

surgery due to an osteomyelitis infection. She returned to a modified position on March 24, 2003. By decision dated January 14, 2004, the Office found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity, which was at three percent of her prior earnings. On March 25, 2004 it modified the wage-earning capacity decision, finding that she had no loss of wage-earning capacity, as her current wages exceeded her date-of-injury wages.

Appellant received compensation for intermittent periods of disability and when no appropriate work was available at the employing establishment. She filed a CA-7 on June 19, 2007 for the period June 12 to 19, 2007. On a Form CA-7a, the employing establishment certified that appellant was sent home for this period because no work was available within her restrictions. By letter dated June 28, 2007, the Office informed her that, because a formal loss of wage-earning capacity decision was in place, it would remain unless one of the described criteria for modifying the loss of wage-earning capacity was met. By decision dated August 8, 2007, it denied modification of the March 25, 2004 loss of wage-earning capacity decision. The Office concluded that, even though the employing establishment sent appellant home intermittently because no work was available, she had not met one of the criteria for modifying the loss of wage-earning capacity determination.¹

On August 20, 2007 appellant requested a telephonic hearing that was scheduled for 2:00 p.m. on December 13, 2007. She did not call in at the scheduled time. Appellant thereafter called the Office and a review of the written record was done. In a December 16, 2007 letter, she informed the Office that she had not received the March 25, 2004 decision, that there had been no material change in her medical condition, and that she was sent home by the employing establishment on the days of claimed compensation because no work was available within her restrictions. By decision dated March 7, 2008, an Office hearing representative affirmed the August 8, 2007 decision denying modification of the March 25, 2004 loss of wage-earning capacity decision.

The relevant medical evidence includes a January 22, 2007 report in which Dr. Steven M. Mardjetko, a Board-certified orthopedic surgeon, who had performed appellant's surgery in July 2001, advised that appellant's infection was currently quiescent and provided examination findings. In a July 16, 2007 form report, Dr. Marjetko advised that appellant was at maximum medical improvement, could work with a 20-pound lifting restriction, that she avoid repetitive bending at the waist, and should be allowed to change positions from sitting to standing. In a July 16, 2007 treatment note, he noted the history of injury, diagnosed lumbar spine degenerative disease and opined that he was pleased with appellant's outcome to date although advising that

¹ The Office also advised appellant that she had been incorrectly paid for intermittent periods from June 12 through July 15, 2007, and that she would later be advised that an overpayment had been created. There is no indication in the record that an overpayment notification was issued for these periods. The record, however, contains a final overpayment decision dated June 22, 2007 regarding an overpayment totaling \$1,640.89 that was created because the Office incorrectly determined that the job appellant returned to on March 24, 2003 paid less than the salary for her date-of-injury position and thus compensated her at an incorrect rate for the period March 24, 2003 to January 24, 2004. Appellant has filed an appeal with the Board of the June 22, 2007 overpayment decision, Docket No. 08-649, that will be adjudicated separately.

she could require additional surgery in the future. He concluded that she should return in one year's time.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.² The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity 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 [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."³ 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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁶

The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁷

ANALYSIS

Applicable case law and Office procedures require that once a formal wage-earning capacity decision is in place, a modification of such determination is not warranted unless there

² *Katherine T. Kreger*, 55 ECAB 633 (2004).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁵ *Id.*

⁶ *See* Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.814.11 (June 1996).

⁷ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

The Board finds that appellant did not submit sufficient evidence to show that the Office's March 25, 2004 wage-earning capacity determination was erroneous.¹⁰ There is no evidence of record that the decision was in error or that appellant was retrained or otherwise vocationally rehabilitated and the medical evidence submitted is insufficient to show that there was a material change in the nature and extent of the injury-related condition beginning in June 2007.

In a January 22, 2007 report, Dr. Mardjetko, appellant's attending orthopedist, advised that her osteomyelitis infection was quiescent, and on July 16, 2007 reported that she was at maximum medical improvement, that he was pleased with her outcome and she should return to see him in one year. These reports are insufficient to establish that the March 25, 2004 wage-earning capacity determination should be modified. As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted medical evidence to establish a material change in the nature and extent of her employment-related conditions.¹¹

Appellant, however, is not precluded from receiving wage-loss compensation for intermittent periods, even though a formal wage-earning capacity determination has been issued.¹² Beginning in June 2007, she claimed intermittent wage-loss compensation because she was sent home as no light duty was available at the employing establishment. Thus, upon return of the case record to the Office, her CA-7 claims for compensation should be adjudicated.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that the March 25, 2004 wage-earning capacity determination should be modified. This, however, does not preclude her from receiving intermittent wage-loss compensation.

⁸ *Stanley B. Plotkin, supra* note 4.

⁹ *Id.*

¹⁰ *Katherine T. Kreger, supra* note 2; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 3.

¹¹ *Stanley B. Plotkin, supra* note 4.

¹² *Sandra D. Pruitt, supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2008 decision of the Office of Workers' Compensation Programs be affirmed, as modified.

Issued: March 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board