



## **FACTUAL HISTORY**

On November 24, 1992 appellant, then a 36-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her left toe, foot, and leg at work due to a crushing injury involving a bed rail. OWCP accepted the claim for contusion of left toe, contusion of left foot, lesion of plantar nerve, left foot plantar fibromatosis, crushing injury of left foot, bunion, left foot, and post-traumatic osteoarthritis, ankle and left foot. It authorized surgery, which appellant underwent in November 1993 and June 1995.

By decision dated December 10, 1997, OWCP determined that the position of alternative duty nursing assistant, a position she had worked in since January 27, 1997, fairly and reasonably represented her wage-earning capacity and terminated her wage-loss compensation benefits. Appellant resigned from her federal employment on August 4, 2000.

The last medical report on file in 2000 was an August 28, 2000 report from Dr. Thomas P. San Giovanni, an orthopedic surgeon specializing in the foot and ankle. Dr. San Giovanni noted that appellant's magnetic resonance imaging (MRI) scan was relatively unremarkable and demonstrated postsurgical changes in the great toe and mild degenerative changes within the midfoot. He indicated that her examination was relatively unchanged and that she may have a symptomatic assessor navicular. Dr. San Giovanni recommended orthotics to relieve some of the strain upon her midfoot/forefoot. He also noted that she should consult a spine specialist regarding her back pain.

In March 2 and April 16, 2001 reports, Dr. San Giovanni indicated that appellant's examination and x-rays remained unchanged. He noted that there may be a peripheral neuropathy as a significant component of her pain and recommended a referral to a neurologist.<sup>3</sup>

On May 8, 2015 appellant filed Form CA-7 claim for compensation for total disability from work during the period August 4, 2000 to April 3, 2015.

As no documentation was submitted with the claim, by development letter dated May 14, 2015, OWCP informed appellant of the three criteria necessary for modifying a formal LWEC determination. It advised her that her physician must describe a worsening of her accepted condition and provide a well-rationalized medical opinion regarding the relationship between such changes and her increased disability. OWCP informed her that an increase in pain did not constitute objective evidence of disability. It afforded appellant 30 days to provide the necessary documentation to support her claim.

Medical reports dated February 23 through June 23, 2015 from Dr. Tania C. Turbay, a podiatrist, were received. Dr. Turbay documented appellant's residual symptoms approximately every three weeks. She provided an assessment of closed fracture of metatarsal bone(s), closed

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<sup>3</sup> During the period April 17, 2001 through November 25, 2014, the record is devoid of any evidence for medical treatment for the accepted conditions. Rather, the medical evidence of record indicates that appellant was receiving medical treatment for a nonwork-related back condition.

fracture of one or more phalanges of foot, pain in soft tissue of limb, contusion of toes, primarily localized osteoarthritis, ankle and foot, crushing injury of foot, lesion of plantar nerve, contusion of foot, and unspecified deformity of ankle and foot, acquired.

On March 16, May 21, and June 23, 2015 Dr. Turbay performed ultrasound guided injection of appellant's left second metatarsophalangeal joint (MPJ). She noted that appellant suffered from neuropathy to the left foot and that procedure was medically necessary. Dr. Turbay indicated that the pain had not been relieved by conservative modalities, it radiated to the left lower extremity with numbness, tingling, and paresthesia, it was severe and intractable and interfered with appellant's daily activities, physical activities, physical function, quality of life, sleep and mood. Appellant's diagnoses were again noted as in prior reports.

By decision dated July 9, 2015, OWCP denied modification of its December 10, 1997 LWEC determination and, therefore, found no basis for payment of wage-loss compensation benefits as of August 4, 2000. It found that there was no evidence to substantiate that appellant had met any of the three criteria for modifying a formal LWEC determination.

On March 29, 2016 appellant requested reconsideration.

Dr. Turbay performed ultrasound guided injection of appellant's left second metatarsophalangeal joint (MPJ) on August 25 and June 23, 2015 and April 29, 2016. She noted appellant's diagnoses, as in prior reports, and discussed appellant's pain as the reason for the procedure.

