

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

A.D., Personal Representative of the Estate of L.D., Appellant	)	
	)	
and	)	<b>Docket No. 25-0301</b>
	)	<b>Issued: April 24, 2025</b>
	)	
DEPARTMENT OF TRANSPORTATION,	)	
FEDERAL AVIATION ADMINISTRATION,	)	
Aurora, IL, Employer	)	
	)	

*Appearances:*  
Daniel M. Goodkin, 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  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 7, 2025 appellant, through counsel, filed a timely appeal from an August 14, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</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> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether the evidence of record was sufficient to modify the employee's December 16, 1998 loss of wage-earning capacity (LWEC) determination.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> 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.

OWCP accepted that, in October 1972, the employee, then a 31-year-old air traffic controller, sustained the condition of unspecified anxiety state due to factors of his federal employment, including a September 2, 1972 incident in the air traffic controller tower. It paid him wage-loss compensation for disability from work.

Through a vocational rehabilitation program sponsored by OWCP, the employee graduated from Palmer College of Chiropractic on June 14, 1985. He passed his Board examination in Iowa on February 2, 1986, and opened his office in Eldridge, Iowa, as a self-employed chiropractor on August 17, 1986.

By decision dated December 16, 1998, OWCP adjusted the employee's compensation based on its determination that he was capable of earning wages in the constructed position of associate chiropractor. It found that the constructed position of associate chiropractor had wages of \$36,644.69 per year and had been shown by a labor market survey to have been reasonably available in the employee's commuting area. OWCP determined that the position represented the employee's wage-earning capacity as of January 1, 1992.<sup>4</sup>

The employee appealed to the Board and, by decision dated May 23, 2001,<sup>5</sup> the Board affirmed OWCP's December 16, 1998 LWEC determination.

In a letter dated October 21, 2004, the employee requested reconsideration. He argued that OWCP had not taken into consideration factors enumerated under 5 U.S.C. § 8115(a). The employee submitted an October 9, 2002 report wherein Dr. Sofia Donskaya, a Board-certified psychiatrist, diagnosed major depressive disorder and chronic post-traumatic stress disorder (PTSD). In a report dated November 23, 2003, Michael Jones, Ph.D., a clinical psychologist, noted that the employee was first evaluated in 1997 with a long history of intermittent depressive episodes and PTSD. He concluded that, based on treatment and psychological testing, the employee remained vocationally disabled.

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<sup>3</sup> Docket No. 22-0485 (issued December 6, 2022); Docket No. 09-1057 (issued May 24, 2010); Docket No. 99-1454 (issued May 23, 2001); 49 ECAB 665 (1998); Docket No. 93-92 (issued November 5, 1993); Docket No. 90-540 (issued September 27, 1990).

<sup>4</sup> The associate chiropractor position required lifting up to 50 pounds maximum, with frequent lifting and/or carrying of objects weighing up to 25 pounds. It also required the ability to reach, handle, finger, and/or feel.

<sup>5</sup> Docket No. 99-1454 (issued May 23, 2001).

By decision dated March 8, 2006, OWCP denied modification of the December 16, 1998 LWEC determination.

On February 14, 2007 the employee requested reconsideration. He argued that OWCP did not take into account the factors listed at 5 U.S.C. § 8115 and did not properly calculate his wage-earning capacity. In a February 5, 2006 report, Dr. Jones noted that the employee continued to exhibit symptoms of post[-]traumatic stress “when exposed to cues related to air traffic controlling. [The employee’s] symptoms are generally much improved, but show a tendency to wax and wane relative to psychosocial stressors. He [has] been placed on permanent disability since the 1980s.”

By decision dated February 7, 2008, OWCP denied modification of the December 16, 1998 LWEC determination.

The employee again requested reconsideration on August 20, 2008. He submitted a May 19, 2008 report, wherein Dr. Jones reiterated his opinion that the employee remained disabled from work.

By decision dated January 23, 2009, OWCP denied modification of the December 16, 1998 LWEC determination.

The employee appealed to the Board and, by decision dated May 24, 2010,<sup>6</sup> the Board affirmed OWCP’s January 23, 2009 decision.

On March 14, 2018, K.D., the employee’s widow, advised OWCP that the employee had passed away on March 8, 2018.

