United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
	)	**Docket No. 15-520**
and	)	**Issued: May 19, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Topeka, KS, Employer	)	

Appearances:
Bruce A. Brumley, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 8, 2015 appellant, through counsel, filed a timely appeal from a July 17, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has established that OWCP's September 14, 2006 loss of wage-earning capacity (LWEC) determination should be modified.

On appeal, counsel contends that the rationalized medical opinion of Dr. Peter V. Bieri, an otolaryngologist, is sufficient to establish that appellant's accepted medical condition had materially worsened and that she was unable to work.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In a February 20, 2013 decision, the Board set aside a September 14, 2006 LWEC determination and remanded the case for further development of the medical evidence. The Board found that the medical opinion of Dr. Joseph W. Huston, a Board-certified orthopedic surgeon and OWCP referral physician, was vague and speculative as to whether appellant had any residuals resulting from her accepted employment injuries. The Board instructed OWCP to obtain a supplemental report from Dr. Huston. The relevant facts are set forth below.

On May 17, 2004 appellant, then a 33-year-old packer/warehouseman, filed an occupational disease claim alleging that she sustained injuries to her cervical and thoracic spines due to repetitive, overhead lifting at work. OWCP accepted the claim for aggravation of cervical and thoracic sprains/strains bilaterally.

In a September 14, 2006 decision, OWCP determined that a modified packer/warehouseman position fairly and reasonably represented appellant's wage-earning capacity with no wage loss.

On September 14, 2010 appellant filed a recurrence and stopped work on that day alleging that her accepted injuries had worsened. OWCP interpreted her claim as a request to modify the September 14, 2006 LWEC determination.

In a December 7, 2010 decision, OWCP denied modification of the September 14, 2006 LWEC decision. It found that appellant had not submitted any evidence to establish that the original LWEC determination was erroneous, that she was otherwise retrained or vocationally rehabilitated, or that there was a material change in her accepted medical conditions.

In an August 2, 2011 medical report, Dr. Huston provided a history of the accepted employment injuries and provided physical examination findings. He diagnosed chronic myofascial pain syndrome in the cervical and thoracic regions. Dr. Huston opined that the diagnosed conditions preexisted appellant's employment injury, but were no doubt aggravated by her repetitive lifting work activities. He stated that her history of complaints suggested that there might be some permanent aggravation. Dr. Huston stated, however, that there was no concrete evidence of this, such as a magnetic resonance imaging (MRI) scan or nerve testing.

On March 4, 2013 pursuant to the Board's remand instructions, OWCP requested that Dr. Huston provide a supplemental report. It advised him that he was authorized to perform further noninvasive testing or consultation, if necessary. OWCP noted Dr. Huston's August 2, 2011 findings and specifically requested that he explain how the accepted employment condition was causally related to his diagnosed condition and whether the diagnosed condition from September 14, 2010 to the present represented a worsening of the accepted condition. It also requested that he clarify and provide an opinion as to whether appellant's work factors did in fact result in a permanent aggravation of any condition. OWCP stated that Dr. Huston could perform an MRI scan and nerve testing if needed to provide a rationalized opinion.

[2] Docket No. 12-1594 (issued February 20, 2013).

In an April 24, 2013 letter, Dr. Huston reviewed his prior August 2, 2011 report and the statement of accepted facts. He noted appellant's job as a packer and warehouse worker and stated that when he last saw her on August 2, 2011 she was no longer working. Dr. Huston stated that he had no first-hand information about her present status since that time. At his last evaluation, he diagnosed chronic myofascial pain syndrome involving the cervical and thoracic regions and found that appellant's physical problems were no doubt aggravated by her repetitive lifting work activities and that these activities possibly caused permanent aggravation. Dr. Huston also previously found no concrete physical evidence to show a permanent physical worsening of her problem. The need for ongoing treatment was due to the underlying chronic and preexisting condition. Dr. Huston reviewed the records of Dr. Mark S. Newth, a Board-certified osteopath, which indicated that he had been seeing appellant for these same problems since 1999 and that he had given her many manipulations for back pain, which included the neck, upper back, and interscapular areas. Dr. Newth's June 16, 2003 note indicated a diagnosis of somatic dysfunction in the cervical, thoracic, and lumbar areas. Dr. Huston noted that a July 13, 2010 electromyogram/nerve conduction study (EMG/NCS) of the bilateral upper extremities was normal.

