



rehabilitation did not occur in the early but necessary stages of vocational rehabilitation.<sup>2</sup> In a July 21, 2010 decision, the Board set aside a June 3, 2009 OWCP decision denying her request for reconsideration. The Board found that appellant's reconsideration request should be treated as a request for modification of the wage-earning capacity determination and remanded the case for OWCP to adjudicate this issue.<sup>3</sup> The facts of the case contained in the Board's prior decisions are incorporated herein by reference.<sup>4</sup>

In a July 10, 2007 report, Dr. Jack C. Tippett, a Board-certified orthopedic surgeon and second opinion specialist, noted the history of injury and reviewed appellant's medical record. He provided examination findings and an impression of healed complex pelvis fracture with malposition; apparent limb length discrepancy with left leg about three centimeters short; degenerative joint disease of right sacroiliac joint and dyspareunia. Dr. Tippett stated that appellant's pelvic tilt was the result of the accepted conditions and was permanent. He stated that the accepted conditions also resulted in traumatic changes in the right sacroiliac joint and that she has pain in that area related to certain movements in her low back and in her hips. Dr. Tippett opined that the work-related conditions were still active and recommended the use of half-inch lifts in appellant's left shoe. He stated that, while intermittent pain may occur, it should be minimized by occasionally changing from a sitting position to a standing position and vice-versa. Bending, stooping and heavy lifting should be reduced as necessary. In response to OWCP's questions, Dr. Tippett indicated in an October 3, 2007 report that appellant was partially disabled as a result of the employment injury. He opined that, based on objective findings, she was able to perform an eight-hour workday with restrictions. In an October 3, 2007 work capacity evaluation form, Dr. Tippett provided permanent work restrictions on lifting over 30 pounds limited, up to four hours a day, and no climbing and squatting; occasional twisting and bending/stooping; and change positions from sitting and standing as necessary.

On October 12, 2007 appellant was referred for vocational rehabilitation. On November 5, 2007 the vocational rehabilitation counselor identified the positions of telephone solicitor, ticket seller, and cashier-checker (retail trade) as being within appellant's experience, education, and medical restrictions and available based on a local labor market study. Placement efforts began on January 2, 2006 and ran through April 1, 2008. Appellant did not obtain employment. On April 9, 2008 the vocational rehabilitation counselor indicated that she was not very cooperative in her job search. He stated that appellant was vocationally and educationally capable of performing the positions of cashier and customer service, which were reasonably available in her local commuting area on a full-time basis based on labor market research of November 5 and December 28, 2007.

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<sup>2</sup> Docket No. 05-1315 (issued January 24, 2006).

<sup>3</sup> Docket No. 10-99 (issued July 21, 2010).

<sup>4</sup> Appellant, a part-time rural carrier associate, was injured in a November 15, 1995 motor vehicle accident. OWCP accepted the claim for closed sacrum/coccyx fracture; closed pubis fracture; closed spleen hematoma; closed four rib fractures; closed lumbar vertebra fracture; posthemorrhage anemia; forehead open wound and foot/toe abrasion. It began paying compensation for temporary total disability on December 31, 1995. The employer terminated appellant's employment in February 1996.

By decision dated June 9, 2008, OWCP reduced appellant's compensation effective June 10, 2008 on the basis that the selected position of cashier/checker (retail trade) represented her wage-earning capacity. It found the position was medically and vocationally suitable and reasonably available in her commuting area. OWCP further found the physical requirements of this job allowed appellant to change position (sitting, standing and walking) and was within her medical restrictions of lifting up to 30 pounds limited to four hours a day and no climbing and squatting; occasional twisting and bending/stooping; and change positions sitting/standing.

In a May 14, 2009 letter, appellant requested reconsideration. She stated that she had a difficult time finding work in a cashier position. Appellant explained that she could not find work because of her medical restrictions as well as the economy. She indicated that a manager of a local store told her it did not hire people for a cashier position who needed to "sit, walk and stand every 15 minutes."

