

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

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A.E., Appellant )

and )

U.S. POSTAL SERVICE, FAIRHOPE POST )  
OFFICE, Fairhope, AL, Employer )

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**Docket No. 24-0231**  
**Issued: April 19, 2024**

*Appearances:*

Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 January 5, 2024 appellant, through counsel, filed a timely appeal from a December 20, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the December 20, 2023 decision, OWCP received additional evidence. 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.*

## ISSUE

The issue is whether appellant has met her burden of proof to modify the July 29, 2021 loss of wage-earning capacity (LWEC) determination.

## FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>4</sup> The relevant facts are as follows.

OWCP accepted that on December 22, 2015 appellant, then a 35-year-old rural carrier associate, sustained sprain of unspecified ligament of the left ankle; other instability of the left ankle; other postprocedural complications and disorders of nervous system; other specified acquired deformities of musculoskeletal system; and peroneal tendinitis of the left leg; spontaneous rupture of extensor tendons, left ankle and foot when she stepped into a hole while in the performance of duty. On February 26, 2016 appellant underwent OWCP-authorized decompression of left superficial peroneal nerve and left sural nerve, excision of peroneal brevis tear, transfer of left peroneal longus tendon, left peroneal retinacular repair, and application of left short cast. On April 13, 2016 she underwent OWCP-authorized left ankle arthroscopy with microfracture arthroplasty and synovectomy of ankle microfracture of talar dome, and open peroneal tendon exploration with debridement of distal muscle of brevis with repair of brevis and retinacular repair. On January 9, 2017 appellant underwent OWCP-authorized left ankle fibular groove osteotomy with tenosynovectomy. OWCP paid her wage-loss compensation on the supplemental rolls as of February 6, 2016, and on the periodic rolls as of May 27, 2018.

By decision dated October 4, 2019, OWCP reduced appellant's wage-loss compensation effective August 23, 2019, based on her capacity to earn wages as a receptionist with weekly earnings of \$393.10.

By decision dated April 13, 2020, an OWCP hearing representative set aside the October 4, 2019 LWEC determination, and remanded the case to OWCP to determine appellant's correct pay rate for compensation purposes. Since appellant had not worked in the position for a full year prior to injury, the hearing representative determined that appellant's pay rate should be based upon the earnings of a similarly situated employee who had earnings for a full year. The hearing representative also remanded the case for reinstatement of appellant's compensation for total disability.

On remand, after further development of the record, OWCP, in a November 18, 2020 decision, reduced appellant's wage-loss compensation, effective November 19, 2020, based on her capacity to earn wages as a secretary with weekly earnings of \$400.00.

In a May 28, 2021 decision, another OWCP hearing representative set aside the November 18, 2020 decision and remanded the case to OWCP to verify the pay rate for the secretary position, and to clearly explain how it determined the \$400.00 weekly pay rate for this

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<sup>4</sup> Docket No. 22-0119 (issued February 13, 2023).

position, and reinstatement of appellant's compensation for total disability. She also noted that, contrary to appellant's contention during the hearing that she was physically unable to perform the secretary position, the medical evidence of record was insufficient to establish that appellant was totally disabled and unable to perform the duties of the constructed position.

Following further development, in a decision dated July 29, 2021, OWCP reduced appellant's wage-loss compensation, effective August 2, 2021, based on her ability to earn wages as a secretary.

By decision dated October 6, 2021, OWCP denied modification of the July 29, 2021 decision.

On November 2, 2021 appellant, through counsel, appealed to the Board. By decision dated February 13, 2023, the Board affirmed the October 6, 2021 LWEC determination, finding that OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective August 2, 2021, based on her capacity to earn wages in the constructed position of secretary.<sup>5</sup>

OWCP subsequently received medical evidence by Dr. Robert Agee, Jr., an attending Board-certified family practitioner. In a March 22, 2023 report, Dr. Agee noted appellant's history of injury on December 21, 2015 and medical treatment including left surgeries performed on January 18, 2016, February 18, 2017, and June 20, 2018. He discussed his examination findings and diagnosed the accepted conditions of sprain of unspecified ligament of left ankle, initial encounter; other instability, left ankle; injury of peroneal nerve at lower leg level, left leg; other acquired deformities of musculoskeletal system; peroneal tendinitis, left leg; and other postprocedure complications and disorders of nervous system. Dr. Agee agreed with the opinion of appellant's neurologist that she was unable to hold meaningful employment due to permanent debilitating conditions resulting from surgeries on the injured peroneal nerve at lower leg level, left leg, with postprocedural complications causing disorders of the nervous system. He noted that appellant reported an inability to bend and lift her left leg, symptoms that became unbearable with one to two hours of standing/walking, and left foot swelling with muscle weakness in her left leg. Dr. Agee again noted appellant's three leg surgeries, and related that she reported muscle spasms with occasional buckling two to three times per week and tingling and numbness that radiated from her left lower back to her left leg and foot. He concluded that appellant was unable to perform her regular work duties due to her condition.

