United States Department of Labor
Employees' Compensation Appeals Board

T.V., Appellant	)	
and	)	**Docket Nos. 24-0914 & 25-0004**
	)	**Issued: November 26, 2024**
U.S. POSTAL SERVICE, PASADENA PROCESSING & DISTRIBUTION CENTER, Pasadena, CA, Employer	)	

Appearances:
Guillermo Mojarro, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 8, 2024 appellant filed a timely appeal from an August 8, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 24-0914. On October 1, 2024 appellant, through her representative, filed a timely appeal from an April 23, 2024 nonmerit decision of OWCP. The Clerk of the Appellate Boards assigned the appeal Docket No. 25-0004.[2] Pursuant

[1] 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.

[2] Appellant, through her representative, timely requested oral argument before the Board regarding OWCP's August 8 and October 1, 2024 decisions. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). She contended that OWCP erroneously concluded that she could perform the duties of the selected information clerk position. The Board in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's April 22, 2024 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether appellant has met her burden of proof to modify the April 20, 2018 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On January 18, 2011 appellant, then a 37-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she experienced pain and numbness in both arms, hands, wrists, fingers, and right buttocks area due to factors of her federal employment including repetitive use of both arms, hands, wrists, fingers, and prolonged sitting. She noted that she first became aware of her conditions on June 15, 2004, and first realized their relationship to her federal employment on January 7, 2011. OWCP initially accepted the claim for bilateral carpal tunnel syndrome (CTS). It subsequently expanded the acceptance of the claim to include thoracic or lumbosacral neuritis or radiculitis, not otherwise specified; enthesopathy of hip region, right; and right cubital tunnel syndrome. OWCP paid appellant wage-loss compensation on the supplemental rolls as of February 14, 2011, and on the periodic rolls as of July 1, 2012.

In a vocational rehabilitation closure memorandum dated August 11, 2017, OWCP's vocational rehabilitation specialist noted that appellant had received computer software training from November 16, 2016 through April 2, 2017 and that her placement services had ended on July 6, 2017. The vocational rehabilitation specialist related that the position of Information Clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT) # 237.367-022, working 20 hours per week with average wages of $228.80 per week, was medically and vocationally suitable, and existed in sufficient numbers within the reasonable commuting area. The vocational rehabilitation specialist also noted that the position was selected as it was less physically demanding on the upper extremities than other similar positions.

In a December 18, 2017 report, Dr. Julie M. Fuller, an attending Board-certified internist, noted a date of injury as June 15, 2004. She discussed appellant's physical examination findings and diagnosed the accepted conditions of bilateral CTS and lumbar radiculopathy. Dr. Fuller also diagnosed right ulnar nerve entrapment at elbow, right piriformis syndrome, and de Quervain's tenosynovitis. She opined that appellant was capable of returning to modified work with permanent restrictions, which included fine manipulation, including keyboarding, no more than 15 minutes, four hours per day; lifting, pushing, and pulling no more than 10 pounds, intermittently, 20 minutes per hour, four hours per day; no repetitive forceful gripping, grasping, pushing, or pulling; continuous sitting no more than two hours per three-hour period; standing and walking no more than one hour per two-hour period; repetitive bending, stooping, and twisting no more than 15 minutes per hour, four hours per day; and driving no more than one hour per three-hour period.

[3] 5 U.S.C. § 8101 *et seq.*

In a notice dated March 9, 2018, OWCP advised appellant that, under 5 U.S.C. § 8106 and 5 U.S.C. § 8115, it proposed to adjust her wage-loss compensation based on her ability to earn wages in the part-time (four hours a day) constructed position of information clerk, DOT # 237.367-022. It noted that the position had been identified by appellant's vocational rehabilitation specialist in a July 21, 2017 job classification and labor market survey as within appellant's medical and vocational abilities, and reasonably available in her commuting area, part time, with an average weekly wage of $228.00. OWCP also noted that appellant had successfully completed training for the position from November 16, 2016 through April 2, 2017. It informed her that the duties of the position were within the work restrictions recommended by Dr. Fuller. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed reduction. No response was received.

