

appellant entitled to disability compensation retroactive to April 24, 2008 and 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. 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.

On May 17, 2013 OWCP issued a formal loss of wage-earning capacity (LWEC) determination based upon appellant's ability to earn \$318.00 per week as a receptionist. Appellant's compensation was adjusted commencing June 2, 2013 based on this LWEC determination. 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 and she submitted medical evidence from her attending Board-certified anesthesiologists, including a December 11, 2014 report of Dr. Mark A. Deloma and a September 10, 2015 report of Dr. Karim Rasheed. She argued that these reports showed that she could no longer work as a receptionist.

By decision dated February 29, 2016, OWCP refused to reopen appellant's case for further review of the merits of her claim because the February 12, 2016 request for reconsideration was untimely filed and appellant had failed to demonstrate clear evidence of error.

Appellant appealed the February 29, 2016 decision to the Board and, by order dated December 21, 2016,² the Board set aside the February 29, 2016 decision and remanded the case to OWCP for further development. The Board found that appellant had raised the issue of whether modification of the May 17, 2013 LWEC determination was warranted and directed OWCP to consider this matter on remand and issue an appropriate decision.

On remand, OWCP issued an April 12, 2017 decision in which it determined that appellant had not met her burden of proof to modify its May 17, 2013 LWEC determination.

On July 10, 2018 appellant requested reconsideration through an appeal request form. In a July 2, 2018 letter received on July 10, 2018, appellant argued that her employment-related medical condition had materially changed such that modification of OWCP's May 17, 2013 LWEC determination was warranted.

Appellant submitted a number of medical reports, including a January 11, 2018 report from Dr. Robert D. Owens, an attending Board-certified neurosurgeon, who indicated that appellant complained of left-sided neck pain which radiated into her left hand. Dr. Owens diagnosed cervical disc disorder with radiculopathy and recommended anterior cervical discectomy/fusion surgery at C5-6. In an April 23, 2018 report, Dr. John J. Vaughan, an attending Board-certified orthopedic surgeon, noted that appellant reported experiencing increased cervical pain which radiated into her left arm. Dr. Vaughan indicated that a December 1, 2017 magnetic resonance

² *Id.*

imaging (MRI) scan of appellant's cervical spine showed a moderate disc herniation at C5-6 which was not present in a 2013 cervical spine MRI scan.³ He recommended anterior cervical discectomy/fusion surgery at C5-6.

By decision dated July 25, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the July 10, 2018 request was untimely filed and 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.⁴ A wage-earning capacity 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.⁵ Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.⁶ 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.⁷ The burden of proof is on the party seeking modification of the LWEC determination.⁸

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."⁹

OWCP determined, by its decision dated July 25, 2018, that appellant had filed a request for reconsideration of its April 12, 2017 decision. The Board finds that the issue presented was whether the May 17, 2013 LWEC determination should be modified. Appellant submitted evidence which she believed demonstrated a worsening of her accepted medical conditions. The Board has held that, when an LWEC determination has been issued, and the claimant submits

³ Appellant submitted a copy of the December 1, 2017 MRI scan.

⁴ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see C.C.*, Docket No. 18-1127 (issued January 19, 2019).

⁵ *W.G.*, Docket No. 18-0374 (issued August 28, 2018).

⁶ *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁷ 20 C.F.R. § 10.511; *see E.H.*, Docket No. 17-0963 (issued August 24, 2018); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

⁸ 20 C.F.R. § 10.511.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (February 2013).

evidence with respect to disability from work, OWCP must evaluate the evidence to determine if modification of the prior LWEC determination is warranted.¹⁰

The Board finds that appellant's claim for compensation raised the issue of whether modification of the May 17, 2013 LWEC determination was warranted. The case must therefore be remanded to OWCP for a *de novo* decision on this issue. Accordingly,

IT IS HEREBY ORDERED THAT the July 25, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: August 20, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁰ See *Katherine T. Kreger*, *supra* note 6. 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 LWEC determination. *See id.*