Pursuant to the Board's July 21, 2010 decision, OWCP considered appellant's May 14, 2009 letter a request for modification of the June 9, 2008 wage-earning capacity decision. On July 27, 2010 it sent her a letter discussing the criteria for modification of a formal loss of wage-earning capacity decision. Appellant was afforded 30 days to provide factual or medical evidence to meet such criteria.

On August 11, 2010 OWCP received a statement from appellant requesting information and an extension of time to obtain information.<sup>5</sup> In an August 23, 2010 statement, appellant indicated that the original wage-earning capacity was in error and her work-related medical conditions had worsened. She noted potential employers that she contacted from July 17, 2008 through August 6, 2010 that either were not hiring or would not hire a person with her restrictions.

By decision dated September 10, 2010, OWCP denied modification of the June 9, 2008 loss of wage-earning capacity decision.

On March 11, 2011 appellant requested reconsideration. She indicated that OWCP had a copy of her August 23, 2010 letter which noted the grounds for her disagreement.

In a December 13, 2010 report, Dr. Clarence A. Temple, a Board-certified orthopedic surgeon, reported a history of injury as related by appellant and reviewed medical records which she provided. He provided examination findings and the following assessments: closed fracture of sacrum and coccyx without mention of spinal cord injury; closed fracture of pubis; lumbosacral spondylosis without myelopathy; scoliosis (and kyphoscoliosis), idiopathic. Dr. Temple noted that the diagnosis of scoliosis was not that of idiopathic scoliosis, but rather scoliosis due to the malposition of her sacrum. He stated that the scoliosis in the lumbar area secondary to the malposition of the sacrum could reasonably be expected to play a role in the degenerative changes at L4-5 and L5-S1. This, along with the sacroiliac injury on the left and what may be a sacroiliac injury on the right, may explain why appellant has pain on standing and

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<sup>5</sup> OWCP provided appellant copies of her file and information to obtain a physician. In an August 4, 2010 letter, it notified her that a formal extension would not be granted; however, an additional 14 days were accorded to provide information.

on walking. Dr. Temple explained that, while the addition of a half-inch lift to the left leg may have been helpful in leveling her sacrum, it would not be expected to provide immediate improvement and, because the degenerative changes were already present, it may not have been of benefit in the long run. He noted that the x-rays from four years prior showed some changes in the facet joints at L5-S1, but the limitations on that single view made it difficult to determine whether there were changes compared to films he had taken that day. Dr. Temple stated that it was “reasonable to assume that the degenerative changes have progressed and thus [appellant’s] condition would have worsened. I have serious doubts as to whether she could maintain any job in which she was required to stand for more than 15 or 20 minutes at a time or required to walk for more than 15 [to] 20 feet on a repeated basis.” He agreed that surgery was not indicated. Dr. Temple opined that appellant’s condition was permanent and would tend to worsen with time.

By decision dated June 15, 2011, OWCP denied modification of the September 10, 2010 decision.

### **LEGAL PRECEDENT**

Section 8115 of FECA and OWCP regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or 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 employee’s usual employment, age and qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.<sup>6</sup>

OWCP must initially determine a claimant’s medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which it relies must provide a detailed description of the condition.<sup>7</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>8</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee’s case to a vocational rehabilitation counselor authorized by it for selection of a position listed in the Department of Labor’s *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee’s capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.<sup>9</sup> Finally,

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<sup>6</sup> 5 U.S.C. § 8115; 20 C.F.R. § 10.520; see *John D. Jackson*, 55 ECAB 465 (2004).

<sup>7</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>8</sup> *John D. Jackson*, *supra* note 6.

<sup>9</sup> *James M. Frasher*, 53 ECAB 794 (2002).

application of the principles set forth in *Albert C. Shadrick*<sup>10</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>11</sup>

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.<sup>12</sup>

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>13</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>14</sup> OWCP's procedure manual provides that, if 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.<sup>15</sup> The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.<sup>16</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>17</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>18</sup>

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides

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<sup>10</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

<sup>11</sup> *James M. Frasher*, *supra* note 9.

