

¹ The Board notes that, following the April 26, 2024 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.*

of duty.² He stopped work on the date of injury. On June 13, 2005 OWCP accepted the claim for strain of right biceps tendon aggravation. It subsequently expanded the acceptance of the claim to include right wrist sprain, lesion of right ulnar nerve, rupture of right synovium, right elbow and forearm sprain, tenosynovitis of right hand and wrist, right median nerve lesions, joint derangement of the right upper arm, and affections of the right shoulder region not elsewhere classified.

In a report dated June 15, 2012, Dr. David J. Flesher, a Board-certified orthopedic surgeon, released appellant to return to light duty with restrictions of no overhead work, no work away from the body with the right or left arm, and no lifting, carrying, pushing, or pulling greater than 10 pounds.

On August 26, 2012 appellant accepted a full-time, temporary appointment as a clerk. The duties included visitor security screening and clerical office work. The physical requirements involved no standing, bending, or stooping; no lifting greater than 10 pounds; and sitting, walking, and standing, as needed. The salary was \$20.83 per hour.

In a Notification of Personnel Action (Standard Form (SF) 50) dated September 27, 2012, the employing establishment noted that appellant's term appointment for the clerk position was effective September 24, 2012 and was not to exceed beyond January 12, 2013.

By letter dated December 12, 2012, the employing establishment advised OWCP that appellant returned to full-time work on September 24, 2012.

By decision dated January 11, 2013, OWCP issued a retroactive loss of wage-earning capacity (LWEC) determination, finding that appellant's full-time position as a clerk beginning September 24, 2012 fairly and reasonably represented his wage-earning capacity with no loss of earnings. It found that his current wages met or exceeded those of his date-of-injury position and, therefore, his entitlement to compensation for wage-loss was terminated effective September 24, 2012. OWCP noted that the clerk position was a term appointment and, as he had worked in the position for 90 days or more, he was deemed to have attained maximum medical improvement (MMI).

In a letter dated March 21, 2013, the employing establishment informed OWCP that appellant's term position was held from September 24, 2012 through January 12, 2013.

OWCP continued to receive medical evidence.

² OWCP assigned the current/present claim OWCP File No. xxxxxx563. On December 10, 2012 appellant filed an occupational disease claim (Form CA-2) alleging that he injured his cervical spine due to factors of his federal employment. He noted that he first became aware of his condition on March 17, 2005, and realized its relationship to his federal employment on April 10, 2007. OWCP assigned that claim OWCP File No. xxxxxx103 and accepted it for degeneration of cervical intervertebral disc and spinal stenosis in cervical region. It subsequently expanded its acceptance of that claim to include cervical disc disorder at C4-5 and C5-6 with radiculopathy, pseudarthrosis after fusion with radiculopathy, and cervical spondylosis without myelopathy. OWCP has administratively combined OWCP File Nos. xxxxxx103 and xxxxxx563, with the latter serving as the master file.

On April 3, 2013 Dr. Flesher performed arthroscopic surgery on appellant's left shoulder, including debridement of tears, chondroplasty of the glenohumeral joint, revision of prior subacromial decompression, which he opined was causally related to the March 17, 2005 employment injury.

In narrative medical reports and notes dated June 30, 2016 through October 4, 2023, Dr. John W. Ellis, Board-certified in family medicine, opined that appellant was temporarily totally disabled from work due to the accepted employment injury.

On March 14, 2024 appellant filed a claim for compensation (Form CA-7) for total disability from work commencing December 20, 2012.

By decision dated March 28, 2024, OWCP denied appellant's claim for disability from work for the period December 20, 2012 through March 14, 2024, finding that his full-time position as a clerk beginning September 24, 2012 fairly and reasonably represented his wage-earning capacity.

On April 19, 2024, *via* the Employees' Compensation Operations & Management Portal (ECOMP), appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review with respect to the January 11, 2013 decision.

By decision dated April 26, 2024, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed through a request for reconsideration before OWCP, along with the submission of new evidence.

The Board has duly considered this matter and finds that the case is not in posture for a decision.

Following OWCP's January 11, 2013 formal LWEC determination, appellant filed a Form CA-7 claim for compensation requesting resumption of total wage loss commencing December 20, 2012. 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 formal [LWEC]."³ The burden of proof is on the party attempting to show modification of the LWEC determination.⁴ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁵

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.1501 (June 2013); *M.G.*, Docket No. 19-1659 (issued August 18, 2020); *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).

⁴ *Id.*

⁵ *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).

As appellant has submitted evidence of increased disability, in accordance with its procedures, OWCP must evaluate the evidence to determine if modification of the LWEC determination is warranted.⁶ On remand, OWCP shall consider the medical evidence and determine whether appellant has established that the January 11, 2013 LWEC determination should be modified. Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the March 28, 2024 merit 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. The April 26, 2024 nonmerit decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: June 1, 2026
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

⁶ See *D.R.*, Docket No. 18-1197 (issued April 30, 2020); *Katherine T. Kreger*, 55 ECAB 633 (2004).