By decision dated April 20, 2018, OWCP reduced appellant's wage-loss compensation, effective April 29, 2018, based on her capacity to earn wages as an information clerk at the rate of $228.00 per week.

On April 22, 2024 appellant requested reconsideration. She contended that OWCP failed to forward a description and physical requirements of the offered information clerk position to Dr. Fuller for review. Appellant also contended that OWCP failed to recognize that, after April 20, 2018, her accepted conditions worsened, and, thus, required modification of its LWEC determination. She further contended that OWCP issued a defective notice of proposed reduction of her wage-loss compensation on March 9, 2018 as it omitted one of her pertinent medical restrictions, lifting, pushing, and pulling intermittently 20 minutes per hour, four hours per day. Lastly, appellant contended that the vocational rehabilitation specialist who proposed that she could perform the physical requirements of the constructed information clerk position misrepresented the availability of that position.

OWCP, by decision dated April 23, 2024, denied appellant's request for reconsideration, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

In an April 23, 2024 letter, appellant requested modification of OWCP's April 20, 2018 LWEC determination.

OWCP received additional medical evidence from Dr. Fuller. In progress notes and industrial work status reports dated April 7, 2022, February 8, May 18, July 31, November 15, and December 14, 2023, and January 24, April 9, and May 28, 2024, Dr. Fuller reiterated her prior diagnoses of the accepted conditions of bilateral CTS and lumbar radiculopathy. She also reiterated her prior diagnoses of right ulnar nerve entrapment at elbow, de Quervain's tenosynovitis, and right piriformis syndrome. Additionally, Dr. Fuller restated her opinion that appellant could work four hours per day and permanent restrictions, which included fine manipulation, including keyboarding, no more than 15 minutes, four hours per day; lifting, pushing, and pulling no more than 10 pounds, intermittently, 20 minutes per hour, four hours per day; no repetitive forceful gripping, grasping, pushing, or pulling; continuous sitting no more than two hours per three-hour period; standing and walking no more than one hour per two-hour period; repetitive bending, stooping, and twisting no more than 15 minutes per hour, four hours per day; and driving no more than one hour per three-hour period. She opined that appellant's additional diagnosed conditions and disability were causally related to the accepted employment injury. Dr. Fuller also opined that, if modified activity could not be accommodated by

appellant's employer, then appellant would be considered temporarily totally disabled from her regular work.

OWCP, in a June 25, 2024 development letter, advised appellant that the evidence submitted 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; that there has been a material change in the nature and extent of her injury related condition; or that she has been retrained or vocationally. It afforded her 30 days to submit the necessary evidence.

In a response dated July 2, 2024, appellant again requested modification of OWCP's April 20, 2018 LWEC determination. She reiterated her contentions that OWCP failed to forward a description and physical requirements of the offered information clerk position to Dr. Fuller for review. Appellant further reiterated that OWCP failed to recognize that after April 20, 2018 her accepted conditions worsened, that the notice of proposed reduction on March 9, 2018 omitted one of her pertinent medical restrictions, and that the vocational rehabilitation specialist misrepresented the availability of the information clerk position.

In additional industrial work status reports dated August 6, 2013, and October 4, 2022, and progress notes dated January 24 and July 26, 2024, Dr. Fuller reiterated her prior diagnoses, opinions regarding appellant's work capacity and permanent restrictions.

OWCP, by decision dated August 8, 2024, denied modification of the April 20, 2018 LWEC determination.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[4] OWCP's regulations[5] establish a one-year time limitation for requesting reconsideration which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.[6] This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought. Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).[7] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[8]

[4] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[5] 20 C.F.R. § 10.607(a).

[6] *E.R.*, Docket No. 21-0423 (issued June 20, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

[8] *S.S.*, Docket No. 23-0086 (issued May 26, 2023); *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.[9] Its procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.[10]

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly adjudicated appellant's April 22, 2024 request for modification of the April 20, 2018 LWEC determination as a request for reconsideration.