On April 20, 2023 Dr. Agee advised that appellant could return to full-duty work on April 29, 2023.

Dr. Ross Barnett, a Board-certified diagnostic radiologist, in a May 23, 2023 diagnostic report, related that a left ankle magnetic resonance imaging (MRI) scan, provided impressions of acute plantar fasciitis and reactive marrow edema inferior calcaneus; posterior tibialis and flexor hallucis longus tendinitis; old osteochondral injury talar dome; and small ankle joint effusion and retrocalcaneal bursitis.

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<sup>5</sup> *Id.*

On August 25, 2023 OWCP received a September 15, 2021 report from Dr. Agee, not previously of record. In this report he related that appellant had developed reflex sympathy dystrophy (RSD), also known as complex regional pain syndrome (CRPS), which was a chronic, painful, and progressive neurological condition that affected skin, muscles, joints and bones.

On August 25, 2023 OWCP also received visit notes dated April 16, May 4, June 8, and August 19, 2021, from Amir Davijan, a physical therapist, who discussed examination findings and noted diagnoses of sprain of unspecified ligament of left ankle, initial encounter; other instability, left ankle; injury of peroneal nerve at lower leg level, left leg; other acquired deformities of musculoskeletal system; peroneal tendinitis, left leg; and other postprocedure complications and disorders of the nervous system.

In a September 13, 2023 report, Dr. Agee discussed his examination findings and reiterated his prior diagnoses. He did not note RSD or CRPS as a diagnosis. Dr. Agee indicated that appellant's response to treatment was unfavorable at that time, and again noted that she reported flare-ups and swelling with prolonged walking and standing following her 2017, 2018, and 2019 ankle surgeries. Appellant also reported that she was unable to drive a vehicle for extended periods and required assistance with basic activities of daily living (ADLs), physical engagement with her son, and performing home duties. Dr. Agee opined that appellant's condition can be considered a potential permanent injury.

In a September 14, 2023 letter, Dr. Agee related that his April 20, 2023 note was completed in error. He explained that the note was for a different patient with a similar name as appellant's name. Dr. Agee again noted appellant's prior left ankle surgeries and advised that these surgeries resulted in a possible permanent injury. He concurred with the opinion of Dr. Alan Shah, Board-certified in cardiovascular disease and internal medicine, who found that appellant was unable to hold meaningful employment due to a permanent debilitating condition resulting from surgery of the injured peroneal nerve at the left lower leg level, and postprocedural complications causing disorders of the nervous system.

On October 30, 2023 appellant, through counsel, requested reconsideration of the July 29, 2021 LWEC determination and submitted a copy of Dr. Agee's September 14, 2023 report.

OWCP, by decision dated December 20, 2023, denied modification of the July 29, 2021 LWEC determination.

### **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>6</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>7</sup> A determination

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<sup>6</sup> 5 U.S.C. § 8115(a); *see O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>7</sup> *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

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>8</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>9</sup> Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.<sup>10</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>11</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to modify the July 29, 2021 LWEC determination.

Appellant has not alleged that the original LWEC determination was in error, or that she was vocationally rehabilitated. The issue is whether she has established a material change in her work-related conditions after the issuance of the July 29, 2021 LWEC determination that prevented her from performing the duties of the constructed position of secretary.<sup>13</sup> The Board finds that the medical evidence submitted is insufficient to establish modification of the LWEC determination.<sup>14</sup>

Appellant submitted reports from Dr. Agee. In reports dated March 22 and September 13 and 14, 2023, Dr. Agee noted appellant's history of injury on December 21, 2015 and medical treatment, including three left leg surgeries performed in 2016, 2017, and 2018. He discussed his examination findings and diagnosed the accepted conditions of sprain of unspecified ligament of left ankle, initial encounter; other instability, left ankle; injury of peroneal nerve at lower leg

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

<sup>9</sup> See *M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

<sup>10</sup> See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

<sup>11</sup> *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3a (June 2013).

