 2022 x-rays of appellant's right ankle revealed interval breakage of a syndesmosis screw suggesting non-union of the syndesmosis arthrodesis; and radiolucency at the tibiotalar joint suggesting non-union at this location.

The Board finds that these reports are of no probative value in supporting appellant's request for modification of the May 2, 2022 LWEC determination because they do not contain an opinion that appellant's injury-related condition had changed such that he was prevented from working as a modified city carrier. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on

[15] *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

the issue of causal relationship.[16] Therefore, this evidence is insufficient to establish a material change in the nature and extent of appellant's accepted work injury such that he was prevented from working as a modified city carrier.

The Board further finds that the record does not establish that appellant was subsequently retrained or vocationally rehabilitated.[17] For these reasons, appellant has not met his burden of proof to modify the May 3, 2022 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 his burden of proof to modify the May 3, 2022 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

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

[17] *See supra* note 10.