



She stopped work on June 3, 1996 and did not return. OWCP accepted the claim for aggravation of preexisting spondylolisthesis; herniated disc at C5-6; mood disorder in conditions classified elsewhere; other psychogenic pain; and other specified transient mental disorder in conditions classified elsewhere. It authorized compensation for total disability.

By decision dated November 19, 2007, OWCP determined that appellant could perform the duties of a telephone representative. It reduced her compensation effective November 25, 2007 to reflect her wage-earning capacity in this constructed position. The weight of medical evidence was given to the May 31, 2006 report of Dr. Michael Sellman, a Board-certified neurologist selected as the impartial medical specialist, who found that appellant reached maximum medical improvement from the disabling residuals of her work injury. He advised that the injury to her cervical spine had resolved and, while she continued to have low back pain, she was able to work within specified restrictions. Appellant could not lift heavy objects or bend for a prolonged period of time. Dr. Sellman found that a large percentage of appellant's low back pain was aggravated by the consequence of aging and her preexisting psychiatric problems amplified her physical problems.

On December 10, 2007 appellant requested a hearing before an OWCP hearing representative, which was held on April 8, 2008. By decision dated June 11, 2008, the hearing representative affirmed the November 19, 2007 decision finding that the selected position of telephone representative was vocationally suitable and appropriate to her physical condition and vocational capabilities. The position was also reasonably available within appellant's commuting area. The hearing representative found that there was no medical evidence which established her inability to perform the selected position of telephone representative.

On January 28, 2013 OWCP received an inquiry from appellant's senator concerning her claim and a January 20, 2013 letter from her detailing her case. In a February 1, 2013 letter, it advised appellant that since a formal LWEC was issued on November 19, 2007 any claim for increased compensation would be adjudicated as a claim for modification of the LWEC decision. Appellant was informed of the three criteria to warrant modification of a formal LWEC decision and provided her 30 days to submit additional relevant information.

The record reflects that appellant saw Dr. Mark A. Cohen, a Board-certified orthopedic surgeon, on August 8, 2012. She was diagnosed with grade 1 to 2 spondylolisthesis at L5-S1 and degenerative disc disease at L5-S1. Dr. Cohen opined that appellant's lumbar conditions were related to the March 22, 1996 work injury. In an August 14, 2012 work capacity evaluation, he advised that she reached maximum medical improvement and could work sedentary duty eight hours a day with restrictions.

On September 13, 2012 appellant was seen at a hospital emergency room for acute exacerbation of chronic low back pain.

In a September 19, 2012 report, Dr. Cohen reiterated the impression of grade 1 to 2 spondylolisthesis at L5-S1 with degenerative disc disease at L5-S1 related to the work injury from March 22, 1996. A magnetic resonance imaging (MRI) scan of the lumbar spine was recommended as well as a custom back brace. On November 14, 2012 appellant underwent a lumbar spine MRI scan of lumbar spine.

In November 21, 2012 report, Dr. Cohen reported findings on examination and reviewed the MRI scan. He listed impression of grade 1 to 2 spondylolisthesis at L5-S1 with degenerative disc disease and a bulging disc.

In a January 11, 2013 report, Dr. Joseph K. Jamaris, a Board-certified neurosurgeon, saw appellant in neurosurgical consultation at the request of Dr. Cohen. She reported a history of injury that on March 22, 1996 she injured her neck and back by lifting mail. Appellant had not been able to return to work since. Dr. Jamaris described her symptoms and treatment. On physical examination, he noted a hyperlordotic posture with tenderness in the LS junction; moderate difficulty in changes of mechanical position; complaints in the buttock, thigh and calf in both legs on straight leg raising; unremarkable rotation of the hips; bilateral sacroiliac hypethesis; mild weakness of the plantar flexors; nearly absent ankle reflexes; and preserved knee reflexes. Dr. Jamaris reviewed the November 14, 2012 lumbar MRI scan, noting anterolisthesis and bilateral pars defects. He diagnosed preexisting pars defects and resultant spondylolisthesis and lumbar musculoligamentous spasm from spinal instability and bilateral lumbar radiculopathy. Dr. Jamaris recommended surgery and injections and concluded that appellant could not work.

In an April 3, 2008 letter to Dr. Cohen, appellant expressed her disagreement with his conclusion that she could return to the workforce. She described frequent pain in the lower and upper back and hips. Appellant's knee was also injured in a September 7, 2007 auto accident. She noted that she was diagnosed with depression.

