



compensation for four hours a day. In merit decisions dated January 17, 2001, October 30, 2004 and January 10, 2005, OWCP denied that appellant sustained a recurrence of total disability on November 1, 1999. In a May 5, 2005 decision, it denied modification of the June 11, 1999 wage-earning capacity decision. On September 29, 2005 appellant underwent lumbar surgery, and began receiving compensation at the full-time rate, effective October 30, 2005.<sup>3</sup>

On December 8, 2010 appellant, through her representative, requested reconsideration. In a June 14, 2011 decision, OWCP denied modification of the June 11, 1999 wage-earning capacity decision. On December 19, 2011 appellant, again requested reconsideration. Her representative asserted that the June 11, 1999 decision was in error because the position on which the decision was based was for four hours a day and the duties were “makeshift work” and “odd lot.” He further asserted that appellant’s medical condition had worsened when she stopped work on November 1, 1999, as shown by having a morphine pump placement on May 17, 2000 and that the condition eventually necessitated the lumbar surgery on September 29, 2005. Appellant’s representative submitted supportive medical evidence. In a merit decision dated January 30, 2012, OWCP denied that appellant sustained a recurrence of disability on November 1, 1999.

As noted above, OWCP issued a formal decision on appellant’s wage-earning capacity on June 11, 1999. It is well established that a claimant may establish that a modification of a wage-earning capacity is warranted if there is a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.<sup>4</sup> Appellant’s submission of a claim for total disability compensation beginning November 1, 1999 should thus be regarded as a request for modification of the wage-earning capacity determination. The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>5</sup> OWCP issued decisions on May 5, 2005 and June 14, 2011 denying modification of the June 11, 1999 wage-earning capacity determination. However, while its January 30, 2012 decision acknowledged that a formal wage-earning capacity determination was in place, OWCP adjudicated the claim for total disability beginning November 1, 1999 as a recurrence claim.

OWCP procedures cover the situation when a claimant has completely stopped working.<sup>6</sup> The principle is equally applicable to a claim of increased disability which would prevent a claimant from performing the position that was the basis of the wage-earning capacity

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<sup>3</sup> In an October 30, 2007 decision, OWCP found that appellant was at fault in creating an \$11,477.54 overpayment of compensation because she was paid compensation at the augmented rate for the period February 28, 1999 through June 9, 2007 when she had no dependents. In a September 21, 2009 decision, Docket No. 08-1642, the Board found that she received the \$11,477.54 overpayment but that she was without fault in creating the overpayment. The case was remanded for OWCP to consider appellant’s eligibility for waiver. On April 1, 2010 OWCP denied waiver of the overpayment and set a repayment schedule at \$100.00 each compensation period.

<sup>4</sup> *P.C.*, 58 ECAB 405 (2007).

<sup>5</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

determination.<sup>7</sup> The June 11, 1999 wage-earning capacity decision was based on appellant's capacity to earn wages in a part-time modified clerk position. With the December 8, 2010 reconsideration request, appellant asserted that the June 11, 1999 decision was in error because it was a makeshift position and also submitted medical evidence regarding the argument that the accepted conditions had worsened such that she became totally disabled on November 1, 1999.

The Board finds that OWCP should have adjudicated appellant's claim for total disability compensation as whether she had established that the wage-earning capacity determination should be modified.<sup>8</sup> The Board will therefore remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.

**IT IS HEREBY ORDERED THAT** the January 30, 2012 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: November 26, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>7</sup> *D.G.*, Docket No. 10-1666 (issued May 12, 2011).

<sup>8</sup> *F.B.*, Docket No. 09-99 (issued July 21, 2010).