Regarding OWCP's first query, Dr. Huston related that it was very difficult to state definitively whether the activities at work caused any worsening of appellant's preexisting problems. He was sure that the work activities aggravated the symptoms of the underlying condition, but he had no concrete evidence to know that the underlying muscle damage was made worse. Dr. Huston stated that certainly the symptoms appellant had in her position at the employing establishment apparently caused her to stop work. They were not initially caused by this job and were present for several years before she quit work. In response to OWCP's second query, Dr. Huston stated that he could not be sure or definite that there was permanent aggravation of appellant's preexisting problem which she had been treating for several years.

In a May 17, 2013 decision, OWCP denied modification of the December 7, 2010 decision. It found that the evidence submitted did not establish an error in the original LWEC determination, that appellant had been vocationally rehabilitated, or a worsening of her accepted condition such that she could no longer work.

By letter dated May 7, 2014, appellant, through her attorney, requested reconsideration and submitted medical evidence. In a May 5, 2014 report, Dr. Bieri reviewed the medical record. He agreed with the finding of Dr. Sushmita Veloor, a Board-certified physiatrist, that appellant's employment-related chronic cervical and thoracic strain had worsened to include myofascial pain syndrome and that her myofascial symptoms were related to the accepted condition. Dr. Bieri advised that medical objective findings supported a material worsening of the accepted condition. On examination, he found back spasms which could be produced upon palpation. Dr. Bieri stated that appellant could not artificially produce back spasm. Based on his review of the records and her history, Dr. Bieri advised that these spasms increased in nature resulting in a permanent worsening condition. He stated that the chronicity was the rationality for permanency. Dr. Bieri noted that Dr. Veloor's treatment was consistent with appellant's accepted condition with provision of trigger point treatments to the affected areas. He related that the trigger points could also be an example of objective findings to support his opinion that the accepted condition worsened in the fall of 2010. Dr. Bieri agreed with Dr. Veloor's October 23, 2010 restrictions, which included pulling and pushing at a maximum of 10 pounds,

and no reaching based on appellant's back spasms and related pain in the thoracic and cervical regions. He also agreed with his finding that appellant should be allowed to lay down every hour as needed for at least 10 minutes and that she could not lift at all above the shoulder. Dr. Bieri related that she was only able to perform part-time work, no more than four hours a day. As appellant was not capable of performing full-time work, it was very unlikely that she would be able to perform substantial and gainful work.

Dr. Bieri stated that her increased restrictions were established by objective findings of back spasms and trigger points, and they were permanent and directly related to her accepted condition. He believed that the chronicity of her back spasms and trigger points, and increased restrictions and pain were a permanent worsening and recurrence of the accepted condition dating back to the fall of 2010. Dr. Bieri noted that, while appellant may need palliative care, she had reached maximum medical improvement. He related that back spasms frequently developed from chronic strains of the cervical and thoracic regions and it was medically reasonable to expect this progression of the accepted condition. It was also reasonable to expect the development of myofascial syndrome from the accepted condition given the chronic nature of this injury. Dr. Bieri advised that the chronic nature of the accepted condition resulted in increased pain, back spasms, and trigger points. This chronicity was permanent and a material change in the accepted condition.

In a July 17, 2014 decision, OWCP denied modification of the September 14, 2006 LWEC decision. It found that appellant met none of the criteria for modification.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[3]

OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.[4] The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated.[5] OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.[6]

[3] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

[5] *Id.* at Chapter 2.1501.3(a) (June 2013).

[6] *Id.* at Chapter 2.1501.4 (June 2013).

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationalize explaining the opinion.[7]

ANALYSIS

The Board finds that this case is not in posture for a decision as to whether appellant has established that OWCP's September 14 2006 loss of LWEC determination should be modified.

The Board previously remanded this case based upon a finding that the second opinion physician, Dr. Huston, had not provided a probative medical opinion regarding whether appellant had any residuals of her accepted employment-related aggravation of cervical and thoracic sprains/strains bilaterally. Following the Board's remand, OWCP requested a supplemental report from Dr. Huston. Dr. Huston was asked to explain how the accepted aggravation of cervical and thoracic strain was causally related to his diagnosis of chronic myofascial pain syndrome and whether the diagnosed condition from September 14, 2010 to the present represented a worsening of the accepted condition. He was also asked to clarify and provide an opinion as to whether appellant's work factors resulted in a permanent aggravation of any condition. In his April 24, 2013 letter, Dr. Huston failed to offer sufficient answers to OWCP's questions.

