

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

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**B.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Houston, TX, Employer**  
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**Docket No. 21-0892  
Issued: November 29, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On April 26, 2021 appellant filed a timely appeal from a February 2, 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.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met her burden of proof to modify OWCP's June 19, 2017 loss of wage-earning capacity (LWEC) determination.

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

<sup>2</sup> The Board notes that, following the February 2, 2021 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.*

## **FACTUAL HISTORY**

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

On December 24, 2007 appellant, then a 52-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained numbness in her left hand and pain in her left wrist and forearm causally related to factors of her federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome, a bilateral benign neoplasm of the connective and soft tissue of the upper limb including the shoulders, and chronic pain syndrome. It paid appellant wage-loss compensation on the supplemental rolls beginning January 1, 2009 and on the periodic rolls beginning July 5, 2009.

OWCP determined that a conflict in medical opinion existed between Dr. James E. Butler, a Board-certified orthopedic surgeon and OWCP referral physician, and Dr. James Key, a Board-certified orthopedic surgeon and treating physician, regarding the extent of appellant's disability from employment. It referred her to Dr. Frank L. Barnes, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated December 12, 2013, Dr. Barnes diagnosed healed bilateral carpal tunnel syndrome and a cervical fusion at C4-5. He referred appellant for a functional capacity evaluation (FCE); however, she was unable to undergo the FCE because of high blood pressure. In a December 26, 2013 work capacity evaluation (Form OWCP-5c), Dr. Barnes found that appellant could work full time with restrictions, including performing repetitive movements of the wrists and elbows for two hours per day and lifting, pushing, and pulling up to 20 pounds for two hours per day. In a supplemental report dated April 18, 2014, he advised that appellant had no evidence of continuing carpal tunnel syndrome, but did have reduced shoulder movement as a result of her work injury.

On May 6, 2014 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

The vocational rehabilitation counselor completed a job classification (Form CA-66) on July 22, 2014 for the position of receptionist.

In a clarification received August 25, 2014, Dr. Barnes advised that appellant had the physical capacity to perform the duties of a teacher aide, receptionist, and teacher assistant/substitute.<sup>4</sup> He completed an OWCP-5c.

By decision dated May 11, 2015, OWCP reduced appellant's wage-loss compensation based on its finding that she had the capacity to work as a receptionist earning \$441.96 per week.

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<sup>3</sup> *Order Remanding Case*, Docket No. 18-1515 (issued June 20, 2019).

<sup>4</sup> Dr. Barnes dated his response April 18, 2014; however, he indicated that he was responding to OWCP's August 5, 2014 letter.

On May 26, 2015 appellant requested reconsideration.

By decision dated August 24, 2015, OWCP modified its May 11, 2015 decision. It found that it had used incorrect pay rate information in calculating appellant's loss of wage-earning capacity.

By decision dated October 15, 2015, OWCP reduced appellant's wage-loss compensation based on its finding that she had the capacity to earn wages of \$448.50 per week in the selected position of receptionist.

On November 8, 2015 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.<sup>5</sup>

By decision dated March 18, 2016, OWCP's hearing representative set aside the October 15, 2015 decision. She found that OWCP had not sufficiently explained its finding that appellant could earn \$448.50 weekly when the entry level salary for the receptionist position ranged from \$388.00 to \$486.00. The hearing representative remanded the case for OWCP to verify the current entry-level wage of a receptionist.

In a Form CA-66 dated April 14, 2016, the vocational rehabilitation counselor indicated that the position of receptionist was reasonably available within appellant's commuting area at an entry-level salary of \$360.40 per week according to employment data from the 2015 Bureau of Labor Statistics. The vocational rehabilitation counselor found that she met the specific vocational preparation for the position through her prior employment.

By decision dated June 9, 2016, OWCP reduced appellant's wage-loss compensation based on its finding that she had the capacity to earn wages of \$360.40 per week in the selected position of receptionist.

On June 13, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated October 26, 2016, OWCP's hearing representative vacated the June 9, 2016 decision. He remanded the case for OWCP to obtain the current pay rate for appellant's date-of-injury position.