In a March 9, 2020 notice of recurrence (Form CA-2a), K.D. claimed that the employee sustained a recurrence of disability on April 30, 2012 causally related to his accepted employment injury. She asserted that the employee’s work-related condition had worsened by April 30, 2012, such that he was no longer able to work. In two accompanying statements, K.D. discussed the employee’s psychological problems since the early-1970’s, including PTSD and anxiety, which she related to his work as an air traffic controller. She also discussed the employee’s treatment for leukemia since 1983 and indicated that he last worked as a self-employed chiropractor in 1996. K.D. also submitted a November 20, 2019 e-mail statement in which the employee’s son discussed his father’s progressively declining psychological condition, particularly after 2010, which he related to PTSD caused by his work as an air traffic controller. In a September 23, 2019 statement and an undated statement, two friends of the employee also discussed the employee’s psychological condition.

In a September 21, 2020 letter, counsel argued that the recurrence of disability claim effectively constituted a request to modify the December 16, 1998 LWEC determination. In a February 23, 2021 development letter, OWCP advised K.D. that she had not submitted sufficient evidence to modify the December 16, 1998 LWEC determination. It requested that she submit additional factual and medical evidence in support of the claim and afforded her 30 days to submit such evidence.

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<sup>6</sup> Docket No. 09-1057 (issued May 24, 2010).

K.D. subsequently submitted a January 16, 2020 report from Vincent Ruscelli, Ph.D., a clinical psychologist, who indicated that it was clear that the employee's severe symptoms had persisted for years and were indicative of PTSD, which was related to an incident at work when the employee was directing multiple aircraft and two of the aircraft nearly collided. He opined that these PTSD symptoms persisted throughout the rest of the employee's life, and that his detachment and estrangement from others, along with a chronic irritability and frequent emotional outbursts, made it impossible for him to work with others in any capacity. Dr. Ruscelli asserted that statements of the employee's family members and friends demonstrated a worsening of the employee's psychological conditions in 2010. He opined that the statements showed that the employee never fully recovered and that the dramatic change in his personality left him incapable of functioning effectively in any occupation. Dr. Ruscelli indicated that there was no question that the employee's dramatic personality change persisted until his death and was the result of continued PTSD. He noted that the employee "continued throughout his life to demonstrate classic signs of PTSD, as well as debilitating depression and anxiety, which would have made it impossible for him to function effectively in any career." Dr. Ruscelli opined that the depression and anxiety were secondary to the PTSD and were related to his continued failure to function because of the PTSD.

K.D. also submitted a February 19, 2009 report, wherein Dr. Nancy D. Hanna, a Board-certified psychiatrist, noted that the employee visited for follow-up of his depression and PTSD that was in remission. Dr. Hanna indicated that the employee was not on any psychiatric medication and noted that he advised that his mood was good, that he had been going out with friends, and that he had been doing chores and enjoying family. The employee also advised that he had no passive or active suicidal thoughts. Dr. Hanna indicated that the employee reported that as an air traffic controller he saw two airplanes about to hit each other, thereby creating a situation in which 800 people could have died. She noted that the employee also reported that, although he used to have nightmares about the incident, he did not have them anymore. Dr. Hanna advised that the employee did not have intrusive thoughts about the incident and could talk about it, although he could get emotional when doing so. She diagnosed depressive disorder and partial PTSD.

By decision dated July 14, 2021, OWCP determined that K.D. had not met her burden of proof to modify the December 16, 1998 LWEC determination. It found that she had not shown that the December 16, 1998 LWEC determination was erroneous; that the employee had been retrained or otherwise been vocationally rehabilitated; or that the employee's employment-related medical condition had materially changed such that he ceased to be able to work in the constructed position of associate chiropractor.

On August 6, 2021, K.D., through counsel, requested reconsideration of the July 14, 2021 decision.

By decision dated January 10, 2022, OWCP denied modification.

K.D. appealed to the Board and, by decision dated December 6, 2022,<sup>7</sup> the Board affirmed OWCP's January 10, 2022 decision.

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<sup>7</sup> Docket No. 22-0485 (issued December 6, 2022).