Regarding OWCP's first query, he opined that he was sure that appellant's work activities aggravated the symptoms of her underlying preexisting chronic myofascial pain syndrome, but he also opined that he could not provide a definitive opinion on this issue because he had no concrete evidence to show that the underlying muscle damage worsened. Dr. Huston's opinion is vague and speculative as he fails to provide an unequivocal opinion on the cause of appellant's current condition. The Board has held that medical opinions which are speculative or equivocal are of diminished probative value.[8] Dr. Huston did not definitely state whether appellant's preexisting condition was caused or aggravated by the accepted employment injury. Further, the Board notes that he was authorized to perform any testing he deemed to be necessary in order to render a rationalized opinion. Dr. Huston stated that appellant had symptoms of preexisting myofascial pain syndrome at work which caused her to stop work. However, the Board has held that the fact that a condition arises while appellant was at work does not establish that work caused the condition.[9] Dr. Huston did not explain how his diagnosis of chronic myofascial pain syndrome was causally related to the accepted aggravation of cervical and thoracic sprain/strain and whether appellant's current condition represented a worsening of the

[7] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

[8] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (the Board has generally held that opinions such as the condition is probably related, most likely related or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662 (2005) (medical opinions which are speculative or equivocal are of diminished probative value).

[9] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

accepted condition.[10] Regarding OWCP's second query, Dr. Huston noted that he was also unable to provide a definitive opinion as to whether appellant had permanent aggravation of her preexisting chronic myofascial pain syndrome. His opinion is vague and speculative and, thus is of diminished probative value.[11]

The Board previously determined that Dr. Huston's August 2, 2011 report did not provide a clear opinion regarding whether appellant had any residuals of her accepted employment-related condition. On remand, OWCP requested that Dr. Huston provide a supplemental report on this matter. Given that Dr. Huston's supplemental report dated April 24, 2013, does not adequately elaborate on his original report by providing a rationalized medical opinion explaining how appellant's accepted cervical and thoracic sprains/strains bilaterally had materially worsened such that she was unable to perform the duties of her modified position, the Board finds that OWCP did not fulfill its obligation to assist in the development of medical evidence as directed by the Board on the prior appeal. OWCP must submit the case record and a detailed statement of accepted facts to a second referral physician for the purpose of obtaining a rationalized medical opinion on the issue of whether appellant has a change in her employment-related medical condition that has rendered her totally disabled for work. After this and such other development of the medical evidence as it deems necessary, OWCP shall issue a *de novo* decision.

Before OWCP and on appeal before the Board, appellant's attorney contended that Dr. Bieri's May 5, 2014 report was sufficient to establish that appellant's accepted medical condition had materially worsened and that she was unable to work. In his report, Dr. Bieri agreed with the opinion of Dr. Veloor that appellant's employment-related chronic cervical and thoracic strain had materially worsened to include myofascial pain syndrome and resulted in increased restrictions dating back to the fall of 2010 based on his objective examination findings of muscle spasms, trigger points, and myofascial symptoms. The Board previously reviewed Dr. Veloor's opinion and determined that it was insufficiently rationalized to establish a material worsening of appellant's accepted employment-related condition.

Dr. Bieri explained that back spasms frequently developed from chronic strains of the cervical and thoracic regions and concluded that it was medically reasonable to expect this progression of the accepted condition. He further concluded that it was reasonable to expect the development of myofascial syndrome from the accepted condition given the chronic nature of this injury. Dr. Bieri did not sufficiently explain the process through which myofascial pain syndrome was caused or contributed to by the accepted cervical and thoracic conditions. His opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusion.[12] Further, Dr. Bieri did not provide an opinion explaining how appellant's disability for full-time work was caused by the accepted employment injuries. The Board has held that medical evidence offering no opinion regarding the cause of an

[10] *F.T.*, Docket No. 09-919 (issued December 7, 2009); *Elizabeth H. Kramm*, 57 ECAB 117, 124 (2005); *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[11] *See* cases cited, *supra* note 8.

[12] *L.H.*, Docket No. 09-1779 (issued June 15, 2010); *William C. Thomas*, 45 ECAB 591 (1994).

employee's condition is of limited probative value on the issue of causal relationship.[13] For the stated reasons, Dr. Bieri's report does not establish a material change in the accepted work-related condition. Thus, appellant did not meet her burden of proof with this submission.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether OWCP's September 14, 2006 LWEC decision should be modified as further development is needed.

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this decision of the Board.

Issued: May 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004).