

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

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J.F., Appellant)

and)

**U.S. POSTAL SERVICE, LAWRENCE POST
OFFICE, Lawrence, MA, Employer**)

**Docket No. 23-0662
Issued: December 8, 2023**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 4, 2023 appellant filed a timely appeal from an October 26, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 2, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 23, 2011 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 16, 2010 she felt immediate lower back and leg pain when she bent down to pick up a tray of mail and twisted to lift the tray out of the rack while in the performance of duty.⁴ She stopped work on October 16, 2010. By decision dated June 20, 2011, OWCP accepted appellant's claim for aggravation of herniated disc at L5-S1. It paid her wage-loss compensation on the supplemental rolls, effective December 1, 2010, and placed her on the periodic rolls, effective August 28, 2011.

On December 5, 2017 the employing establishment offered appellant a part-time, modified-duty position as a rural carrier associate.⁵ The position was for 21 hours a week. The job duties required driving 30 minutes to North Redding, MA, retrieving Express Mail for 10 minutes, driving 30 minutes back to the delivery area, and 2 hours and 20 minutes of delivering Express mail. The physical requirements included driving up to three and a half hours intermittently, walking one and half hours intermittently, standing for one hour intermittently, and lifting up to five pounds for one and a half hours intermittently.

In a letter dated December 8, 2017, the employing establishment informed OWCP that appellant had refused the December 5, 2017 job offer.

By decision dated March 7, 2018, OWCP reduced appellant's compensation, effective April 1, 2018, because she failed to accept the December 5, 2017 part-time, modified-duty job offer in accordance with 20 C.F.R. § 10.500(a). It noted that she had not accepted the temporary limited-duty job offer, which was within the restrictions provided by Dr. Eaton in his September 15, 2017 report, and had not submitted sufficient medical evidence to support her refusal of the temporary limited-duty job offer.

Appellant appealed to the Board. By decision dated July 5, 2019, the Board affirmed OWCP's March 7, 2018 decision.⁶ The Board found that OWCP properly reduced appellant's wage-loss compensation, effective April 1, 2018, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted the part-time, limited-duty rural carrier associate position. The Board determined that the physical requirements of the position as described in the December 5, 2017

³ Docket No. 18-0923 (issued July 5, 2019).

⁴ OWCP assigned this case OWCP File No. xxxxxx244. Appellant has a previously accepted traumatic injury claim for displacement of lumbar intervertebral disc at L5-S1 without myelopathy causally related to a May 23, 2009 employment incident. OWCP assigned that case OWCP File No. xxxxxx108 and has administratively combined OWCP File Nos. xxxxxx108 and xxxxxx244 with the latter claim as the master file.

⁵ The position was based on the medical restrictions of Dr. Anthony G. Eaton, an internist and appellant's treating physician, who determined in a September 15, 2017 report that appellant could work part time with restrictions of lifting up to five pounds and the ability to change positions (sitting, standing, and lying down) at will.

⁶ *Supra* note 3.

job offer were within appellant's medical restrictions as provided by Dr. Eaton in his September 15, 2017 report.

In a letter dated September 26, 2019, appellant requested a modification of OWCP's March 7, 2018 loss of wage-earning capacity determination (LWEC). She alleged that she was unable to perform the position as offered because she was unable to drive or lie down comfortably. Appellant also asserted that her condition had worsened, and she had fallen down unexpectedly within the past few months. She indicated that her neurologist believed it could be related to her employment injury and had requested additional testing.

Appellant submitted progress notes dated January 31 through May 23, 2019 by Dr. Simon Faynzilberg, Board-certified in anesthesiology and pain medicine, who noted appellant's complaints of chronic pain across her lower back following a 2009 employment injury. On physical examination of the lumbar spine, Dr. Faynzilberg observed positive facet tenderness and positive facet loading bilaterally. He discussed diagnostic testing and diagnosed chronic lumbar axial pain and bilateral lower extremity radicular symptoms, secondary to lumbar degenerative disc disease and myofascial pain.

In a report dated August 21, 2019, Dr. Luba Tsytkin, Board-certified in family medicine, opined that appellant was disabled and would need a neurological workup due to her recent frequent falls. She provided restrictions of no sitting, standing, or walking for extended periods of time, no driving, and lifting up to 10 pounds.

In a November 13, 2019 development letter, OWCP noted that it had received a formal request to modify the LWEC determination and related that the evidence of record was insufficient to warrant modification. It advised appellant of the criteria necessary to modify a formal LWEC decision and requested that she submit additional evidence or argument to establish that her accepted work-related medical conditions had materially changed or worsened, the original LWEC determination was in error, or that she had been retrained or otherwise vocationally rehabilitated.

OWCP received an undated letter by appellant who asserted that OWCP made an error for loss of wages. Appellant alleged that she knew what she could do physically and that her condition had not improved.

Appellant submitted a progress note dated October 2, 2019 by Dr. Tsytkin who indicated that she treated appellant for chronic back pain. Dr. Tsytkin provided examination findings and diagnosed chronic lumbar radiculopathy.

In a note dated December 11, 2019, Dr. Eaton indicated that appellant was a primary care patient.

In a letter dated December 26, 2019, appellant requested reconsideration and alleged that OWCP erred by reducing her wages. She asserted that she was physically unable to work the light-duty position and explained that she had chronic back and nerve pain due to her injuries in 2009 and 2010. Appellant alleged that if she had accepted the light-duty position, she would put herself and others in danger.

By decision dated May 5, 2020, OWCP denied appellant's request for modification of the March 7, 2018 LWEC determination. It found that she had not met the three criteria sufficient to warrant modification of a formal LWEC determination.

On May 26, 2020 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 19, 2020.

