

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

_____)	
B.E., Appellant)	
)	
and)	Docket No. 20-1100
)	Issued: May 7, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Lexington, KY, Employer)	
_____)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On April 29, 2020 appellant filed a timely appeal from a November 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-1100.¹

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On April 22, 2004 appellant, then a 49-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her neck and right upper extremity due to her federal employment duties on or about April 20, 2004. OWCP accepted appellant's claim

¹ The Board notes that following the November 1, 2019 decision, appellant submitted additional evidence to OWCP. 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 *Order Remanding Case*, Docket No. 16-1761 (issued December 21, 2016); *Order Remanding Case*, Docket No. 18-1654 (issued August 20, 2019).

for disc herniation at the C6-7 level with radiculopathy and appellant underwent OWCP-authorized anterior cervical discectomy/fusion surgery at C6-7 on September 30, 2004. In December 2009, OWCP expanded the accepted conditions to include C5-6 herniated disc with degenerative changes. It later found that appellant was entitled to wage-loss compensation for disability from work retroactive to April 24, 2008 and placed her on the periodic rolls. In March 2012, appellant's rehabilitation counselor determined that she was capable of earning wages in the constructed position of receptionist. The physical requirements of the position were within the October 25, 2012 work restrictions of Dr. Theodore T. Le, a Board-certified orthopedic surgeon who served 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 and it adjusted appellant's wage-loss compensation commencing June 2, 2013 based on this determination. By decisions dated July 15, 2014 and February 9, 2015, it denied modification of the May 17, 2013 LWEC determination.

On February 12, 2016 appellant requested reconsideration and submitted medical evidence, which she believed showed she could no longer work as a receptionist, including a December 11, 2014 report of Dr. Mark A. Deloma and a September 9, 2015 report of Dr. Karim Rasheed, both Board-certified in anesthesiology.

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 failed to demonstrate clear evidence of error.

Appellant appealed the February 29, 2016 decision to the Board and, by order dated December 21, 2016,³ 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 and, in a July 2, 2018 letter received on July 10, 2018, she argued that her employment-related medical condition had materially changed such that modification of OWCP's May 17, 2013 LWEC determination was warranted. She submitted a number of medical reports, including a January 11, 2018 report from Dr. Robert D. Owen, a Board-certified neurosurgeon, who noted her complaints of left-sided neck pain radiating into the left hand, diagnosed cervical disc disorder with radiculopathy, and recommended anterior cervical discectomy/fusion surgery at C5-6. Appellant also submitted an April 23, 2018 report from Dr. John J. Vaughan, a Board-certified orthopedic surgeon, who noted that she reported experiencing increased cervical pain, which radiated into her left arm. Dr. Vaughan indicated that a December 1, 2017 magnetic resonance imaging (MRI) scan of appellant's cervical spine showed a moderate disc herniation at C5-6, which was not present in a

³ *Id.*

2013 cervical spine MRI scan and he recommended anterior cervical discectomy/fusion surgery at C5-6. Appellant submitted a copy of the December 1, 2017 MRI scan.

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.

Appellant appealed the July 25, 2018 decision to the Board and, by order remanding case dated August 20, 2019,⁴ the Board set aside the July 25, 2018 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 it directed OWCP to issue a *de novo* decision after evaluating the new evidence submitted by appellant to determine if modification of the prior LWEC determination was warranted.

By decision dated November 1, 2019, OWCP determined that appellant had not met her burden of proof to modify its May 17, 2013 LWEC determination. It advised that it had reviewed the following evidence it had received from appellant: medical reports dated February 7, April 24, September 6, and October 8, 2019.⁵

Since the Board's jurisdiction of a case is limited to reviewing the evidence which is before OWCP at the time of its final decision,⁶ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,⁷ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.⁸

In the present case, OWCP did not review evidence received prior to the issuance of its November 1, 2019 decision, *i.e.*, the January 11, 2018 report from Dr. Owen, the April 23, 2018 report from Dr. Vaughan, and the December 1, 2017 MRI scan. The Board, therefore, must set aside the November 1, 2019 decision of OWCP and remand the case so that OWCP may fully consider the evidence that was properly submitted by appellant prior to the issuance of this decision. Following such further consideration and after such further development as it deems necessary, OWCP shall issue an appropriate decision regarding appellant's request for modification of the May 17, 2013 LWEC determination.

⁴ *Supra* note 2.

⁵ Each of the reports was produced by Dr. Rasheed. Appellant submitted the reports to OWCP between March 4 and October 26, 2019.

⁶ 20 C.F.R. § 501.2(c).

⁷ *Id.* at § 501.6(d).

⁸ *T.B.*, Docket No. 19-1841 (issued July 7, 2020); *E.P.*, Docket No. 14-0278 (issued February 26, 2014). *See also William A. Couch*, 41 ECAB 548, 553 (1990).

IT IS HEREBY ORDERED THAT the November 1, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: May 7, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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