OWCP found that appellant's April 22, 2024 request for reconsideration of its April 20, 2018 LWEC determination was untimely filed and failed to demonstrate clear evidence of error.

The Board finds, however, that appellant's April 22, 2024 reconsideration request was, instead, a request for modification of the April 20, 2018 LWEC determination, which OWCP had denied on April 23, 2024. Although appellant requested reconsideration, when the underlying issues involved LWEC, the initial question is whether the claimant has submitted an application for reconsideration of a recent LWEC determination or has requested modification of the LWEC determination.[11] This requires that OWCP conduct a limited review of the evidence or argument submitted to determine if the claimant is alleging either that the original determination was in error, or that his injury-related condition had worsened.[12] 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 of the LWEC is warranted.[13]

In the April 22, 2024 letter, appellant alleged that the original April 20, 2018 LWEC determination was, in fact, erroneous. Additionally, she contended that OWCP failed to recognize that after April 20, 2018 her accepted conditions worsened, and, thus, required modification of its LWEC determination. The Board has long held that a claimant may demonstrate that modification of an LWEC determination is warranted if there has been a

[9] *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

[10] *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id*. at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (September 2020).

[11] *J.F.*, Docket No. 23-0662 (issued December 8, 2023); *E.C.*, Docket No. 19-0646 (issued February 26, 2020); *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4b (June 2013).

[13] *J.F.*, *supra* note 11; *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

material change in the nature and extent of the injury-related condition, or the original determination was, in fact, erroneous.[14]

The Board thus finds that OWCP improperly adjudicated appellant's request for reconsideration of the April 20, 2018 LWEC determination as a request for reconsideration. As appellant has requested modification of the LWEC determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) did not apply.[15]

LEGAL PRECEDENT -- ISSUE 2

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.[16] 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.[17]

If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances, which may affect the wage-earning capacity in his or her disabled condition.[18] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.[19]

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

[14] 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. *E.H.*, Docket No. 17-0963 (issued August 24, 2018); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[15] *J.F.*, *supra* note 11; *E.H.*, *id.*

[16] 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).

[17] *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

[18] *R.L.*, Docket No. 24-0475 (issued June 7, 2024); *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

[19] *Id*.

rehabilitated, or the original determination was, in fact, erroneous.[20] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[21]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to modify the April 20, 2018 LWEC determination.

Appellant has not met any of the three criteria for establishing that modification of the April 20, 2018 LWEC determination is warranted. First, she has not shown that the original determination was, in fact, erroneous.[22] By decision dated April 20, 2018, OWCP reduced appellant's wage-loss compensation, effective April 29, 2018, based on her ability to earn wages as an information clerk with average part-time weekly earnings of $228.00. At the time of this decision, a vocational rehabilitation specialist had identified an information clerk position based upon appellant's age, experience, and education, and conducted a state labor market survey which demonstrated that the constructed position was reasonably available in appellant's commuting area with part-time average weekly earnings of $228.00. Appellant had also successfully completed training for the constructed position. The December 18, 2017 permanent work restrictions of Dr. Fuller, appellant's physician, represented the best assessment of appellant's ability to work in the information clerk position on a part-time basis. Dr. Fuller indicated that appellant could work with permanent restrictions, including fine manipulation, including keyboarding, no more than 15 minutes, four hours per day; lifting, pushing, and pulling no more than 10 pounds, intermittently, 20 minutes per hour, four hours per day; no repetitive forceful gripping, grasping, pushing, or pulling; continuous sitting no more than two hours per three-hour period; standing and walking no more than one hour per two-hour period; repetitive bending, stooping, and twisting no more than 15 minutes per hour, four hours per day; and driving no more than one hour per three-hour period. The Board notes that the physical requirements of the position were within the work restrictions provided by Dr. Fuller. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115, appellant's entitlement to compensation for wage loss was properly reduced as of April 29, 2018.[23]

Further, appellant contended that OWCP improperly reduced her compensation because it did not send Dr. Fuller a description of the information clerk position. However, the Board notes that OWCP's regulations and procedures do not require OWCP to send a copy of the description of the constructed position to appellant's physician.

