

include displacement of lumbar intervertebral disc without myelopathy at L3-4, L4-5, L5-S1, permanent aggravation of spondylolisthesis at L5-S1, and lumbar radiculopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls as of January 15, 2010 and on the periodic rolls as of July 1, 2012.

In reports dated March 21 and April 25, 2019, Dr. Scott Goldman, a Board-certified orthopedic surgeon and treating physician, noted appellant's diagnoses and indicated that she had ongoing pain, stiffness, and tenderness to her low back, causing weakness in her lower extremities, with intermittent pain and numbness radiating down her lower extremities, and difficulty weight bearing. He opined that she remained temporarily totally disabled from work due to her accepted employment-related conditions.

In an April 15, 2019 report, OWCP's second opinion physician, Dr. Satish K. Lal, an orthopedic surgeon, opined that appellant continued to suffer residuals of the accepted employment conditions to include low back pain and stiffness with radicular symptoms in the lower limb with numbness over the lower limb, more so in the right lower limb as compared to the left lower limb. He opined that she had not reached maximum medical improvement (MMI) and recommended surgery to remove the segmental instrumentation followed by physical therapy and reassessment six months postsurgery when he opined that she would reach MMI. However, Dr. Lal noted that appellant related that she declined the proposed surgery. He opined that she was capable of light sedentary work with no pulling, pushing, or carrying objects weighing more than 10 pounds. Dr. Lal completed a work capacity evaluation (Form OWCP-5c) delineating restrictions of no more than four hours per day of sitting, no more than two hours of walking and standing, no more than four hours of repetitive movements of the wrists and elbows, no more than two hours of pushing, pulling, or lifting, and a 10-pound weight restriction.

On May 23, 2019 the employing establishment offered appellant a temporary light-duty assignment of 20 hours per week as a modified sales and service associate. It noted that the duties were in accordance with Dr. Lal's work restrictions.

In a notice of proposed reduction of compensation, OWCP advised appellant that the temporary light-duty position of modified sales and service associate accommodated her current work restrictions. It advised her that if she did not accept the position her wage-loss compensation would be reduced indefinitely.

By decision dated July 8, 2019, OWCP finalized the notice of proposed reduction of appellant's compensation benefits and issued a formal loss of wage-earning capacity (LWEC) determination. It found that she failed to accept the temporary light-duty assignment and reduced her wages effective July 8, 2019. OWCP explained that, if appellant had accepted the light-duty assignment, she would have worked 20 hours per week with wages of \$574.76 per week, and that she would be paid compensation based on the difference between the pay of the temporary light-duty assignment and the current pay of the position she held on the date of injury.

On December 7, 2020 appellant requested reconsideration. She explained that her submission of medical reports was delayed because she was not able to see her physician until June 2020 due to the COVID-19 virus. Appellant enclosed reports from Dr. Goldman dated May 27, June 15, and July 7, 2020. The reports opined that she was unable to return to her usual

and customary work without restrictions. In the May 27, 2020 report, Dr. Goldman explained that appellant could only return to work for two hours a day, not four hours as recommended by Dr. Lal. OWCP also received a November 27, 2019 report from Dr. Goldman who addressed Dr. Lal's report, disagreeing with his opinion. Dr. Goldman opined that it was not reasonable for appellant to return to any type of functional work.

OWCP also received reports from Dr. Wayne Cheng, a Board-certified orthopedic surgeon, dated August 19, 2020 and a December 15, 2020 report from Dr. James I. Rho, a Board-certified anesthesiologist, which related appellant's current findings.

By decision dated December 18, 2020, OWCP summarily 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.³

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.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 decision, as opposed to a modification of the LWEC determination.⁶

The Board finds that appellant's December 7, 2020 request for reconsideration was a request for modification of the July 8, 2019 LWEC determination. Appellant specifically alleged that her physician's reports were delayed because she was not able to see her physician until June 2020 due to the COVID-19 virus. Her physician Dr. Goldman, disagreed with the report from Dr. Lal, the second opinion physician, upon which the LWEC determination was based in that she could only return to work for two hours a day, not four hours as recommended by Dr. Lal. It is well established that a claimant may demonstrate that a modification of an LWEC determination is warranted, if there has been a showing that the original determination was, in fact, erroneous.⁷

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

³ See *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).

⁴ 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).

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

⁶ *Supra* note 4 at Chapter 2.1501.4a (June 2013).

⁷ 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.⁸ Following such development as is deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the December 18, 2020 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: August 8, 2022
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

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