

By decision dated November 18, 2015, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted employment incident.

Appellant continued to request reconsideration of the denial of his claim.

By decision dated June 2, 2017, OWCP vacated the November 18, 2015 decision, finding that the medical evidence submitted established that appellant sustained chronic lumbar strain, permanent aggravation of preexisting lumbar degenerative disc disease, and bilateral lumbosacral radiculopathy, causally related to the accepted July 11, 2015 employment incident.

By separate decision of even date, OWCP formally accepted appellant's claim for chronic lumbar strain, lumbar region radiculopathy, and permanent aggravation of preexisting lumbar degenerative disc disease.

On February 21, 2019 appellant was referred for vocational rehabilitation based on a November 20, 2018 report and a November 21, 2018 work capacity evaluation (Form OWCP-5c) submitted by Dr. Steven A. Silver, a Board-certified orthopedic surgeon and an OWCP second opinion physician, who opined that appellant was capable of performing part-time, limited-duty work with restrictions.

On May 7, 2019 a vocational rehabilitation counselor identified three positions as appropriate for appellant, including customer service representative. He determined that appellant's training and work experience qualified him for a customer service representative with vocational preparation of six months to one year, and the position of customer service representative was being performed in sufficient numbers so as to make it reasonably available within his commuting area. The vocational rehabilitation counselor further determined that the physical demands of the customer service representative position were within the medical restrictions set forth in Dr. Silver's November 21, 2018 Form OWCP-5c.

Appellant subsequently submitted a June 7, 2019 report from Dr. Byron V. Hartunian, an attending orthopedic surgeon, who opined that appellant was totally disabled from work and was incapable of undergoing vocational rehabilitation. OWCP thereafter found a conflict in the medical opinion evidence between Dr. Hartunian and Dr. Silver regarding appellant's work capacity.

On October 23, 2019 OWCP referred appellant to Dr. John H. Chaglassian, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a November 18, 2019 report, Dr. Chaglassian, serving as the impartial medical examiner (IME), agreed with Dr. Silver and opined that appellant was capable of performing part-time work with restrictions.

By decision dated March 23, 2020, OWCP finalized a February 3, 2020 proposed reduction of appellant's compensation, based on his capacity to earn wages in the constructed position of customer service representative, effective March 29, 2020.

OWCP received additional evidence following OWCP's March 23, 2020 decision, including medical records dated February 8, 2018 through January 14, 2021 from Dr. Hartunian; Dr. Simon N. McRae, a Board-certified urologist; Jessica Day and Taylor K. Boudreau, nurse practitioners; Kelsey Toomey, a psychologist; Melissa J. Labonte, a Board-certified advanced practical registered nurse; Laura Smith, a licensed practical nurse; Dr. Richard A. Haas, a Board-certified internist; Dr. Thomas Kessman, a Board-certified orthopedic surgeon; Dr. Benjamin D. Prentiss, Board-certified in cardiovascular disease; Dr. Kelly E. Hoisington, a family practitioner; Dr. Judy Bavongkhoun, an optometrist; and Dr. Mukti Patel, a Board-certified family practitioner. All of these providers addressed appellant's disability status and medical conditions.

On October 20, 2021 appellant, through counsel, requested reconsideration.

OWCP, by decision dated January 18, 2022, denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board, having duly considered this matter, concludes that this case is not in posture for decision.²

Modification of an LWEC determination is unwarranted 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 erroneous.³ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁴ Unlike reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting modification of an LWEC determination.⁵ Requests for "modification" should be reviewed carefully to determine whether the claimant is seeking a reconsideration of a recently issued LWEC decision, as opposed to a modification of the LWEC determination.⁶

The Board finds that appellant's October 20, 2021 request for reconsideration was, in fact, a request for modification of the March 23, 2020 LWEC determination. It is well established that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous.⁷

As OWCP improperly reviewed the case under the standard for an untimely reconsideration request, the case must 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

² *C.H.*, Docket No. 19-1114 (issued April 30, 2020); *B.H.*, Docket No. 18-1515 (issued June 20, 2019); *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

³ 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

⁴ 20 C.F.R. § 10.511.

⁵ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁶ *Supra* note 3, Federal (FECA) Procedure Manual, Chapter 2.1501.4a (June 2013).

⁷ 20 C.F.R. § 10.511; *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

of proof to establish modification of the March 23, 2020 LWEC determination.⁸ The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.

IT IS HEREBY ORDERED THAT the January 18, 2022 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.

Issued: July 19, 2022
Washington, DC

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

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

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

⁸ See *L.H.*, Docket No. 18-1787 (issued July 29, 2019); *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).