<sup>12</sup> *John D. Jackson*, *supra* note 6.

<sup>13</sup> *D.M.*, 59 ECAB 164 (2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>14</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

<sup>16</sup> Federal (FECA) Procedure Manual, *id.* *See Harley Sims, Jr.*, *supra* note 13.

<sup>17</sup> *See D.M.*, *supra* note 13; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *A.J.*, Docket No. 10-619 (issued June 29, 2010).

<sup>18</sup> *See Harley Sims, Jr.*, *supra* note 13; *Stanley B. Plotkin*, *supra* note 17; *F.B.*, Docket No. 10-99 (issued July 21, 2010).

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. OWCP 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 OWCP 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.<sup>19</sup>

### ANALYSIS

OWCP accepted that appellant sustained closed sacrum/coccyx fracture; closed pubis fracture; closed spleen hematoma; closed four rib fractures; closed lumbar vertebra fracture; posthemorrhage anemia; forehead open wound; and foot/toe abrasion as a result of a November 15, 1995 motor vehicle accident. In a June 9, 2008 decision, it adjusted her compensation to reflect its determination that she was capable of earning wages in the selected position of cashier-checker (retail trade). Appellant contends that there has been a material change in the nature and extent of her injury-related condition and that the original wage-earning capacity determination was erroneous. She has not argued that she has been retrained or otherwise vocationally rehabilitated.

Appellant contends that the original loss of wage-earning capacity determination was erroneous. However, she submitted no evidence that the initial decision of June 9, 2008 was in error. In the June 9, 2008 decision, OWCP determined that appellant had the wage-earning capacity to perform the position of cashier/checker (retail trade) and reduced her wage-loss benefits accordingly. The medical evidence from Dr. Tippett established that she was no longer totally disabled and OWCP properly referred appellant for vocational rehabilitation counseling. Because appellant was unable to secure employment, the vocational rehabilitation counselor identified the position of cashier-checker (retail), among others, as within her capabilities. OWCP based its June 9, 2008 decision on the latter position which is identified in the *Dictionary of Occupational Titles*<sup>20</sup> as light physical demand category. The medical evidence established that she was physically capable of performing the cashier-checker (retail) position. Furthermore, the rehabilitation counselor reported that, based on appellant's experience, education, medical restrictions, and recent labor market surveys she was employable as a cashier-checker (retail trade) and that such positions were reasonably available in her commuting area. While appellant believed there were no cashier-checker positions available within her restrictions and summarized conversations with potential employers, she produced no evidence to show that OWCP's determination that the position of cashier-checker was not medically or vocationally suitable.<sup>21</sup> She therefore did not establish that the June 9, 2008 wage-earning decision was erroneous.

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<sup>19</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (October 2009).

<sup>20</sup> Department of Labor, *Dictionary of Occupational Titles*.

<sup>21</sup> See *H.N.*, Docket No. 09-1628 (issued August 19, 2010) (the fact that appellant was not successful in securing employment did not establish that the constructed position was not vocationally suitable).

Appellant also has not established that there has been a material change in the nature and extent of her injury-related condition. Dr. Temple stated that it was reasonable to assume that her condition would have worsened. However, his statement as well as his disagreement as to whether appellant could maintain a job within her restrictions is speculative in nature. Dr. Temple did not identify any diagnostic findings or examination findings to support his conclusion that her condition had worsened and he provided no discussion of the selected position of cashier-checker (retail trade) or why she was unable to perform such position. The Board has held that speculative and equivocal medical opinions regarding causal relationship have no probative value.<sup>22</sup> For these reasons, Dr. Temple's report is insufficient to modify OWCP's wage-loss decision.

Appellant therefore did not establish that the June 9, 2008 wage-earning capacity decision should be modified. She may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof to establish that a modification of the loss of wage-earning capacity determination was warranted.

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<sup>22</sup> See *Alberta S. Williamson*, 47 ECAB 569 (1996); *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Paul E. Davis*, 30 ECAB 461 (1979).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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