Medical reports from Dr. Turbay dated September 15 through November 30, 2015 and January 8 through June 17, 2016 documented appellant's residual symptoms and indicated that she had chronic pain. She continued to provide an assessment of closed fracture of metatarsal bone(s); closed fracture of one or more phalanges of foot, pain in soft tissue of limb, contusion of toes, primarily localized osteoarthritis, ankle and foot, crushing injury of foot, lesion of plantar nerve, contusion of foot, and unspecified deformity of ankle and foot, acquired was provided. In her September 29, 2015 report, Dr. Turbay indicated that appellant had reached maximum medical improvement and provided a permanent impairment rating of two percent.

In January 8, February 5, and March 4, 2016 reports, Dr. Turbay opined that appellant's reflex sympathetic dystrophy (RSD) was probably from the crush injury to the foot. She indicated that the post-traumatic arthritic changes were also causally related to the crush injury to the foot. Dr. Turbay indicated that appellant had chronic pain and neuropathy and impairment on ambulation due to severe deformity of the toes of the right foot. She provided 20 percent permanent impairment rating.

In her April 29, 2016 reports and onward, Dr. Turbay provided an assessment of closed fracture of metatarsal bone(s), pain in unspecified foot, other hammer toe(s) (acquired), left foot, unspecified acquired deformity of unspecific lower leg, closed fracture of one or more phalanges of foot, contusion of toe, primary localized osteoarthritis, ankle and foot, crushing injury of foot, and lesion of plantar nerve and contusion of foot.

In forms dated September 15, and 29, and November 30, 2015, January 8, February 5, and June 9, 2016, Dr. Turbay indicated that appellant was capable of sedentary desk-type work, only with no weight bearing to affected foot.

By decision dated August 4, 2016, OWCP denied modification of its July 9, 2015 decision. It found that none of the new evidence submitted discussed a material worsening of her accepted conditions which would prevent her from working the position of alternative duty nursing assistant. Appellant also had not demonstrated any of the three criteria for modifying an LWEC determination.

On August 27, 2016 appellant requested reconsideration. She stated that she was forced to resign or be terminated from the employing establishment because of the leave she had to use due to her job-related injury.

Medical reports from Dr. Turbay dated August 24 and 25, September 29, and November 4, 2016 were received. On August 24 and 25, 2016 appellant received an injection to the left 2<sup>nd</sup> MPJ joint and the plantar aspect of the left foot. Dr. Turbay indicated that appellant's pain was the reason the procedure was medically necessary. In her August 25, September 29, and November 4, 2016 reports, she continued to note appellant's chronic pain. An assessment of closed fracture of metatarsal bones, closed fracture of one or more phlanges of foot, pain in soft tissues of limb, contusion of toes, primary localized osteoarthritis, ankle and foot, crushing injury of toot, lesion of plantar nerve, contusion of foot and unspecified deformity of ankle and foot, acquired were provided. Dr. Turbay also submitted medication logs and disclosure and consent forms.

In a status reporting form dated August 25, 2016, Dr. Turbay indicated that appellant was capable of sedentary work only. She noted that appellant reached maximum medical improvement on September 29, 2015.

By decision dated December 2, 2016, OWCP denied modification of its prior decision. It found that the evidence of record did not substantiate a worsening of appellant's accepted conditions such that she could not perform the duties of alternate nursing assistant as of August 4, 2000, the date appellant resigned from her federal employment.

### **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>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</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

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<sup>4</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>5</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

rehabilitated, or the original determination was, in fact, erroneous.<sup>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

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 rationale explaining the decision.<sup>8</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that her 1997 LWEC determination should be modified.

OWCP accepted that appellant sustained a contusion of left toe, contusion of foot, lesion of plantar nerve, left foot plantar fibromatosis, crushing injury of left foot, bunion, left foot and post-traumatic osteoarthritis, ankle and left foot and authorized surgery, which appellant underwent in November 1993 and June 1995. On December 10, 1997 a formal LWEC determination was issued, finding that the position of alternative duty nursing assistant fairly and reasonably represented her wage-earning capacity. Appellant resigned from her federal employment on August 4, 2000. She subsequently claimed total disability as of August 4, 2000.