OWCP subsequently received a November 14, 2023 report, wherein Seth Bricklin, Psy.D., a licensed clinical psychologist, indicated that he reviewed Dr. Donskaya's October 9, 2002 report, Dr. Jones' November 23, 2003 report, and Dr. Ruscelli's January 16, 2020 report, as well as statements by the employee's family members and friends. Dr. Bricklin opined that the medical evidence of record demonstrated that the employee had PTSD dating back to the near miss of aircraft that occurred at work. He noted that every medical report he reviewed indicated that the employee had PTSD and was vocationally disabled. Dr. Bricklin advised that the diagnosis of PTSD had not been officially added to the Diagnostic Statistical Manual by 1977 and noted that, while the employee clearly had all the symptoms of PTSD, unspecified anxiety state was the only option for a diagnosis to be made for him. He indicated that the diagnosis of PTSD did not become officially recognized until 1980 and that all subsequent doctors who evaluated the employee after that time diagnosed him with PTSD. Dr. Bricklin advised that only the name of the employee's condition changed, not his symptoms or its impact on his overall functioning. He noted that, while the employee's medical records and statements from family and friends clearly indicated he was never able to function in any capacity in any work setting, OWCP ruled that he was capable of working as a chiropractor at some point. Dr. Bricklin advised that he would refrain from arguing why the employee was disabled from the time of his accident, and would explain how his condition "materially changed" such that "he was at one point able to work as chiropractor [then] became unable to do so." He indicated that the medical evidence as discussed by Dr. Ruscelli and the statements by family members and friends clearly demonstrated that, by 2010, the employee's condition had significantly worsened.

Dr. Bricklin asserted that the employee had chronic PTSD, a condition that did not always improve, even with proper treatment. The employee's PTSD had a severe, negative impact on all areas of his life and affected how he managed significant events and even day-to-day stressors. Dr. Bricklin further advised that the employee's inability to maintain healthy relationships or to cope with simple interactions, much less more emotionally challenging situations such as being diagnosed with leukemia in 1983 and the death of his best friend in 2000, increased his feelings of shame and guilt, which further exacerbated his PTSD. He indicated that the employee continued to decompensate in a downward spiral that culminated in 2009 with an incident in his home where he went on a tirade that left a friend in tears and caused most of his other friends to end their relationship with him. The employee stopped going out, did not socialize at all, became more agitated and irritable, and began drinking too much. Dr. Bricklin opined that it was clear that the employee's PTSD was worsening and, when his mother had a stroke in 2012, he was completely unable to cope, and other family members had to handle everything. He indicated that, as the employee's mother recovered and was able to talk, the employee would yell at her for not remembering things. When she eventually died in 2016, the employee did not grieve and acted as though nothing had happened. Dr. Bricklin stated, "Based on the medical evidence and the information provided by [the employee's] family and friends, it is my opinion that his PTSD rendered him totally disabled as of 2010 and from that point on, he was unable to work in any capacity."

In a January 17, 2024 statement, counsel argued that Dr. Bricklin's November 14, 2023 report established the request to modify the employee's December 16, 1998 LWEC determination.

By decision dated February 13, 2024, OWCP again denied modification of the employee's December 16, 1998 LWEC determination.

On March 5, 2024, counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The request was later converted to a request for a review of the written record. No additional medical evidence was received.

By decision dated August 14, 2024, OWCP's hearing representative affirmed the February 13, 2024 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.<sup>8</sup> 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.<sup>9</sup> An employee's actual earnings generally best reflect his or her wage-earning capacity.<sup>10</sup> 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.<sup>11</sup> 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 disabled condition.<sup>12</sup>

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.<sup>13</sup> The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.<sup>14</sup> Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to post-injury or subsequently-acquired conditions.<sup>15</sup> When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP

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<sup>8</sup> *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>9</sup> 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see T.D., id.*; *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>10</sup> *T.D., id.*; *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>11</sup> *Hayden C. Ross, id. S.J.*, Docket No. 19-0186 (issued August 2, 2019).

<sup>12</sup> 5 U.S.C. § 8115(a); *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *MaryJo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>13</sup> *L.M., id.*; *M.A.*, 59 ECAB 624, 631 (2008).

<sup>14</sup> *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

<sup>15</sup> *L.M., supra* note 12; *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, *id.* at Chapter 2.816.4c (June 2013).

