

bilateral S1 joint dysfunction causally related to her federal employment as a mail processor. Appellant received compensation for total disability as of February 3, 2010. OWCP found that a conflict in the medical evidence with respect to employment-related work restrictions and Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, was selected as a referee physician. It issued a wage-earning capacity determination dated January 24, 2011, finding that the constructed position of customer service representative at \$480.00 per week represented appellant's wage-earning capacity. An April 23, 2009 report from Dr. Sabin was found to represent the weight of medical opinion. The Board remanded the case, noting that there was no evidence of record to establish that he was properly selected as a referee physician. The history of the case as provided in the Board's prior order is incorporated herein by reference.

On August 14, 2012 appellant underwent lumbar surgery performed by Dr. Jeffrey Kleiner, a treating orthopedic surgeon. She filed a claim for compensation (Form CA-7) commencing August 14, 2012. By letter dated August 29, 2012, OWCP advised appellant that the surgery was authorized. Since the record showed that her condition had worsened, she would receive compensation for total disability commencing August 14, 2012. Appellant continues to receive compensation for total disability.

With respect to the selection of Dr. Sabin, the record contains an October 31, 2012 memorandum from the medical scheduler. The scheduler stated that on March 25, 2009 she entered information regarding appellant's case unto the Physician's Directory System (PDS) and the system selected Dr. Sabin. According to the scheduler, no other physicians were bypassed as Dr. Sabin was the first name that was selected. The record also contains a copy of a print screen indicating no bypasses were found.

By decision dated December 21, 2012, OWCP found that the prior wage-earning capacity determination dated January 24, 2011 remained valid. Based on the evidence found that there was no basis to modify the determination.

Appellant, through her representative, requested a hearing before an OWCP hearing representative that was held on May 6, 2013. She argued that OWCP had just reissued the decision that the Board had found was improper. In addition, appellant argued that Dr. Sabin's report was stale; that he did not consider all employment-related conditions and the job description did not provide the required hours of sitting, walking and standing. She argued that it was not clear from the vocational rehabilitation counselor whether the availability of jobs referred to the selected customer service representation position or to a receptionist position.

By decision dated July 24, 2013, the hearing representative affirmed the December 21, 2012 decision. The hearing representative found that Dr. Sabin was properly selected referee as the physician. Further, no error in the original wage-earning capacity determination was established.

LEGAL PRECEDENT

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS

The factual history indicates that, as of August 14, 2012, appellant began receiving compensation for total disability and continues to receive such compensation. She received monetary compensation from January 29, 2011 to August 13, 2012 based on a loss of wage-earning capacity. Appellant has argued that the January 24, 2011 wage-earning capacity determination was erroneous and should be modified.

As to the selection of Dr. Sabin, the Board previously noted that record contained only an ME023 sheet that was not sufficient documentation to support selection of Dr. Sabin in 2009. On remand, OWCP provided evidence from the medical scheduler as to the selection of Dr. Sabin. The medical scheduler noted that the PDS was used and that no physicians were bypassed as Dr. Sabin was the first physician that appeared under the PDS rotational selection process. The record also contains a screen shot supporting that no physicians were bypassed.

The prior Board remand was premised on the lack of documentary evidence as to the selection of Dr. Sabin. The record now contains documentation as to the proper selection of Dr. Sabin. The Board finds that he was properly selected as the referee physician in this case.⁵ Having established Dr. Sabin as a referee physician, the next question is whether his report and the medical evidence of record are sufficient to establish that the selected position was medically suitable.

The selected position of customer service representative was a sedentary position with up to 10 pounds of lifting. Although the number of hours of sitting is not specifically noted, appellant had previously stated that the term “sedentary” as found under the *Dictionary of Occupational Titles* Appendix C means “sitting most of the time” but may involve brief periods of standing and walking.⁶

Appellant argued at the May 6, 2013 hearing that Dr. Sabin limited her to five hours of sitting intermittently. The copy in the record of the April 23, 2009 OWCP-5c form Dr. Sabin provided for eight hours with respect to intermittent sitting. This is consistent with his indication that appellant could work eight hours a day, the other restrictions noted (such as up to seven hours lifting of 20 pounds and six hours squatting) and his narrative report. Dr. Sabin did not place restrictions on sitting in the narrative report other than noting that she should change positions approximately every 30 minutes. The selected position was a sedentary position with a 10-pound lifting restriction. Dr. Sabin considered all of appellant’s conditions, whether

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

⁵ *See, e.g., D.F.*, Docket No. 09-1463 (issued August 12, 2010) (OWCP documented the proper selection of the referee physician using the PDS).

⁶ Department of Labor’s *Dictionary of Occupational Titles*, Appendix C, Components of the Definition Trailer.

employment related or not and based his opinion on a complete background. It is well established that when a case is referred to a referee physician for the purpose of resolving a conflict, the opinion of such referee, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁷ The Board finds that the weight of the medical evidence established that the selected position was medically suitable.

The Board also finds that the selected position was properly found to be vocationally suitable and available in appellant's commuting area. The record properly notes that employer contacts were made, the position was found reasonably available in appellant's commuting area and the weekly wages were \$440.00 to \$520.00. There was no probative evidence of error in this regard.

The Board finds that appellant has not established that the original wage-earning capacity determination was erroneous. OWCP followed its procedures and the selected sedentary position was medically suitable. Appellant did not present any probative evidence of a material change in an employment-related condition prior to August 14, 2012. Therefore, the Board finds that she did not meet her burden of proof to establish that a modification of the wage-earning capacity determination was warranted. Appellant did not show that the original determination was erroneous or establish a material change in an employment-related condition warranting modification. The Board notes that she may request modification of a wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not established that the wage-earning capacity determination should be modified.

⁷ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 24, 2013 is affirmed.

Issued: July 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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