

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

S.V., Appellant	)	
	)	
and	)	Docket No. 19-1521
	)	Issued: February 22, 2021
U.S. POSTAL SERVICE, POST OFFICE,	)	
Schaumburg, IL, Employer	)	
	)	

*Appearances:*  
Larissa Ann Parde, for the appellant<sup>1</sup>  
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 July 9, 2019 appellant, through his representative, filed a timely appeal from a January 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup>

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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 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> Appellant timely requested oral argument before the Board. By order dated April 15, 2020, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1521 (issued April 15, 2020).

Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether appellant has met his burden of proof to modify OWCP's June 1, 2017 loss of wage-earning capacity (LWEC) determination.

### **FACTUAL HISTORY**

On May 18, 2015 appellant, then a 56-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment, including over 30 years of bending, twisting, lifting, and falling caused a medical condition. He noted that he first became aware of his condition on September 1, 2014 and its relation to his federal employment on May 7, 2015. In an accompanying narrative, appellant indicated that the implicated employment factors caused a neck injury. OWCP accepted the claim for cervical radiculopathy. Appellant stopped work on September 9, 2015. On November 12, 2015 OWCP expanded acceptance of the claim to include bilateral carpal tunnel syndrome, cervical disc displacement, mid-cervical region, and cervical disc displacement, cervicothoracic region C3-C7. Appellant returned to full-time, limited-duty work on July 19, 2016.

Appellant accepted a modified limited-duty assignment on September 10, 2016, which required lifting up to 47 pounds for 2 to 4 hours, carrying up to 42 pounds for 2 to 4 hours and pushing pulling up to 200 pounds for 2 to 4 hours.

By decision dated June 1, 2017, OWCP found that the modified city carrier position appellant had held since September 10, 2016 fairly and reasonably represented his wage-earning capacity. It further found that, as his actual earnings met or exceeded the current wages of the job he held when injured, there was no loss of wage-earning capacity (LWEC).

On July 14, 2017 OWCP received a claim for compensation (Form CA-7) for total disability from June 24 to July 7, 2017. Along with the Form CA-7, it also received a June 23, 2017 work restriction note from Dr. Bruce J. Montella, a Board-certified orthopedic surgeon, holding appellant off work until further evaluation.

In a July 17, 2017 development letter, OWCP advised appellant that his claim for wage-loss compensation for the period June 24 to July 7, 2017 was considered a request for modification of his formal LWEC decision. It informed him of the three criteria to establish modification of an LWEC and afforded him 30 days to submit the necessary information. OWCP also noted that

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the January 16, 2019 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.*

appellant's accepted conditions were bilateral carpal tunnel syndrome, other cervical disc displacement, mid-cervical region, and other cervical disc displacement, cervicothoracic region.

Appellant subsequently submitted additional reports from Dr. Montella, along with a Form CA-7, claiming compensation from August 5 through 18, 2017.

By decision dated September 11, 2017, OWCP denied modification of its June 1, 2017 LWEC determination. It found that Dr. Montella did not describe the changes in appellant's accepted conditions or provide rationalized medical opinion regarding the causal relationship between such changes and the increase in disability. The decision noted that appellant's claim was accepted for bilateral carpal tunnel syndrome, other cervical disc displacement, mid-cervical region, and other cervical disc displacement, cervicothoracic region.

A September 26, 2017 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated restriction of movement in various flexion and extension positions along with numerous disc bulges. A September 26, 2017 MRI scan of the cervical spine revealed mild increase in the severity of right neural foraminal stenosis at C3-4 level and mild increase in severity of bilateral foraminal stenosis at C4-5 level as compared to previous MRI scan of cervical spine dated July 24, 2015. An October 2, 2017 electromyogram (EMG) showed moderate bilateral median neuropathy across the wrists, left worse than right, with no significant change from prior study. It also noted suspicious but not diagnostic findings of chronic bilateral mid-cervical (C6-7) radiculopathy.

In reports beginning September 22, 2017, Dr. Montella indicated that appellant's conditions had worsened to a state of permanent total disability. In an October 13, 2017 report, he provided an impression of cervical disc displacement at C5-6 level and cervical disc disorder at C6-7 level with radiculopathy. Dr. Montella indicated that appellant's MRI scans showed a distinct worsening of the biomechanic integrity and ability of appellant's spinal column to function in regard to bearing stresses required of him at work. He advised that the EMGs were consistent with nerve root entrapment at the cervical spine as well as at the wrists; that the serial radiographs showed significant progression of spondylitic changes consistent with disability; and that a follow-up EMG was consistent with radiculopathy. Dr. Montella related that appellant required daily pain medication and should not be operating a motor vehicle. He also related that appellant could not lift weights in excess of 5 to 10 pounds, and could not lift any weight in a repetitive fashion. Dr. Montella opined that this was consistent with a worsening of appellant's overall condition which precluded him from returning to work from June 24, 2017 onward.

Appellant requested reconsideration on November 1, 2017. In support of his request, appellant submitted additional reports from Dr. Montella.

By decision dated January 23, 2018, OWCP denied modification of its September 11, 2017 decision, finding that Dr. Montella had not provided a well-rationalized explanation of how appellant's accepted medical conditions had materially changed. The decision noted that appellant's claim was accepted for bilateral carpal tunnel syndrome, other cervical disc displacement, mid-cervical region, and other cervical disc displacement, cervicothoracic region.

Appellant continued to submit evidence from Dr. Montella. In a February 15, 2018 letter, Dr. Montella advised that appellant was being treated for cervical disc herniation at the C5-6 level and cervical disc radiculopathy the C6-7 level. He requested that OWCP expand acceptance of the claim to include cervical radiculopathy based on the October 2, 2017 EMG. Dr. Montella also explained how appellant's cervical spine was aggravated, which caused a herniated disc and led to radiculopathy.

