

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

N.M., Appellant	)	
	)	
and	)	<b>Docket No. 18-1244</b>
	)	<b>Issued: March 4, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Indianapolis, IN, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 4, 2018 appellant filed a timely appeal from a December 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met her burden of proof to modify her April 25, 1996 loss of wage-earning capacity (LWEC) determination.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the December 15, 2017 decision, OWCP received additional evidence. Appellant also 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.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 1, 1992 appellant, then a 39-year-old part-time mail handler, filed a traumatic injury claim (Form CA-1) alleging that on May 27, 1992 she sustained back and leg injuries when she was struck by a cart while in the performance of duty. OWCP accepted the claim for low back strain, herniated L4-5 disc, enthesopathy of the hip region, and sciatica. By decision dated April 25, 1996, it determined that appellant's actual earnings in a part-time modified mail handler position, effective January 20, 1996, fairly and reasonably represented her wage-earning capacity. OWCP reduced appellant's compensation to reflect her LWEC.<sup>4</sup>

Appellant continued to receive compensation based on the April 25, 1996 LWEC until January 29, 2009 when she underwent an authorized lumbar surgery. By letter dated February 2, 2009, OWCP informed her that she was entitled to temporary total disability, effective January 29, 2009. It placed her on the periodic compensation rolls at a total disability rate effective January 30, 2009, and continues to receive total disability compensation.

In correspondence dated February 18, 2013, appellant maintained that she had not been properly compensated from 2000 to 2007.

By decision dated June 18, 2013, OWCP found that appellant's February 18, 2013 correspondence constituted an untimely application for reconsideration which failed to demonstrate clear evidence of error. On December 2, 2013 appellant appealed to the Board. By decision dated May 2, 2014, the Board set aside OWCP's June 18, 2013 decision, finding that appellant had requested modification of her April 25, 1996 LWEC determination for the period prior to January 30, 2009.<sup>5</sup> The case was remanded to OWCP for a proper merit review on the issue of modification of the LWEC determination.

By decision dated August 7, 2014, OWCP denied modification of the April 25, 1996 LWEC determination. It found that the evidence of record failed to establish that modification was warranted.

On July 17, 2015 appellant again requested modification of the April 25, 1996 LWEC determination. By decision dated May 4, 2016, OWCP denied modification of the April 25, 1996

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<sup>3</sup> Docket No. 14-0348 (issued May 2, 2014); Docket No. 16-1858 (issued February 8, 2017).

<sup>4</sup> By decision dated July 9, 1996, OWCP denied appellant's claim for a recurrence of disability commencing March 31, 1996. By decision dated December 31, 1998, it denied her claim for a recurrence of disability commencing May 16, 1998. By decision dated May 19, 1999, OWCP denied modification of the December 31, 1998 decision. By decision dated February 25, 2000, it denied reconsideration of the merits of the claim. The record also contains an August 26, 2008 decision denying a request for hearing before an OWCP hearing representative.

<sup>5</sup> *Supra* note 3.

LWEC determination, finding that the medical evidence of record was insufficient to warrant modification based on a material change in the employment-related condition.

Appellant again appealed to the Board. By decision dated February 8, 2017, the Board reviewed the medical evidence of record dated from May 9, 1996 to January 19, 2009 and affirmed OWCP's decision.<sup>6</sup>

On December 19, 2016 OWCP referred her to Dr. Norman Mindrebo, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her continuing disability status. By report dated January 19, 2017, Dr. Mindrebo noted his review of the medical record, including the statement of accepted facts. He reported that appellant related a very complicated, "colorful medical history" with significant emotional overlay and probable symptom magnification. Dr. Mindrebo noted the history of injury and that appellant reported that she had several other work-related injuries, had been in a car accident, did not get better after the 2009 lumbar surgery, and had cervical spine, bilateral shoulder, and left knee surgical procedures that were not due to the 1992 employment injury. He advised that appellant had progressive degenerative disc changes and diagnosed failed surgery of the lumbar spine and both shoulders and noted diffuse chronic pain in her upper and lower extremities, buttock, low back, and neck. Dr. Mindrebo noted the accepted conditions and advised that appellant would never return to gainful employment due to her chronic pain, but needed no further treatment due to the 1992 employment injury. In a supplemental report dated February 23, 2017, he indicated that there were no objective findings on appellant's physical examination that would justify continued disability from work due to the accepted lumbar conditions.

In a February 6, 2017 report, Dr. Karen H. Adkins, a Board-certified internist, advised that appellant had multiple orthopedic surgical procedures and had ongoing joint and low back pain that required physical therapy and massage therapy.

In a March 1, 2017 report, Dr. Nilda Durany, a family physician, noted that appellant was permanently disabled due to a May 27, 1992 employment injury. She provided physical examination findings and diagnosed "lumbar disc, sprain lumbosacral, enthesopathy right hip, and sciatica." Dr. Durany opined that all diagnosed conditions were a direct result of the May 27, 1992 employment injury.