<sup>12</sup> *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>13</sup> *Supra* note 9.

<sup>14</sup> See *M.H.*, Docket No. 21-1055 (issued March 30, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *B.W.*, Docket No. 17-0366 (issued June 7, 2017); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

level, left leg; other acquired deformities of musculoskeletal system; peroneal tendinitis, left leg; and other postprocedure complications and disorders of nervous system. Dr. Agee agreed with Dr. Shah's opinion that appellant was unable to hold meaningful employment due to permanent debilitating conditions resulting from surgeries on the injured peroneal nerve at lower leg level, left leg, with postprocedural complications causing disorders of the nervous system. He further opined that her left leg surgeries resulted in a "potential" or "possible" permanent injury. Dr. Agee noted that appellant reported an inability to bend and lift her left leg, symptoms that became unbearable with one to two hours of standing/walking, and left foot swelling with muscle weakness in her left leg. He also noted that following her left leg surgeries, she reported muscle spasms with occasional buckling two to three times per week, tingling and numbness that radiated from her left lower back to her left leg and foot, an inability to drive a vehicle for extended periods, and a need for assistance with basic ADLs, physical engagement with her son, and performing home duties.

The Board finds that Dr. Agee's reports are of limited probative value regarding appellant's request to modify the July 29, 2021 LWEC determination because he did not provide sufficient medical rationale in support of his opinion that appellant's employment-related conditions had worsened after the July 29, 2021 LWEC determination.<sup>15</sup> He did not sufficiently explain why appellant could not perform meaningful work and, therefore, could not perform the duties required by the constructed position of secretary. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause.<sup>16</sup> Additionally, Dr. Agee's finding that appellant sustained a condition that was a "potential" or "possible" permanent injury as a result of her left leg surgeries is speculative and not a firm diagnosis.<sup>17</sup> For these reasons, the Board finds that Dr. Agee's reports are insufficient to modify OWCP's July 29, 2021 LWEC determination.

Appellant also submitted Dr. Barnett's May 23, 2023 MRI scan of the left ankle. However, the Board has held that diagnostic studies, standing alone, lack probative value, and are insufficient to establish the claim.<sup>18</sup> Therefore, this evidence is also insufficient to meet appellant's burden of proof.

Lastly, appellant submitted visit notes dated April 16, June 8, and August 19, 2021 by Mr. Davijan, a physical therapist. Certain healthcare providers such as physical therapists, physician assistants, and nurse practitioners are not considered qualified physicians as defined

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<sup>15</sup> See *K.D.*, (*L.D.*), Docket No. 22-0485 (issued December 6, 2022); *B.E.*, Docket No. 22-0423 (issued December 1, 2022).

<sup>16</sup> See *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

<sup>17</sup> *C.S.*, Docket No. 16-1784 (issued May 7, 2018); *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

<sup>18</sup> *M.J.*, Docket No. 20-1263 (issued September 14, 2021); *R.E.*, Docket No. 17-1288 (issued May 16, 2018).

under FECA.<sup>19</sup> Their medical findings, reports and/or opinions, unless cosigned by a qualified physician, will not suffice for purposes of establishing entitlement to FECA benefits.<sup>20</sup> Consequently, these visit notes are insufficient to meet appellant's burden of proof.

The Board finds that appellant did not provide any medical evidence establishing that an accepted employment-related condition prevented her from working as a secretary. Therefore, she did not establish that modification of the July 29, 2021 LWEC determination is warranted on that basis. Appellant also has not demonstrated that modification of the July 29, 2021 LWEC determination is warranted because she has been retrained or otherwise vocationally rehabilitated.<sup>21</sup> For these reasons, appellant has not met her burden of proof to modify OWCP's July 29, 2021 LWEC determination.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

### CONCLUSION

The Board finds that appellant has not met her burden of proof to modify the July 29, 2021 LWEC determination.

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<sup>19</sup> Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *D.T.*, Docket No. 18-0174 (issued August 23, 2019) (physical therapists are considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence); *A.N.*, Docket No. 16-0166 (issued February 1, 2018) (physical therapists are not considered physicians as defined under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

<sup>20</sup> *See D.T., id.; A.N., id.; David P. Sawchuk, id.*

<sup>21</sup> *See M.L.*, Docket No. 23-0060 (issued June 26, 2023); *K.D.*, Docket No. 22-0485 (issued December 6, 2022); *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *H.H.*, Docket No. 18-0802 (issued July 20, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2024  
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