



had the capacity to earn wages in the constructed position of security surveillance monitor.<sup>3</sup> The facts and findings contained in the Board's prior decision are incorporated by reference. The facts germane to the present appeal are set forth.

On October 23, 2013 appellant through her attorney requested reconsideration. Appellant noted that on September 23, 2013 OWCP accepted additional conditions as work related in a separate compensation claim, file number xxxxxx187. Under that claim, OWCP accepted lumbar sprain, degeneration of lumbar or lumbosacral intervertebral disc and facet arthropathy of the lumbar spine. Appellant asserted that she was unable to perform the duties of the constructed position of security surveillance monitor due to the newly accepted conditions. She submitted a copy of the September 20, 2013 letter of acceptance.

In a January 6, 2014 decision, OWCP denied modification of the August 14, 2013 decision finding that appellant failed to establish that the original wage-earning capacity determination was in error or that she has been trained or vocationally rehabilitated, or that her accepted condition in file number xxxxxx355 had materially worsened.

### **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>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</sup> OWCP's regulations provide that, if OWCP issues a formal loss of wage-earning capacity determination, including a finding of no loss of wage-earning capacity, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP.<sup>6</sup> In this instance, the claims examiner will

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<sup>3</sup> On or before January 7, 2006 appellant, a distribution clerk, sustained injury to her hands. OWCP accepted for left trigger finger (acquired) and bilateral tenosynovitis in file number xxxxxx355. Appellant worked modified duty eight hours a day with a lifting restriction. In a July 7, 2010 work capacity evaluation, Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon and OWCP referral physician, advised that appellant could work full time within certain restrictions. A November 10, 2010 functional capacity evaluation (FCE) showed that she could perform light duty for eight hours a day within restrictions. On November 17, 2010 appellant was referred for vocational rehabilitation services and completed vocational testing on December 3, 2010. On January 10, 2011 Dr. Fong agreed with the FCE results and reiterated that appellant could work full time, light duty. In October 2011, a vocational rehabilitation counselor identified positions that included security surveillance monitor as within appellant's physical limitations. She advised that the position was reasonably available in the local labor market and noted its wage level. On November 10, 2011 appellant completed a one-day training class at The Loss Prevention Group on the power to arrest, weapons of mass destruction and terrorism awareness. Appellant participated in 90 days of placement services but was not offered a job. In a July 26, 2012 decision, OWCP reduced appellant's wage-loss compensation effective July 29, 2012 based on her capacity to earn wages as a security surveillance monitor.

<sup>4</sup> *D.M.*, 59 ECAB 164 (2007).

<sup>5</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

<sup>6</sup> 20 C.F.R. § 10.511. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.2(a) (June 2013).

need to evaluate the request to determine whether one of the three criteria for modification has been met.<sup>7</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 rating was in error.<sup>8</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>9</sup>

### ANALYSIS

OWCP accepted left trigger finger (acquired) and bilateral tenosynovitis. Appellant worked modified duty eight hours a day with a lifting restriction of four pounds. By decision dated July 26, 2012, OWCP reduced her wage-loss compensation effective July 29, 2012 based on her capacity to earn wages as a security surveillance monitor. The question is whether appellant established that the July 26, 2012 wage-earning capacity decision should be modified.

After OWCP found that appellant could perform the duties of a security surveillance monitor, the pertinent medical issue is whether there had been any change in her condition that would render her unable to perform those duties.<sup>10</sup> For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.<sup>11</sup> Appellant did not submit any medical evidence. Rather, she submitted an OWCP acceptance of additional conditions under a separate compensation claim, file number xxxxxx187. This evidence submitted after the loss of wage-earning capacity determination, pertaining to a separate claim, does not address why appellant could not perform the duties of the position of a security surveillance monitor.

Appellant did not allege that the original wage-earning capacity determination was erroneous or that she had been retrained or otherwise vocationally rehabilitated. She has contended that based upon the newly accepted conditions in an unrelated claim, she was not able to perform the duties of security surveillance monitor. The record does not contain medical evidence establishing that appellant's accepted work-related conditions, left trigger finger and bilateral tenosynovitis, materially changed or that she was now unable to perform the security surveillance monitor duties. Appellant's contentions do not meet the criteria for modifying a formal loss of wage-earning capacity determination. The evidence does not establish that her accepted work-related medical condition has materially changed, that the original wage-earning

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<sup>7</sup> Federal (FECA) Procedure Manual, *id.*, at 2.1501.3. See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>8</sup> See *id.*; *D.M.*, *supra* note 4; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>9</sup> Federal (FECA) Procedure Manual, *id.*, at 2.1501.4 (June 2013). See *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

<sup>10</sup> *Phillip S. Deering*, 47 ECAB 692 (1996).

<sup>11</sup> *Id.*

capacity determination was in error or that she had been retrained or otherwise vocationally rehabilitated.

For these reasons, appellant has not established that the July 26, 2012 wage-earning capacity determination should be modified.

Appellant 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 OWCP properly denied modification of the established July 26, 2012 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 6, 2014 is affirmed.

Issued: August 15, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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