

of preexisting right shoulder osteoarthritis and arthropathy, aggravation right shoulder impingement syndrome; right carpal tunnel syndrome; and right middle and ring finger flexor tenosynovitis. Appellant received wage-loss compensation on the periodic rolls as of June 5, 2011. On June 13, 2011 she underwent an OWCP authorized right rotator cuff and sub-acromial decompression surgery.

On April 14, 2014 OWCP found a conflict in medical opinion between the second opinion examiner, Dr. Edward G. Fisher, a Board-certified orthopedic surgeon and Dr. Robert L. Reed, a Board-certified general surgeon. In a March 1, 2014 report Dr. Fisher opined that appellant could work full time in both of the selected positions of medical records clerk, *Dictionary of Occupational Titles* (DOT) 245.362.010 and insurance clerk, DOT 214.362.023, two positions previously deemed appropriate by vocational rehabilitation. In December 3, 2012 and January 23, 2013 reports Dr. Fisher opined that appellant was permanently disabled. To resolve the conflict OWCP properly referred a statement of accepted facts (SOAF), a list of medical questions, and the medical record to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The SOAF noted appellant's nonemployment medical history included post-polio syndrome; multilevel degenerative disc disease from mid and lower cervical spine, and that appellant had accepted right shoulder conditions under a prior injury claim in OWCP file No. xxxxxx343.

In a June 23, 2014 report, Dr. Sheridan noted that appellant used a right wrist brace, a cane, and a walker when necessary. He opined that the only residuals that remained of appellant's accepted conditions were restricted motion in the right shoulder for which no additional therapies or treatments were recommended. Dr. Sheridan found no additional current diagnosis that were caused, aggravated, accelerated and/or precipitated by the October 14, 2010 employment injury. He opined that appellant could not return to her former duties as a rural carrier without physical restrictions because of her right-sided shoulder motion restriction. Dr. Sheridan reviewed the position Insurance Clerk and opined that she was capable as performing this position given her right shoulder restrictions. He advised that both work and nonwork-related residuals were considered. In his June 23, 2014 work capacity evaluation (Form OWCP-5c) Dr. Sheridan opined that appellant had reached maximum medical improvement and that she was capable of full-time employment with no restrictions.

By decision dated July 20, 2015, OWCP issued a formal loss of wage-earning capacity (LWEC) determination based upon appellant's ability to perform the selected position of insurance clerk, DOT 205.367.022. It found that the weight of the medical evidence was afforded to Dr. Sheridan, in his capacity as an impartial medical examiner (IME), regarding appellant's ability to perform the sedentary insurance clerk position.

On August 17, 2015 appellant requested a hearing before an OWCP hearing representative. By decision dated June 22, 2016, a hearing representative affirmed the July 20, 2015 LWEC decision. On June 26, 2017 appellant requested reconsideration. By decision dated September 22, 2017, OWCP denied modification of its June 22, 2016 LWEC decision.³

³ It noted that the medical evidence, which showed that her polio syndrome continued to worsen, was insufficient to modify her LWEC as it was not a work-related condition.

On September 25, 2018 OWCP received appellant's September 21, 2018 request for reconsideration. Appellant alleged several errors in the LWEC determination. She alleged that the SOAF provided to Dr. Sheridan, the IME, was inaccurate as it failed to provide a complete and accurate list of her preexisting conditions, including degenerative cervical disc disease with cervical lordosis, asthma, polio, lumbar disc degeneration, atrophy of the left leg, gait and walking disorder, ataxia and tremulous of the right arm, depression, and fatigue. Appellant also alleged error in the substance of Dr. Sheridan's report and conflicting work evaluation, as he had not properly addressed her current limitations or discussed her ability to perform the selected position in light of all of her preexisting conditions.

By decision dated October 16, 2018, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

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 modification of an LWEC determination.⁷ Requests for "modification" 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

The Board finds that appellant's September 21, 2018 request for reconsideration was, in fact, a request for modification of the July 20, 2015 LWEC determination. Appellant specifically alleged error in the SOAF which Dr. Sheridan, the IME, relied upon, as well as in Dr. Sheridan's June 23, 2014 report, upon which the LWEC determination was based. It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous.⁹

As OWCP improperly reviewed the case under the standard for an untimely reconsideration request, the case must be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met her burden

⁴ *B.H.*, Docket No. 18-1515 (issued June 20, 2019); *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.

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

⁸ *Supra* note 5, Federal (FECA) Procedure Manual, Chapter 2.1501.4a (June 2013).

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

of proof to establish modification of her LWEC determination.¹⁰ The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.

IT IS HEREBY ORDERED THAT the October 16, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: April 30, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *L.H.*, Docket No. 18-1787 (issued July 29, 2019); *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).