

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

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**B.E., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Lexington, KY, Employer**

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**Docket No. 16-1761  
Issued: December 21, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

On August 25, 2016 appellant filed a timely application for review of a February 29, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The Board docketed the appeal as No. 16-1761.<sup>2</sup>

On April 22, 2004 appellant, then a 49-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her neck and right upper extremity in the performance of duty on or about April 20, 2004. OWCP initially accepted appellant's claim for C6-7 disc herniation with radiculopathy. On September 30, 2004 appellant underwent an anterior cervical discectomy at C6-7 with interbody fusion, which OWCP had authorized.

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's February 29, 2016 decision was August 27, 2016. Because using September 1, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 25, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> The case record provided to the Board includes evidence received after OWCP issued its February 29, 2016 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

Effective June 7, 2006, the Office of Personnel Management (OPM) granted appellant a disability retirement annuity.<sup>3</sup> In December 2009, OWCP expanded the accepted conditions in appellant's claim to include C5-6 herniated disc with degenerative changes. Additionally, it found appellant entitled to disability compensation retroactive to April 24, 2008, and consequently, placed her on the periodic compensation rolls.

Appellant participated in a vocational rehabilitation program and, in March 2012, her rehabilitation counselor determined that she was capable of earning wages in the constructed position of receptionist.<sup>4</sup>

On May 17, 2013 a formal loss of wage-earning capacity (LWEC) decision was issued based upon appellant's ability to earn \$318.00 per week as a receptionist. Appellant's compensation was adjusted effective June 2, 2013 based on this LWEC decision.

By decisions dated July 15, 2014 and February 9, 2015, OWCP denied modification of the May 17, 2013 LWEC determination.

On February 12, 2016 appellant requested reconsideration. She submitted the appeal request form that accompanied the February 9, 2015 decision. Appellant also submitted a February 8, 2016 letter explaining her disagreement with OWCP's prior decision.

In connection with her claim, appellant submitted evidence which she believed showed that she could no longer work as a receptionist. For example, in a December 11, 2014 report, Dr. Mark A. Deloma, an attending Board-certified anesthesiologist, noted that appellant reported worsening symptoms including increased arm, shoulder, hand, and neck pain which caused sleep disturbance and decreased ability to work. He diagnosed numerous conditions including possible left wrist ganglion, cervical postlaminectomy syndrome, and subacromial bursitis.

In a September 10, 2015 report, Dr. Karim Rasheed, an attending Board-certified anesthesiologist, noted increased complaints of chronic neck pain radiating into the left upper extremity.

By decision dated February 29, 2016, OWCP refused to reopen appellant's case for further review of the merits of her claim because the latest request for reconsideration was untimely filed and appellant had failed to demonstrate clear evidence of error.

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 on LWEC.<sup>5</sup> A wage-earning capacity

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<sup>3</sup> OPM determined that appellant was disabled from performing her modified city carrier position due to cervical degenerative disc disease and bilateral thoracic outlet syndrome.

<sup>4</sup> The physical requirements of the receptionist position were deemed to be within the work restrictions recommended on October 25, 2012 by Dr. Theodore T. Le, a Board-certified orthopedic surgeon serving as an OWCP referral physician.

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

determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.<sup>6</sup> Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.<sup>7</sup> Modification of an LWEC determination is unwarranted 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 erroneous.<sup>8</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>9</sup>

OWCP's procedure manual provides, "If a formal LWEC decision has been issued, and the claim is for recurrent disability, it should be processed in accordance with procedures for modifying a formal LWEC."<sup>10</sup>

In this case, OWCP determined that appellant had filed a request for reconsideration of its February 9, 2015 decision. The Board finds that the issue presented was whether the May 17, 2013 wage-earning capacity determination should be modified. Appellant submitted evidence which she believed demonstrated a worsening of her accepted medical condition. The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>11</sup>

The Board finds that appellant's claim for compensation raised the issue of whether modification of the May 17, 2013 wage-earning capacity decision was warranted. The case therefore must be remanded for an appropriate decision on this issue.

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<sup>6</sup> See *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>7</sup> See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

<sup>8</sup> 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

<sup>9</sup> 20 C.F.R. § 10.511.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (February 2013).

<sup>11</sup> See *Katherine T. Kreger*, *supra* note 7. The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. See *id.*

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 29, 2016 is set aside, and the case is remanded for further action consistent with this order of the Board.

Issued: December 21, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board