

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

J.J., Appellant

and

**DEPARTMENT OF THE AGRICULTURE,
FOOD SAFETY AND INSPECTION SERVICE,
Holcomb, KS, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 21-0479
Issued: November 29, 2021**

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

VALERIE D. EVANS-HARRELL, Alternate Judge

On February 9, 2021 appellant filed a timely appeal from a February 3, 2021 nonmerit decision of the Office of Workers' Compensation Program (OWCP). The Clerk of the Appellate Boards assigned Docket No. 21-0479.

On July 18, 2016 appellant, then a 52-year-old food inspector, filed an occupational disease claim (Form CA-2) alleging that her plantar fasciitis condition was due to long hours of standing and walking on cement floors while in the performance of duty. Appellant stopped work on March 24, 2017 and has not returned. OWCP accepted the claim for bilateral plantar fasciitis, and paid appellant wage-loss compensation on its periodic rolls effective April 30, 2017.

On October 11, 2018 OWCP issued a formal loss of wage-earning capacity (LWEC) determination based upon appellant's ability to earn \$400.00 per week as a customer service representative, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 239.362-014. It adjusted appellant's wage-loss compensation, effective October 14, 2018, based on this determination.

On November 9, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated March 15, 2019, a hearing representative affirmed OWCP's October 11, 2018 LWEC determination. The hearing

representative found that while there was documented medical conditions of degenerative joint disease of the left knee, lumbosacral radiculopathy and sacroiliitis, severe osteoarthritis in the bones of the neck, and a cervical disc disorder and radiculopathy, the medical evidence did not indicate that those conditions preexisted appellant's work-related injury; thus, she found that those conditions did not need to be taken into consideration as to whether the customer service position was medically suitable.

On October 15, 2019 appellant requested reconsideration of OWCP's October 11, 2018 LWEC determination. She submitted an August 27, 2019 medical report from Dr. Cody Matthews, a family practitioner, who related that appellant was totally disabled due to her cervical disc disease with foraminal stenosis. By decision dated November 6, 2019, OWCP denied appellant's request for reconsideration of the October 11, 2018 LWEC determination.

On January 29, 2021 OWCP received a request for reconsideration of OWCP's October 11, 2018 LWEC determination. In her request,¹ appellant indicated that she could no longer work as a part-time or full-time customer service representative. She noted that Dr. Sajidkhan Pathan, a Board-certified occupational medicine specialist, and Dr. Shaniqua McGraw, a Board-certified family practitioner, increased her work restrictions and limited her standing and walking to one hour per shift.

In reports dated December 14, 2020 and January 11, 2021, Dr. Pathan opined that appellant's bilateral plantar fibromatosis was aggravated by excessive/prolonged walking as a food inspector. He agreed with the work restrictions which Dr. McGraw recommended on October 24, 2018, which limited appellant's standing and walking to one hour per shift. In an attending physician's report (Form CA-20) dated December 14, 2020, Dr. Pathan reiterated his opinion that appellant could work with restrictions of sitting and walking up to one hour per shift, as per Dr. McGraw on October 24, 2018, for her work-related bilateral plantar fasciitis. A copy of Dr. McGraw's October 24, 2018 work-capacity evaluation (Form OWCP-5c) was provided.

Also received of record was a July 7, 2020 letter from Dr. Thomas M. Jones, , a podiatrist, who opined that appellant could return to work with restrictions, including standing for shorter periods of time, as a result of her chronic bilateral plantar fasciitis.

By decision dated February 3, 2021, OWCP denied appellant's request for reconsideration received on January 29, 2021 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.²

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

¹ Appellant mistakenly dated her letter February 29, 2021.

² *C.H.*, Docket No. 19-1114 (issued April 30, 2020); *B.H.*, Docket No. 18-1515 (issued June 20, 2019); *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

otherwise vocationally rehabilitated, or the original determination was erroneous.³ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁴ Unlike reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting modification of an LWEC determination.⁵ Requests for modification should be reviewed carefully to determine whether the claimant is seeking a reconsideration of a recently issued LWEC determination, as opposed to a modification of the LWEC determination.⁶

The Board finds that appellant's January 29, 2021 request for reconsideration was, in fact, a request for modification of OWCP's October 11, 2018 LWEC determination. Appellant specifically alleged and set forth evidence that her restrictions had changed due to her planter fasciitis condition which raises the question of whether there had been a material change in the nature and extent of her injury-related condition. 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 there was, in fact, a material change in the nature and extent of her injury-related condition.⁷

As OWCP improperly reviewed the case under the standard for an untimely reconsideration request, the case must be remanded to OWCP for a *de novo* decision which includes findings of fact as to whether appellant has met her burden of proof to establish modification of her LWEC determination.⁸

³ 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).

⁴ 20 C.F.R. § 10.511.

⁵ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁶ *Supra* note 4, Federal (FECA) Procedure Manual, Chapter 2.1501.4a (June 2013).

⁷ *See L.M.*, Docket No. 20-1038; *see also C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ *See L.H.*, Docket No. 18-1787 (issued July 29, 2019); *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).

IT IS HEREBY ORDERED THAT the February 3, 2021 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: November 29, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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