Additionally, appellant contended that OWCP issued a defective notice of proposed reduction of her wage-loss compensation on March 9, 2018 because it omitted one of her pertinent medical restrictions, lifting, pushing, and pulling intermittently 20 minutes per hour,

[20] *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 supra* note 12 at Chapter 2.1501.3a (June 2013).

[21] *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

[22] *See supra* note 20.

[23] *T.K.*, Docket No. 24-0827 (issued October 24, 2024); *J.L.*, Docket No. 23-1024 (issued April 2, 2024); *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

four hours per day. The Board notes, however, that OWCP considered and included all of appellant's work restrictions, and the constructed information clerk position was found suitable.

Appellant also contended that the vocational rehabilitation counselor who proposed that she could perform the physical requirements of the constructed information clerk position misrepresented the availability of that position. However, the vocational rehabilitation counselor indicated that he based his finding that the job was available in sufficient numbers within appellant's geographical area on labor market data obtained from the state Employment Development Department projections for receptionists and information clerks. The vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, and OWCP may rely on his opinion in determining whether the job is vocationally suitable and reasonably available.[24] OWCP's procedures provide that the rehabilitation counselor should investigate and show the availability of targeted jobs "by citing sources such as the local State employment service, the local Chamber of Commerce, [employing establishment] contacts, and actual job openings."[25] The vocational rehabilitation counselor properly provided information from the state employment service. For these reasons, the Board finds that appellant has not shown that the original determination was, in fact, erroneous.

Second, appellant has not shown that a material change in the nature and extent of the accepted work injury prevented her from working in the constructed information clerk position.[26] Appellant submitted additional medical evidence after OWCP issued its April 20, 2018 LWEC determination, but this evidence does not establish a material change in the nature and extent of her accepted work injury such that she was prevented from working as an information clerk.

In progress notes and reports dated August 6, 2013 through October 24, 2024, Dr. Fuller diagnosed the accepted conditions of bilateral CTS and lumbar radiculopathy. She also diagnosed right ulnar nerve entrapment at elbow, de Quervain's tenosynovitis, and right piriformis syndrome. Dr. Fuller opined that appellant could work four hours per day with permanent restrictions.

The Board finds that Dr. Fuller's progress notes and reports do not support appellant's request for modification of the April 20, 2018 LWEC determination, because they do not contain an opinion that appellant's injury-related conditions had changed such that she was prevented from working in the constructed information clerk position. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[27] Therefore, this evidence is insufficient to establish a material change in the nature and extent of appellant's accepted work injury such that she was prevented from working in the constructed information clerk position. For these reasons, the Board finds that the medical evidence from Dr. Fuller is insufficient to modify OWCP's April 20, 2018 LWEC determination.

[24] *See M.P.*, Docket No. 18-0094 (issued June 26, 2018); *D.P.*, Docket No. 16-1198 (issued August 22, 2017).

[25] *See supra* note 20 at Chapter 2.816.6a (June 2013).

[26] *See supra* note 20.

[27] *See J.M.*, Docket No. 23-0457 (issued September 14, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

The Board further finds that appellant has not established that modification of the August 4, 2022 LWEC determination was warranted by establishing that she was vocationally rehabilitated after OWCP adjusted her compensation per its April 20, 2018 LWEC determination.[28] The case record does not contain evidence of such rehabilitation.

For these reasons, appellant has not met her burden of proof to modify the April 20, 2018 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 OWCP improperly adjudicated appellant's April 22, 2024 request for modification of the April 20, 2018 LWEC determination as a request for reconsideration. The Board further finds that appellant has not met her burden of proof to modify the April 20, 2018 loss of LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2024 decision of the Office of Workers' Compensation Programs is reversed and the October 1, 2024 decision is affirmed.

Issued: November 26, 2024
Washington, DC

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

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

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

[28] *Supra* note 20.