By decision dated June 19, 2017, OWCP reduced appellant's wage-loss compensation based on its finding that she had the capacity to earn wages of \$360.40 per week in the selected position of receptionist. It found that the 2013 and 2014 reports from Dr. Barnes represented the weight of the evidence and established that the position of receptionist was within her physical

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<sup>5</sup> By decision dated November 10, 2015, OWCP granted appellant a schedule award for six percent permanent impairment of the left upper extremity and nine percent permanent impairment of the right upper extremity. It based its finding on the July 31, 2015 report from Dr. Zvi Kalisky, a Board-certified physiatrist, who provided a second opinion examination and the September 3, 2015 report from its district medical adviser.

capacity. OWCP applied the formula set forth in *Albert C. Shadrick*,<sup>6</sup> to determine appellant's loss of wage-earning capacity.

On June 27, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated November 17, 2017, OWCP's hearing representative affirmed the June 19, 2017 LWEC determination.

On February 23, 2018 appellant requested reconsideration.

By decision dated July 23, 2018, OWCP denied modification of its November 17, 2017 decision.

Appellant appealed to the Board. By order dated June 20, 2019, the Board set aside the July 23, 2018 decision.<sup>7</sup> It remanded the case for OWCP to determine whether appellant had established modification of the LWEC determination.

In a January 10, 2020 development letter, OWCP advised appellant that the evidence was currently insufficient to support modification of the established LWEC determination and requested that she submit evidence or argument supporting that the original rating was in error or that she was disabled from employment. It afforded her 30 days to submit additional information.

In a response dated January 17, 2020, appellant questioned whether she was qualified for the position of receptionist. She advised that a counselor at a state commission and a vocational rehabilitation specialist with the Social Security Administration had both agreed that she was not qualified for any position.

By decision dated May 12, 2020, OWCP found that appellant had not established modification of its June 19, 2017 LWEC determination.

On September 16, 2020 Dr. Arnold Ravdel, an orthopedic surgeon, provided a history of the accepted employment injury. He diagnosed a C6-7 cervical disc lesion and bilateral recurrent carpal tunnel syndrome, noting that appellant had declined surgery for the carpal tunnel syndrome. Dr. Ravdel advised that she was not "felt fit for any work at this time" and that she had retired.

On July 19, 2020 appellant requested modification of the June 19, 2017 LWEC determination. She contended that the position description of receptionist used by OWCP in its LWEC determination was obsolete and had been superseded. Appellant questioned why she had not been provided with the computer training necessary for the position.

By decision dated February 2, 2021, OWCP denied modification of its May 12, 2020 decision, finding that appellant had not established modification of the LWEC determination. It

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<sup>6</sup> 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

<sup>7</sup> *B.H., Order Remanding Case*, Docket No. 18-1515 (issued June 20, 2019).

found that she had not demonstrated that the rehabilitation counselor relied on erroneous evidence in finding the receptionist position medically and vocationally suitable.

### LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>8</sup> Compensation payments are based on the wage-earning capacity 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> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

### ANALYSIS

The Board finds that appellant has met her burden of proof to modify OWCP's June 19, 2017 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.<sup>12</sup>

The Board finds that appellant has established that the original determination was in error. In its June 19, 2017 LWEC determination, OWCP relied upon reports dated 2013 and 2014 from Dr. Barnes, the impartial medical examiner, in finding that she had the physical capacity to perform the selected position of receptionist. Its procedures provide that, in assessing an employee's ability to perform in a constructed position, if the evidence is unclear, equivocal, or if the evidence is old enough to be considered stale (generally greater than 18 months old), the claims examiner should seek clarification from the attending physician, second opinion, or referee specialist as appropriate.<sup>13</sup> The Board finds that the medical evidence relied upon by OWCP in its June 19, 2017 LWEC determination was not reasonably current as it was more than three years

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<sup>8</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>9</sup> See *M.K.*, Docket No. 17-1852 (issued August 23, 2018).

<sup>10</sup> See *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>11</sup> See *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

<sup>12</sup> See *supra* note 10.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4(d) (June 2013); see also *G.F.*, Docket No. 20-1031 (issued December 31, 2020).

old.<sup>14</sup> Appellant, consequently, has met her burden of proof to modify OWCP's June 19, 2017 LWEC determination as it was erroneously issued.

**CONCLUSION**

The Board finds that appellant has met her burden of proof to modify OWCP's June 19, 2017 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 29, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>14</sup> *G.F., id.*; *see W.C.*, Docket No. 17-0562 (issued November 17, 2017).