

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

_____)	
B.H., Appellant)	
)	
and)	Docket No. 18-1515
)	Issued: June 20, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Houston, TX, Employer)	
_____)	

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
JANICE B. ASKIN, Judge

On August 2, 2018 appellant filed a timely appeal from a July 23, 2018 decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Boards assigned the appeal Docket No. 18-1515.

On December 23, 2007 appellant, then a 52-year-old mail processor, filed an occupational disease claim (Form CA-2) for a left upper extremity condition that she attributed to factors of her federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome, bilateral benign neoplasm of the connective and soft tissue of the upper limb including the shoulder, and chronic pain syndrome.² It paid appellant wage-loss compensation on the supplemental rolls beginning January 1, 2009 and on the periodic rolls beginning July 5, 2009.

¹ The Board notes that appellant submitted additional evidence on appeal. 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.*

² OWCP also authorized bilateral carpal tunnel releases.

By decision dated June 19, 2017, OWCP reduced appellant's wage-loss compensation effective June 25, 2017 finding that she had the capacity to earn wages of \$360.40 per week as a receptionist.³ Appellant timely requested a review of the written record by an OWCP hearing representative.

By decision dated November 17, 2017, OWCP's hearing representative affirmed the June 19, 2017 decision. She found that OWCP had properly reduced appellant's wage-loss compensation as the position of receptionist was medically and vocationally suitable. The hearing representative further found that OWCP had properly determined her loss of wage-earning capacity based on her date-of-injury pay rate and the entry level salary for the selected position of receptionist.

On February 23, 2018 appellant requested reconsideration of the hearing representative's November 17, 2017 decision. She submitted a November 1, 2017 decision from the Social Security Administration (SSA) finding her disabled as of June 3, 2010. In her request for reconsideration, appellant noted that the included decision was based upon new evidence regarding her "employability." Appellant subsequently submitted an SSA disability determination and transmittal form (SSA-831)

By decision dated July 23, 2018, OWCP reviewed appellant's request for reconsideration pursuant to 5 U.S.C. § 8128 and 20 C.F.R. § 10.609, and denied modification of the hearing representative's November 17, 2017 decision, which affirmed the original June 19, 2017 LWEC determination.

The Board, having duly considered the matter, concludes that the case is not in posture for decision.⁴

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.⁵ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁶ Unlike reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting

³ OWCP initially issued a loss of wage-earning capacity (LWEC) determination on October 15, 2015 finding appellant capable of earning \$448.50 per week as a receptionist. By decision dated March 18, 2016, a representative of OWCP's Branch of Hearings and Review found that the selected position of receptionist was medically and vocationally suitable. However, the hearing representative set aside the October 15, 2015 decision and remanded the case to OWCP to determine the appropriate weekly wage for a receptionist. OWCP issued a June 9, 2016 LWEC determination finding that appellant was capable of earning \$360.40 per week as a receptionist. That decision was similarly set aside by an OWCP hearing representative because OWCP relied on an incorrect pay rate in determining appellant's loss of wage-earning capacity. Following remand, OWCP issued a proposed LWEC determination on April 24, 2017, followed by the June 19, 2017 final LWEC determination.

⁴ *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

⁵ 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).

⁶ 20 C.F.R. § 10.511.

modification of an LWEC determination.⁷ Any request for “modification” (especially those without an accompanying claim for compensation) should be reviewed carefully to determine whether the claimant is seeking a reconsideration of a recently issued LWEC decision, as opposed to a modification of the LWEC determination.⁸

It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.⁹ Although appellant used the term reconsideration in her February 23, 2018 correspondence, she questioned OWCP’s finding about her employability given SSA’s recent disability determination.

The Board finds that the February 23, 2018 letter from appellant constituted a request for modification of the June 19, 2017 LWEC determination.¹⁰ The Board has held that, when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of the LWEC determination is warranted.¹¹ The Board finds that the issue is whether a modification of the June 19, 2017 LWEC determination was warranted and thus the case must be remanded for an appropriate decision on this issue.¹²

⁷ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501.4a (June 2013).

⁹ 20 C.F.R. § 10.511; *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

¹⁰ *R.Z.*, *Order Remanding Case*, Docket No. 17-1455 (issued February 15, 2019).

¹¹ *L.P.*, *Order Remanding Case*, Docket No. 18-1429 (issued March 8, 2019); *W.R.*, Docket No. 16-0098 (issued May 26, 2016).

¹² *T.H.*, *Order Remanding Case*, Docket No. 16-1659 (issued July 14, 2017).

IT IS HEREBY ORDERED THAT the July 23, 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: June 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