

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

_____)	
L.P., Appellant)	
)	
and)	Docket No. 20-0154
)	Issued: April 7, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, MILWAUKEE)	
MITCHELL INTERNATIONAL AIRPORT,)	
Milwaukee, WI, Employer)	
_____)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On October 25, 2019 appellant filed a timely appeal from an August 8, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-0154.¹

On March 11, 2003 appellant, then a 37-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on March 1, 2003 she experienced right shoulder and neck pain while checking bags, weighing 50 to 100 pounds each, for 2 to 2.5 hours without a break, while in the performance of duty. OWCP accepted the claim under File No. xxxxxx562 for right rotator cuff syndrome, herniated disc at C3-4, C4-5, and C5-6, cervical spondylosis without myelopathy, and disc desiccation at C6-7. Appellant stopped work on September 8, 2003. She

¹ The Board notes that following the August 8, 2019 decision, OWCP received additional evidence. 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.*

eventually returned to work with restrictions, stopping several times throughout the years. On November 7, 2005 appellant underwent an OWCP authorized C5-6 discectomy and fusion. She was released to return to work on March 6, 2006. On October 29, 2008 appellant stopped work and underwent an OWCP-approved cervical surgery on October 30, 2008. She returned to part-time limited-duty work on March 6, 2009.²

The record reveals that, under OWCP File No. xxxxxx976, OWCP accepted appellant's May 19, 2009 occupational disease claim (Form CA-2) for a right plantar fasciitis condition. On May 21, 2009 appellant returned to work full time in a limited-duty capacity. On May 28 and August 10, 2009 she accepted a limited-duty assignment as a full-time modified transportation security officer with restrictions.³ On December 10, 2009 appellant stopped work due to her accepted employment injury under OWCP File No. xxxxxx976.⁴

By decision dated December 22, 2009, OWCP found that the modified transportation security position that appellant worked since August 10, 2009 fairly and reasonably represented her wage-earning capacity. It also found that there was no loss of wage-earning capacity (LWEC) as her actual earnings met or exceeded the current wages of the job she held when injured.⁵ On January 14, 2011 the employing establishment terminated appellant's employment on the grounds she could not perform the essential duties of a transportation security officer.

In a letter to OWCP dated April 26, 2017, appellant related that she had been released back to work under OWCP File No. xxxxxx976 on June 10, 2010, but was not offered a limited-duty assignment. She filed Form CA-7 claims for wage-loss compensation for periods commencing April 17, 2017.

Appellant submitted multiple requests for modification of the December 22, 2009 LWEC determination. By decisions dated September 25 and December 29, 2017, April 12 and August 3, 2018, and January 16 and April 19, 2019, OWCP denied modification of the December 22, 2009 LWEC determination.

Appellant continued to file Form CA-7 claims for wage-loss compensation.

On April 30, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 17, 2019, OWCP denied appellant's request for an oral hearing as she had previously requested reconsideration. After exercising discretion, it further denied the

² By decision dated April 15, 2009, OWCP granted appellant a schedule award for 15 percent permanent impairment of the right arm.

³ Appellant also had restrictions from her May 19, 2009 injury.

⁴ OWCP paid appellant wage-loss compensation under OWCP File No. xxxxxx976 until April 17, 2017 when her wage-loss benefits were terminated. It has not administratively combined the current claim, File No. xxxxxx562, with File No. xxxxxx976.

⁵ On December 10, 2009 appellant stopped work. She was released to return to work on June 15, 2010 in a limited-duty capacity on a full-time basis, but the employing establishment was unable to accommodate the restrictions.

request, finding that the issue could be equally-well addressed through a request for reconsideration.

Appellant continued to file Form CA-7 claims for wage-loss compensation.

On May 30, 2019 appellant requested reconsideration. In her May 30, 2019 letter, she again argued that OWCP's December 22, 2009 LWEC determination was erroneous and should be modified as the modified transportation security officer position was temporary in nature. Appellant indicated that the employing establishment withdrew the August 10, 2009 limited-duty position, which caused the work cessation. She indicated that she was removed from employment on January 21, 2011, after receiving permanent work restrictions from her treating physician. Appellant also indicated that on April 4, 2019 the employing establishment acknowledged that the limited-duty position was not a permanent position, but that it was temporary and subject to revision due to changes in work restrictions or employing establishment operational requirements. Thus, she contended that the limited-duty position was makeshift since it was designed to meet her own particular restrictions. In a June 17, 2019 letter, appellant also presented arguments pertaining to the submission of her Form CA-7 claims for compensation. She requested that OWCP enforce the employing establishment's responsibility to follow the regulations and protocols.

Appellant also submitted medical documentation pertaining to on-going treatment of her accepted conditions. This included follow-up reports from Dr. Luciana Berceanu, a Board-certified anesthesiologist, dated May 20 and June 17, 2019 with regards to appellant's right sided neck/upper back, scapular/arm pain. The record also reflects that appellant underwent trigger point injections in the right trapezius on June 26 and July 10, 2019, performed by Dr. Berceanu.

On July 18, 2019 OWCP sent a copy of appellant's reconsideration request to the employing establishment for comments as the reconsideration request regarded the factual component of the LWEC determination. It afforded the employing establishment 20 days to respond. No response was received.

By decision dated August 8, 2019, OWCP denied appellant's request for reconsideration.

The Board finds that this case is not in posture for decision.

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.⁶ The burden of proof is on the party attempting to establish a modification of the LWEC determination.⁷

⁶ 20 C.F.R. § 10.511; *see C.H.*, Docket No. 19-1114 (issued April 30, 2020); *A.S.*, Docket No. 18-0370 (issued March 5, 2019); *Tamra McCauley*, 51 ECAB 375 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

⁷ *Id.*

The Board finds that appellant's May 30, 2019 for reconsideration was, in fact, a request for modification of the December 22, 2009 LWEC determination. It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous.⁸

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 is warranted.⁹

As OWCP improperly reviewed the case under the standard for a timely reconsideration request, the case must therefore 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 of proof to establish modification of the December 22, 2009 LWEC determination.¹⁰ Furthermore, appellant's prior claim under OWCP File No. xxxxxx976 also involves an alleged injury to the left foot/ankle. OWCP's procedures provide that cases should be administratively combined when correct adjudication depends on frequent cross-referencing between files and where two or more injuries occur to the same part of the body.¹¹ Therefore, on remand, for a full and fair adjudication, OWCP shall administratively combine the present claim with File No. xxxxxx976 prior to adjudicating the issue of the LWEC modification. Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁸ *Id.* at § 10.511; *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

⁹ *See L.P.*, Docket No. 18-1429 (issued March 8, 2019).

¹⁰ *See R.Z.*, Docket No. 17-1455 (issued February 15, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000); *R.G.*, Docket No. 19-1755 (issued July 7, 2020); *L.M.*, Docket No. 19-1490 (issued January 29, 2020).

IT IS HEREBY ORDERED THAT the August 8, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 7, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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