OWCP found that appellant was not entitled to wage-loss compensation when she stopped work, as her wage-earning capacity had previously been established. As a formal LWEC determination has been issued, the decision will remain in place, 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>9</sup>

Appellant has not alleged that she had been retrained or otherwise vocationally rehabilitated. She alleges that her accepted conditions worsened such that she is now totally disabled from work as a result of her accepted employment injuries. Since OWCP found that appellant could perform the duties of an alternative duty nursing assistant, the issue is whether there has been a material change in her work-related condition that would render her unable to perform those duties.<sup>10</sup> This is primarily a medical question.<sup>11</sup> In reviewing the medical evidence of record, the Board finds appellant has failed to provide sufficient evidence to establish that a modification of the LWEC determination is warranted.<sup>12</sup>

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<sup>6</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>7</sup> *Id.*

<sup>8</sup> *Jennifer Atkinson*, 55 ECAB 317, 319 (2004).

<sup>9</sup> *See supra* note 4.

<sup>10</sup> *Phillip S. Deering*, 47 ECAB 692 (1996).

<sup>11</sup> *R.S.*, Docket No. 15-1229 (issued October 2, 2015).

<sup>12</sup> *See R.L.*, Docket No. 15-1337 (issued January 27, 2016); *J.I.*, Docket No. 15-0516 (issued September 21, 2015).

Evidence from Dr. San Giovanni during the years 2000 to 2001 indicated that appellant's examination and x-rays remained unchanged. His reports are, therefore, insufficient to establish a material worsening of the accepted conditions and that appellant could not perform her modified position due to her employment injury.<sup>13</sup>

The multiple reports from Dr. Turbay commencing in 2015 do not establish a material worsening of an employment-related condition. Dr. Turbay's reports do not contain a rationalized opinion explaining how the residuals from appellant's employment injury prevented her from performing the duties as an alternate nursing assistant on the dates in question. Although Dr. Turbay provided examination findings, documented the chronicity of appellant's pain, and provided injections, she did not offer an opinion on whether appellant's accepted conditions had materially worsened preventing her from performing the duties of alternate nursing assistant. An increase in pain alone does not constitute objective evidence of disability.<sup>14</sup>

In her January 8, February 5, and March 4, 2016 reports, Dr. Turbay opined that appellant had RSD "probably" due to the crush injury to the foot. However, OWCP did not accept RSD, and the opinion itself is equivocal and, therefore, of limited probative value.<sup>15</sup> Dr. Turbay also opined that the post-traumatic arthritic changes were causally related to the crush injury to the foot, but offered no medical rationale for her opinion.<sup>16</sup> While she also indicated that appellant had chronic pain and neuropathy and impairment on ambulation due to severe deformity of the toes of the right foot and provided an impairment rating, she did not discuss whether this was due to a worsening of the accepted conditions and prevented appellant from working the position of alternate nursing assistant. A mere conclusory opinion provided by a physician without the necessary rationale explaining how or why the work injury was sufficient to result in the diagnosed medical condition is insufficient to meet appellant's burden of proof to establish her claim.<sup>17</sup> Furthermore, Dr. Turbay does not address in any of her reports appellant's ability to work in the alternate nursing assistant position.<sup>18</sup>

As the medical evidence of record during the claimed period fails to provide support for a material worsening of the accepted employment-related conditions such that appellant was precluded from performing her duties as an alternate nursing assistant, appellant has not met her burden of proof.

The Board finds that the evidence of record does not establish that appellant's accepted work-related medical conditions have materially changed or worsened, that the original LWEC determination was in error, or that she had been retrained or otherwise vocationally rehabilitated.

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<sup>13</sup> See *A.N.*, Docket No. 16-0166 (issued February 1, 2016).

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5(b)(1)(b) (June 2013).

<sup>15</sup> *J.E.*, Docket No. 16-0509 (issued September 16, 2016).

<sup>16</sup> See *B.T.*, Docket No. 13-0138 (issued March 20, 2013).

<sup>17</sup> See *J.D.*, Docket No. 14-2061 (issued February 27, 2015).

<sup>18</sup> *Supra* note 12.

Thus appellant has not established that the December 10, 1997 LWEC determination should be modified.

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 failed to meet her burden of proof to modify the December 10, 1997 LWEC determination as of August 4, 2000.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2018  
Washington, DC

Christopher J. Godfrey, 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