

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

_____	)	
<b>P.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0199</b>
	)	<b>Issued: September 6, 2022</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Ville Platte, LA, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On November 19, 2021 appellant filed a timely appeal from a November 8, 2021 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.

**ISSUE**

The issue is whether appellant has met his burden of proof to modify a May 14, 2021 loss of wage-earning capacity (LWEC) determination.

**FACTUAL HISTORY**

On November 4, 1998 appellant, then a 33-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained plantar fasciitis, possible severe tendinitis, and a possible neuroma due to factors of his federal employment including prolonged walking when delivering mail. He stopped work on October 27, 1998. On December 16, 1998 OWCP

---

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

accepted the claim for plantar fibromatosis. It paid appellant intermittent wage-loss compensation on the supplemental rolls commencing October 16, 1998, and on the periodic rolls commencing June 16, 2002.

Appellant underwent OWCP-authorized left exploration and excision of neuromas of the left second, third, and fourth interspace on November 29, 2000<sup>2</sup> and October 27, 2004, metatarsal head resection of the second, third, and fourth toes of the left foot on October 6, 2006 and hammertoe repair of the left fourth and fifth toes with extensor tendon lengthening and pinning of the left fourth toe on August 25, 2010. He remained off work.

An August 15, 2011 functional capacity evaluation (FCE) demonstrated that appellant could perform full-time sedentary to light-duty work, but could not return to his date-of-injury position.

OWCP expanded its acceptance of the claim to include left plantar nerve lesion, peripheral enesopathy of the left foot, lesion of the left plantar nerve (Morton's neuroma), acquired hammertoes, left Achilles tendinitis, and enesopathy of the left ankle and tarsus.

In reports dated August 31, 2017, Dr. Lon Baronne, a podiatrist, provided a history of injury and treatment. He opined that appellant could walk only on a "very limited basis" using customized shoes and inserts due to multiple left foot surgeries. Dr. Baronne indicated in a work capacity evaluation (Form OWCP-5c) of even date that appellant could perform full-time sedentary work, with standing and walking limited to one hour, and no bending, stooping, squatting, kneeling, climbing, or lifting.

On October 31, 2017 OWCP obtained a second opinion report by Dr. Shawn Granger, a Board-certified orthopedic surgeon, on the nature and extent of the accepted conditions and appellant's work capacity. Dr. Granger reviewed a statement of accepted facts (SOAF), the medical record, and a series of questions provided for his review. On examination of the left lower extremity, he noted numbness of the central three toes, limited dorsiflexion and plantar flexion of the ankle and central three toes, shortening and recession of the three central metatarsals and the first and fifth metatarsal heads, and pain to palpation of the forefoot. Dr. Granger provided an impression of prior second, third, and fourth metatarsal head resections and arthroplasties for a Morton's neuroma with a fixed final deformity. He noted that appellant had attained maximum medical improvement in 2011. Dr. Granger opined that, based on appellant's history, clinical findings, and FCE, he could perform full-time sedentary-duty work.

As the medical evidence established that appellant was no longer totally disabled, OWCP referred appellant for vocational rehabilitation services on June 19, 2018. He participated in vocational rehabilitation through July 9, 2020.

On December 7, 2020 OWCP notified appellant that it proposed to reduce his wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised him that he was only partially disabled from work and that the position of appointment clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.3667-010, was medically and vocationally suitable with regard

---

<sup>2</sup> The record indicates that appellant underwent additional left foot surgeries on January 20 and October 28, 1999 to address neuromas of the left second and third inner space.

to his medical limitations, work experience, and education. OWCP explained that the physical requirements of the appointment clerk position did not exceed the restrictions imposed by Dr. Granger's October 31, 2017 report. It found that appellant was capable of earning wages at the rate of \$483.20 per week as an appointment clerk and that the position was reasonably available within his commuting area. OWCP provided an attachment detailing the application of the formula set forth in *Albert C. Shadrick*.<sup>3</sup> It afforded appellant 30 days to submit evidence and argument challenging the proposed action.

In response, appellant submitted a December 12, 2020 letter. He contended that OWCP could not rely on Dr. Granger's report as it was three years old and, therefore, not reasonably current medical evidence.

On March 23, 2021 OWCP referred appellant, the medical record, a SOAF, and a series of questions to Dr. Douglas C. Brown, a Board-certified orthopedic surgeon, for a new second opinion on the nature and extent of the accepted conditions and appellant's work capacity. Dr. Brown submitted an April 14, 2021 report in which he noted his review of the medical record and SOAF. On examination, he noted diminished push-off with the left foot, a slightly shortened gait on the left, multiple surgical scars on the left foot consistent with multiple neurectomies, hypesthesia of the second, third, and fourth toes from Morton's neurectomies, discomfort with compression, and discomfort with plantar pressure over the area of the metatarsal heads. Dr. Brown diagnosed status post left foot Morton's neurectomies and metatarsal head resections of the second, third and fourth toes and correction of fourth and fifth hammertoes, resolved left Achilles tendinitis, mild persistent metatarsalgia, and healed left fourth and fifth hammertoes. In a Form OWCP-5c he opined that appellant could perform full-time medium-duty work with walking and squatting restricted to two hours, standing and climbing limited to four hours, and pushing and pulling up to 50 pounds.