A note of a telephone call (Form CA-110) dated April 26, 2018 revealed that a voicemail message from OWCP advised appellant that cervical disc radiculopathy could not be added to his claim as the October 2, 2017 EMG findings were "suspicious" and not diagnostic of cervical radiculopathy.

An EMG of May 11, 2018 showed, in relevant part, a more central chronic lesion, radiculopathy of C6-7, bilaterally. In an addendum to a May 11, 2018 EMG report, Dr. Drew S. Kandilakis, a Board-certified neurological electrodiagnostics, opined that, based on the EMG findings, appellant has a chronic C6-7 bilateral cervical radiculopathy.

In a May 25, 2018 report, Dr. Montella again requested that radiculopathy of C6-7 bilaterally be added to appellant's accepted conditions based on the May 11, 2018 addendum to the recent EMG report. He additionally provided a medical explanation as to how the condition resulted from the original cervical disc herniation conditions.

On August 30, 2018 appellant, through his representative, requested reconsideration of the June 1, 2017 LWEC determination, contending that appellant sustained a worsening of his medical conditions because OWCP had not accepted cervical radiculopathy. Narrative medical reports from Dr. Montella, dated February 15 through October 2, 2018, were received along with physical therapy reports, diagnostic tests, and medical literature.

By decision dated January 16, 2019, OWCP denied modification of its January 23, 2018 decision. It indicated, in relevant part, that appellant's cervical radiculopathy was an accepted condition. However, OWCP also found that Dr. Montella's reports were vague as to what material change occurred on June 24, 2017 that demonstrated total disability for all employment. It further found that there was no evidence that the original LWEC decision was in error or that appellant was vocationally rehabilitated.

### **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.<sup>5</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup> OWCP's regulations and procedures contain

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<sup>5</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>6</sup> *W.R.*, Docket No. 18-1782 (issued May 29, 2019); *L.T.*, Docket No. 18-0797 (issued March 4, 2019); *Katherine T. Kreger*, 55 ECAB 633 (2004).

provisions regarding the modification of a formal LWEC.<sup>7</sup> 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 materially changed; or (3) the claimant has been vocationally rehabilitated.<sup>8</sup> It further provides that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met.<sup>9</sup>

### ANALYSIS

The Board finds that appellant has met his burden of proof to modify OWCP's June 1, 2017 LWEC determination.

Appellant received wage-loss compensation based upon an LWEC determination that his modified regular city carrier position which he held since September 10, 2016 fairly and reasonably represented his wage-earning capacity. He subsequently claimed total disability commencing June 24, 2017, which OWCP properly developed as a request for modification of the LWEC.

In denying appellant's initial requests for modification of the LWEC determination following his June 24, 2017 work stoppage due to alleged total disability, OWCP, in its decisions dated September 11, 2017 and January 23, 2018, incorrectly indicated that cervical radiculopathy was not an accepted condition and, therefore, appellant had not established a worsening of his accepted conditions. In the January 16, 2019 decision, OWCP acknowledged that cervical radiculopathy was an accepted condition; however, it found that appellant had not established that his accepted condition had worsened, thereby requiring modification of the LWEC determination.

In his October 13, 2017 report, Dr. Montella related that he had reviewed appellant's MRI and EMG studies and he concluded that appellant had sustained a worsening of his condition, which precluded him from returning to work from June 24, 2017 and continuing. He explained that appellant had cervical disc displacement at C5-6 and cervical disc disorder at C6-7 with radiculopathy. Dr. Montella related that appellant's MRI scan showed a distinct worsening of biomechanic integrity and ability of appellant's spinal column to function in regard to bearing stresses required of him at work. Furthermore, he related that appellant's EMG's were consistent with nerve root compression of the cervical spine and wrists, consistent with radiculopathy, he also noted that appellant had progression of spondylitic changes consistent with disability. In explaining appellant's disability status, Dr. Montella related that appellant could not lift weights in excess of 5 to 10 pounds, and could not lift any weight in a repetitive fashion.

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<sup>7</sup> 20 C.F.R. § 10.511; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013); *see also* C.S., Docket No. 18-1610 (issued April 25, 2019).

<sup>8</sup> *Id.* at Chapter 2.1501.3(a) (June 2013); *see C.S., id.*

<sup>9</sup> *Id.* at Chapter 2.1501.4 (June 2013); *see J.A.*, Docket No. 18-1586 (issued April 9, 2019); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

It is appellant's burden of proof to establish that his accepted conditions have materially worsened, such that the LWEC determination should be modified.<sup>10</sup> Further 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.<sup>11</sup>

Dr. Montella has provided objective evidence that appellant's accepted cervical radiculopathy condition worsened and caused disability from the modified limited-duty position as of June 24, 2017. Appellant's modified limited-duty position, which was the basis of his LWEC determination required lifting up to 47 pounds for two to four hours, carrying up to 42 pounds for two to four hours and pushing pulling up to 200 pounds for two to four hours. Dr. Montella, however, explained that appellant was not able to lift weights in excess of 5 to 10 pounds, and could not lift any weight in a repetitive fashion. He has, therefore, provided the medical rationale necessary to establish that appellant's accepted condition had worsened and that appellant was unable to perform the duties of the modified position.<sup>12</sup> Appellant has met his burden of proof to modify the June 1, 2017 LWEC determination.<sup>13</sup>

### **CONCLUSION**

The Board finds that appellant has met his burden of proof to modify OWCP's June 1, 2017 LWEC determination.

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<sup>10</sup> See *L.P.*, Docket No. 17-1624 (issued March 9, 2018); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>12</sup> *Id.*

<sup>13</sup> See *M.K.*, Docket No. 17-1852 (issued August 23, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 16, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 22, 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