In a July 31, 2020 progress note, Ethan Dionne, a physician assistant, indicated that appellant suffered a right L5-S1 disc herniation since a 2009 work-related incident. He conducted an examination and diagnosed bilateral lumbar radiculopathy.

A July 31, 2020 lumbar spine x-ray scan showed no acute pathology and considerable disc degeneration and bony degenerative at L5-S1.

By decision dated November 2, 2020, OWCP's hearing representative affirmed the May 5, 2020 decision.

OWCP received correspondence dated March 11, 2021 from appellant alleging that OWCP erroneously reduced her wage-loss compensation benefits.

In an attending physician's report (Form CA-20) dated August 17, 2021, Dr. Tsytkin diagnosed lower back pain, radiculopathy, and L5-S1 disc herniation. She indicated that appellant was totally disabled.

In a progress report dated September 23, 2021, Dr. Henry Y. Ty, a Board-certified neurosurgeon, recounted appellant's complaints of back pain since a 2010 employment injury. He noted that the pain worsened in July 2021. On physical examination, Dr. Ty observed no lumbar paraspinal tenderness and positive straight leg raise testing on the right. He diagnosed lumbar disc herniation, hamstring tightness of both lower extremities, and opiate dependence.

A lumbar spine magnetic resonance imaging (MRI) scan dated October 14, 2021 demonstrated no acute fracture, multilevel degenerative disc disease with multilevel disc narrowing disc desiccation, posterior broad-based disc osteophyte complexes, mild facet osteophyte, and significant multilevel neural foraminal stenosis spanning L3-4 through L5-S1.

An electromyography and nerve conduction velocity (EMG/NCV) study of the lower extremities dated November 2, 2021 indicated an unremarkable study without electrodiagnostic evidence of lumbosacral radiculopathy, entrapment neuropathy, or peripheral neuropathy.

A December 6, 2021 lumbar spine x-ray revealed considerable disc degeneration and bony degenerative changes, particularly at L5-S1.

In a December 6, 2021 report, Dr. Ty indicated that an EMG/NCV study showed no radiculopathy or neuropathy. He also reported that lumbar radiographs showed decreased disc height at L5-S1 and no instability on flexion or extension. Dr. Ty diagnosed lumbar disc herniation, hamstring tightness of both lower extremities, and opiate dependence. He explained that appellant had worsening disc degeneration that resulted from her right L5-S1 disc herniation. Dr. Ty indicated that appellant's painful back and leg symptoms had disabled her.

In a letter dated October 3, 2022 and received by OWCP on October 24, 2022, appellant requested reconsideration for lost wages since 2018. She alleged that she was physically unable to perform the light-duty position that was offered in 2017. Appellant asserted that this was the fourth time that she sent "new medical evidence," but the OWCP claims examiner informed her that she would need to write another reconsideration request explaining why she submitted the

evidence late. She explained that she initially went to an appointment with Dr. Ty but was seen by his assistant who did an x-ray scan and requested an MRI scan. Appellant reported that she waited a while for the new MRI scan and was informed that the office was waiting for workers' compensation to approve it. She indicated that she finally got an appointment with Dr. Ty and a new MRI scan. Appellant noted that the first time she sent new medical evidence through the online portal and the second time she mailed in the new medical evidence, but it was returned months later unopened.

By decision dated October 26, 2022, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁹ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.¹¹ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request demonstrates clear evidence of error on the part of OWCP.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest

⁷ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

¹⁰ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *See* 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹² *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see also id.* at § 10.607; *supra* note 8 at Chapter 2.1602.5a (September 2020).

¹³ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

on its face that OWCP committed an error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁷

ANALYSIS

The Board finds that OWCP improperly adjudicated appellant's request for modification of the November 2, 2020 LWEC determination as a request for reconsideration.

OWCP found that appellant's October 4, 2022 request for reconsideration of the November 2, 2020 hearing representative decision was untimely filed and failed to demonstrate clear evidence of error.

The Board finds, however, that appellant's October 4, 2022 reconsideration request was, instead, a request for modification of the March 7, 2018 LWEC determination, which OWCP's hearing representative had denied on November 2, 2020. Although appellant requested reconsideration, when the underlying issues involved LWEC, the initial question is whether the claimant has submitted an application for reconsideration of a recent LWEC determination or has requested modification of the LWEC determination.¹⁸ This requires that OWCP conduct a limited review of the evidence or argument submitted to determine if the claimant is alleging either that the original determination was in error, or that his injury-related condition had worsened.¹⁹ The Board has held that, when an LWEC determination has been issued, and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of the LWEC is warranted.²⁰

In the October 3, 2022 letter, appellant alleged that she was physically unable to perform the light-duty position that was offered in 2017. She submitted additional medical evidence, including October 14 and December 6, 2021 lumbar spine MRI scans, November 2, 2021 EMG/NCV study, and new medical reports from Dr. Ty dated September 23 and

¹⁴ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁵ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ *B.W.*, *supra* note 14.

¹⁷ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁸ *E.C.*, Docket No. 19-0646 (issued February 26, 2020); *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

¹⁹ *Supra* note 9 at Chapter 2.1501.4b (June 2013).

²⁰ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

December 6, 2021. The Board has found that an assertion that the accepted condition has worsened is a basis on which a claimant may seek modification of an LWEC determination.²¹

The Board thus finds that OWCP improperly adjudicated appellant's request for modification of the November 2, 2020 hearing representative decision as a request for reconsideration. As appellant has requested modification of the LWEC determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) do not apply.²²

CONCLUSION

The Board finds that OWCP improperly adjudicated appellant's request for modification of the November 2, 2020 LWEC determination as a request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 8, 2023
Washington, DC

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

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

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

²¹ 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. *E.H.*, Docket No. 17-0963 (issued August 24, 2018); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

²² *E.H.*, *id.*