In an April 15, 2013 letter, appellant described her treatment by Dr. Cohen since 2007 and the change in her medical conditions. She also discussed her financial status.

By decision dated May 23, 2013, OWCP denied modification of the November 19, 2007 wage-earning capacity determination.

On August 9, 2013 OWCP received appellant's August 6, 2013 letter requesting reconsideration. She submitted a copy of Dr. Jamaris' January 11, 2013 report together with a July 24, 2013 report from Dr. Cohen, noting his agreement with the findings by Dr. Jamaris.

By decision dated August 28, 2013, OWCP denied modification of the 2007 wage-earning capacity determination.

### **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.<sup>2</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>3</sup>

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<sup>2</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>3</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

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>4</sup> The burden of proof is on the party attempting to show that modification of the wage-earning capacity determination is warranted.<sup>5</sup>

### ANALYSIS

OWCP accepted an aggravation of preexisting spondylolisthesis; herniated disc at C5-6 and several psychological conditions. On November 19, 2007 it determined that she could perform the duties of a telephone representative and reduced her monetary compensation to reflect her wage-earning capacity in the constructed position. By decision dated June 11, 2008, OWCP affirmed the November 19, 2007 LWEC decision. The issue is whether appellant established that the November 19, 2007 LWEC decision should be modified.

Appellant did not allege that the initial wage-earning capacity determination was issued in error, that she had been retrained or otherwise vocationally rehabilitated. The issue is whether there has been a material change in her work-related condition that rendered her unable to perform the duties of the constructed position. This is primarily a medical question.<sup>6</sup>

Appellant submitted several letters in which she argued that her medical condition rendered her totally disabled. The issue of whether there has been a material change in her work-related condition is a medical determination and may only be resolved by probative medical evidence.<sup>7</sup>

In a January 11, 2013 report, Dr. Jamaris noted that appellant had preexisting pars defects and resultant spondylolisthesis. He obtained a history that she had an onset of symptoms 16 years prior after an event at work. Dr. Jamaris explained that appellant's current symptom complex was of lumbar musculoligamentous spasm from instability and lumbar radiiculopathy. He concluded that she would require L5 laminectomy and fusion. Dr. Jamaris was provided a history of injury occurring on March 22, 1996, implying a traumatic incident. OWCP accepted that the occupational job factor of lifting mail occurred over more than one workday. Additionally, Dr. Jamaris did not provide sufficient explanation as to how the worsening of appellant's accepted aggravation of preexisting spondylolisthesis, caused her diagnosed lumbar radiculopathy in 2013 or the need for L5 laminectomy surgery. He did not explain how she sustained a material change due to the accepted condition of aggravation of spondylosthesis. While Dr. Jamaris opined that appellant could not work in 2013, he did not offer an opinion explaining her inability to perform the sedentary duties of the selected telephone representative

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<sup>4</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *F.B.*, Docket No. 10-99 (issued July 21, 2010); *Selden H. Swartz*, 55 ECAB 272 (2004); *Phillip S. Deering*, 47 ECAB 692 (1996).

<sup>7</sup> *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

position. Dr. Jamaris' opinion on total disability is unrationalized and does not support modification of the LWEC determination.

The September 13, 2012 hospital emergency room report fails to provide an opinion on whether appellant was totally disabled due to her accepted work-related conditions or how her accepted work-related conditions had materially changed. Dr. Cohen opined that she had grade 1 to 2 spondylolisthesis at L1-S1 with degenerative disc disease at L5-S related to the work injury of March 22, 1996. In his August 14, 2012 work capacity evaluation, he found that appellant could work sedentary duty for eight hours a day with restrictions. In a July 24, 2013 report, Dr. Cohen stated his agreement with the January 11, 2013 report of Dr. Jamaris, but he failed to provide sufficient explanation or objective findings to explain the change in her disability status or how her accepted work-related conditions had materially changed. As such, Dr. Cohen's reports are insufficient to establish modification of the LWEC determination.

Appellant did not meet her burden of proof to establish a material change in the nature and extent of her injury-related condition, that the 2007 determination was in fact erroneous or that she was vocationally rehabilitated. She failed to establish that the November 19, 2007 LWEC decision should be modified.

On appeal, appellant argues that the current medical evidence of file supports that she is totally disabled. For the reasons noted, the Boards finds that she did not meet her burden of proof. Appellant may request modification of the LWEC 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 modification of the 2007 LWEC determination was warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2014  
Washington, DC

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

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

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