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.<sup>16</sup> 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.<sup>17</sup> Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.<sup>18</sup>

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.<sup>19</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>20</sup>

### ANALYSIS

The Board finds that the evidence of record is insufficient to modify the employee's December 16, 1998 LWEC determination.

The Board preliminarily notes that it is unnecessary to consider the evidence submitted prior to the issuance of OWCP's January 10, 2022 decision, which was previously considered by the Board in its December 6, 2022 decision affirming OWCP's denial of modification of the December 16, 1998 LWEC determination. Findings made in prior Board decisions are *res judicata* and cannot be considered absent further merit review by OWCP under section 8128 of FECA.<sup>21</sup>

Following OWCP's January 10, 2022 decision, OWCP received a November 14, 2023 report, wherein Dr. Bricklin opined that the medical evidence demonstrated that the employee had PTSD dating back to the near miss of aircraft that occurred at work. Dr. Bricklin related that the diagnosis of PTSD did not become officially recognized until 1980 and that all subsequent doctors who evaluated the employee after that time diagnosed him with PTSD. He indicated that only the name of the employee's condition changed, not his symptoms or its impact on his overall functioning. Dr. Bricklin noted that the medical evidence as discussed by Dr. Ruscelli and the statements by family members and friends clearly demonstrated that by 2010 the employee's condition had become significantly worse. He indicated that the employee's PTSD had a severe,

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<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

<sup>17</sup> 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. *B.E.*, Docket No. 22-0423 (issued December 1, 2022); *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.816.6 (June 2013).

<sup>18</sup> See *Albert C. Shadrick*, 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403(d).

<sup>19</sup> *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>20</sup> See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>21</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

negative impact on all areas of his life and affected how he managed significant events and even day-to-day stressors. Dr. Bricklin advised that the employee's inability to maintain healthy relationships or to cope with simple interactions, much less more emotionally challenging situations such as being diagnosed with leukemia in 1983 and the death of his best friend in 2000, increased his feelings of shame and guilt, which further exacerbated his PTSD. He indicated that the employee continued to decompensate in a downward spiral that culminated in 2009 with an incident in his home where he went on a tirade that left a friend in tears and caused most of his other friends to end their relationship with him. The employee stopped going out, did not socialize at all, became more agitated and irritable, and began drinking too much. Dr. Bricklin discussed how the employee's PTSD made it difficult for him to cope with his mother's stroke in 2012, her post-stroke condition, and her ultimate death in 2016. He stated, "Based on the medical evidence and the information provided by [the employee's] family and friends, it is my opinion that his PTSD rendered him totally disabled as of 2010 and from that point on, he was unable to work in any capacity."

Dr. Bricklin, however, did not provide sufficient medical rationale to support his opinion that the employee could not work in the constructed position of associate chiropractor. Appellant's claim has not been accepted for PTSD, and Dr. Bricklin did not discuss the accepted condition of unspecified anxiety state in any detail or explain, citing objective medical findings, how it prevented the employee from working as an associate chiropractor on or after December 16, 1998 up through his passing on March 8, 2018. 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.<sup>22</sup>

Therefore, this newly-submitted medical evidence does not show that the employee was incapable of performing the requirements of the associate chiropractor position. The Board thus finds that the evidence of record is insufficient to show that OWCP's original December 16, 1998 LWEC determination was, in fact, erroneous.<sup>23</sup> Furthermore, this newly-submitted medical evidence does not show that there was a material change in the nature and extent of the employee's injury-related condition such that he could no longer work as an associate chiropractor.<sup>24</sup> In addition, the evidence of record does not demonstrate that the employee had been vocationally rehabilitated.<sup>25</sup>

For these reasons, the evidence of record is insufficient to modify the employee's December 16, 1998 LWEC.

Modification of the employee's LWEC determination, supported by new evidence or argument, may be requested at any time before OWCP.

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<sup>22</sup> See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017). See also *L.G.*, Docket No. 19-0142 (issued August 8, 2019) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

<sup>23</sup> See *supra* note 19.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

**CONCLUSION**

The Board finds that the evidence of record is insufficient to modify the employee's December 16, 1998 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2025  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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