OWCP determined that a conflict in medical evidence had been created between appellant's treating physician and Dr. Mindrebo regarding whether appellant continued to have residuals of the May 27, 1992 employment injury. In April 2017, it referred her, together with a statement of accepted facts, medical records, and a series of questions to Dr. Neil H. Levine, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a May 23, 2017 report, Dr. Levine described his complete review of the medical record beginning in 1992. He advised that, based on his clinical examination, appellant did not have objective findings consistent with lumbar radiculopathy and that, while she was totally disabled, the disability was not a result of the May 27, 1992 employment injury, but instead was due to a progression of her preexisting

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<sup>6</sup> *Id.*

degenerative disease. Dr. Levine concluded that appellant had no residuals of the work-related conditions.

On September 26, 2017 appellant again requested modification of the April 25, 1996 LWEC determination. She asserted that her claim should be considered a recurrence of disability rather than modification of her LWEC determination.

By decision dated December 15, 2017, OWCP reviewed appellant's September 26, 2017 request for modification and the evidence submitted since its May 4, 2016 decision. It found that, as an LWEC was in place, compensation based on a recurrence of disability was not appropriate. OWCP further found that the medical evidence submitted was insufficient to modify the existing LWEC determination because none of the physicians discussed appellant's work capabilities for the period April 25, 1996 to January 29, 2009. It therefore denied modification of the April 25, 1996 LWEC determination.

### **LEGAL PRECEDENT**

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 loss of wage-earning capacity.<sup>7</sup> An LWEC 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>8</sup> Generally, an employee's actual earnings best reflect his or her wage-earning capacity.<sup>9</sup> Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.<sup>10</sup>

OWCP procedures provide that if an injured employee has returned to alternative employment in the private sector, the claims examiner should consider the number of hours actually being worked in relation to the number the claimant is medically capable of working and review both the nature of the occupation and the actual wages earned in the new position to determine whether the earnings fairly and reasonably represent the wage-earning capacity.<sup>11</sup>

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.<sup>12</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

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<sup>7</sup> 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see T.H.*, Docket No. 18-0704 (issued September 6, 2018).

<sup>8</sup> *See W.G.*, Docket No. 18-0374 (issued August 28, 2018).

<sup>9</sup> *T.H.*, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5d (June 2015).

<sup>12</sup> *J.H.*, Docket No. 18-0535 (issued December 31, 2018); *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.<sup>13</sup> The burden of proof is on the party seeking modification.<sup>14</sup>

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>15</sup> Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the employment injury. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale, which explains the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to modify her April 25, 1996 LWEC determination.<sup>17</sup>

Appellant asserts on appeal that she sustained a recurrence of disability because her accepted condition materially worsened. She did not assert that the April 25, 1996 LWEC determination was erroneous or indicate that she had been retrained or otherwise vocationally rehabilitated.<sup>18</sup>

In its February 8, 2017 decision, the Board reviewed all evidence submitted prior to OWCP's May 4, 2016 decision. The Board's review of the previously submitted medical evidence of record is *res judicata* absent any further review by OWCP under section 8128(a) and; therefore, the prior evidence need not be addressed again in this decision.<sup>19</sup>

In the December 15, 2017 decision on appeal, OWCP reviewed the evidence submitted subsequent to its May 4, 2016 decision. This included a January 19, 2017 report from Dr. Mindrebo, an OWCP referral physician, a February 6, 2017 report from Dr. Adkins, an

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<sup>13</sup> 20 C.F.R. § 10.511; *see J.H., id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

<sup>14</sup> *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>15</sup> *S.C.*, Docket No. 17-1587 (issued January 2, 2019).

<sup>16</sup> *Id.*

<sup>17</sup> 5 U.S.C. § 8114(d).

<sup>18</sup> Appellant also asserts on appeal that she should be compensated for a 1988 unreported employment injury and is entitled to a schedule award. However, the Board's jurisdiction is limited to reviewing final adverse decisions of OWCP issued under FECA within 180 days from the date of issuance. 20 C.F.R. §§ 501.2(c), 501.3(a) & (e); *see C.H.*, Docket No. 18-0772 (issued November 14, 2018); *J.B.*, Docket No. 09-2191 (issued May 14, 2010). OWCP has not issued a final adverse decision within the Board's jurisdiction on these issues.

<sup>19</sup> *E.C.*, Docket No. 17-1765 (issued January 24, 2018); *E.L.*, Docket No. 16-0635 (issued November 7, 2016). *See A.T.*, Docket No. 16-0738 (issued May 19, 2016).

attending internist, a March 1, 2017 report from Dr. Durany, an attending family physician, and a May 23, 2017 report from Dr. Levine, who provided an impartial medical evaluation with regard to whether appellant had current residuals of the conditions caused by the May 27, 1992 employment injury. None of these physicians contemporaneously discussed appellant's work capability during the period from April 25, 1996 to January 29, 2009, which is the disputed issue in this case. While Dr. Durany opined that all diagnosed conditions were a direct result of the May 27, 1992 employment injury, and noted that appellant was totally disabled, appellant has been on total disability compensation since 2009.

It is appellant's burden of proof to establish that modification of the April 25, 1996 LWEC determination was warranted prior to January 30, 2009.<sup>20</sup> The Board finds that appellant has not met her burden of proof to submit a rationalized medical opinion, based on a complete background, establishing a material change in her employment-related condition, which prevented her from performing the light-duty mail handler position. Appellant, therefore, did not meet her burden of proof in this case.

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 not met her burden of proof to modify her April 25, 1996 LWEC determination.

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<sup>20</sup> *J.A.*, *supra* note 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2019  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board