By decision dated May 14, 2021, OWCP finalized the proposed LWEC determination. It reduced appellant's wage-loss compensation benefits, effective May 23, 2021, based on his ability to earn wages of \$483.20 per week as an appointment clerk. OWCP verified that the position was reasonably available in his commuting area, that he was vocationally capable of performing the constructed position, and that the physical duties of the position were in accordance with the restrictions provided by Dr. Brown's April 14, 2021 report. It further found that appellant was no longer totally disabled from work and that the position of appointment clerk was medically and vocationally suitable and properly represented his wage-earning capacity. OWCP applied the *Shadrick*<sup>4</sup> formula to determine his LWEC and adjust his compensation.

On May 26, 2021 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. He contended that Dr. Brown did not provide an accurate assessment of his condition and that OWCP had not properly considered all factors in determining that the appointment clerk position was suitable work.

In June 18, 2021 reports, Dr. Baronne noted appellant's difficulty with ambulation. In a Form OWCP-5c of even date he indicated that appellant was able to perform full-time sedentary-

---

<sup>3</sup> 5 ECAB 376 (1953).

<sup>4</sup> *Id.*

duty work, with standing and walking limited to one hour, and no bending, stooping, squatting, kneeling, climbing, lifting, or operating a motor vehicle.

At the hearing, conducted telephonically on October 6, 2021 appellant asserted that he had been unable to obtain employment as an appointment clerk as he had two master's degrees and prospective employers found him overqualified.

By decision dated November 8, 2021, OWCP's hearing representative affirmed OWCP's May 14, 2021 LWEC determination, finding that the additional evidence and argument did not establish that the LWEC should be modified.

### **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>5</sup> Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup> A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.<sup>7</sup> Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.<sup>8</sup>

Compensation payments are based on the LWEC determination and it remains undisturbed until properly modified.<sup>9</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted 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, in fact, erroneous.<sup>10</sup> OWCP's procedures provide that, "[i]f a formal [LWEC] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a

---

<sup>5</sup> 5 U.S.C. § 8115(a); *see M.J.*, Docket No. 21-0036 (issued August 23, 2021); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>6</sup> *See M.G.*, Docket No. 19-1659 (issued August 18, 2020); *J.A.*, Docket No. 18-1586 (issued April 9, 2019).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

<sup>8</sup> *See M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); *id.* at Chapter 2.815.5(c) (June 2013).

<sup>9</sup> *See M.G.*, *supra* note 6; *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

<sup>10</sup> *M.G.*, *id.*; *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

formal [LWEC].”<sup>11</sup> The burden of proof is on the party attempting to show modification of the LWEC determination.<sup>12</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>13</sup>

### ANALYSIS

The Board finds that appellant has met his burden of proof to modify OWCP’s May 14, 2021 LWEC determination.

As OWCP issued a formal LWEC determination, the decision will remain in place unless there is a material change in the nature and extent of the injury-related position, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.

The Board finds that appellant has established that the original determination was erroneous.

OWCP’s procedures provide that medical suitability of an offered position must be based on a reasonably current medical evaluation.<sup>14</sup> The medical evaluation should be appended to the notice of proposed reduction of compensation.<sup>15</sup> FECA’s implementing regulations provides that the claimant must be afforded 30 days to respond to the proposed notice of reduction and the evidence upon which it is based.<sup>16</sup> OWCP predicated its December 7, 2020 proposed notice of reduction on Dr. Granger’s October 31, 2017 second opinion report. The notice properly afforded appellant 30 days to respond to Dr. Granger’s findings and opinions. He replied in his December 12, 2020 letter that OWCP could not rely on Dr. Granger’s report as it was not reasonably current.

OWCP’s procedures provide that, if the medical evidence is old enough to be considered stale, the claims examiner should seek clarification from the physician as appropriate.<sup>17</sup> Instead, it referred appellant for a new second opinion examination by Dr. Brown, who submitted an April 14, 2021 report. OWCP issued the final LWEC determination on May 14, 2021 citing

---

<sup>11</sup> *Supra* note 7 at Chapter 2.1501.3a (June 2013); *M.G., id.; D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320(2005).

<sup>12</sup> *Id.*

<sup>13</sup> *C.S.*, Docket No. 19-0660 (issued August 13, 2020); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>14</sup> *Supra* note 7 at Chapter 2.816.4(d) (June 2013). *See also G.F.*, Docket No. 20-1031 (issued December 31, 2020) (the Board found that the medical evidence relied upon by OWCP was over two years old and thus not reasonably current); *M.A.*, 59 ECAB 624 (2008); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996); *Anthony Pestana*, 39 ECAB 980 (1988) (where the Board found that a three-year-old medical evaluation is not reasonably current for a wage-earning capacity determination).

<sup>15</sup> *Supra* note 7 at Chapter 2.816.8b(9) and 2.816.8c (June 2013).

<sup>16</sup> 20 C.F.R. § 10.540(a), (b); *id.*

<sup>17</sup> *Supra* note 7 at Chapter 2.816.4 (June 2013); *B.H.*, Docket No. 21-0892 (issued November 29, 2021); *see also G.F.*, *supra* note 14.

Dr. Brown's April 14, 2021 opinion as the weight of the medical evidence. In contravention of FECA's implementing regulations and OWCP's procedures, it did not issue a new proposed notice of reduction of compensation after obtaining his report, or otherwise afford appellant 30 days to respond to the new medical evidence.<sup>18</sup> The Board, therefore, finds that the May 14, 2021 LWEC decision was issued in error, as appellant was not afforded due process under 20 C.F.R. § 10.540 and OWCP's procedures.

Accordingly, appellant has established a basis for modifying the LWEC determination. Upon return of the case record, OWCP shall determine his entitlement to compensation benefits.

**CONCLUSION**

The Board finds that appellant has met his burden of proof to modify OWCP's May 14, 2021 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 8, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 6, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>18</sup> *Supra* note 16.