



capacity decision and that OWCP met its burden of proof to modify the wage-earning capacity decision on November 29, 2011.<sup>2</sup> The facts of the previous Board decision are incorporated herein by reference.

On August 19, 2013 appellant requested modification of the 1989 wage-earning capacity determination.<sup>3</sup> She asserted that the January 4, 1989 decision was based on an incorrect pay rate and that her employment-related condition had materially worsened. Appellant submitted monthly reports dated July 12, 2012 to October 14, 2013 from Dr. Thomas N. Bernard, Jr., a Board-certified orthopedic surgeon, who provided findings on physical examination, diagnosed degenerative lumbar spondylosis and noted that appellant was not working and in the process of retiring. Dr. Bernard advised that she was disabled from work. On August 5, 2013 he noted that appellant's medical retirement had been approved and in the future he would see her on an as-needed basis. An October 10, 2012 electrodiagnostic study of the lower extremities demonstrated evidence of acute denervation in the left L5-S1 paraspinals with no abnormalities noted in the corresponding left lower extremity myotomes. An October 28, 2013 magnetic resonance imaging (MRI) scan study of the lumbar spine was similar to an August 11, 2011 study. It demonstrated degenerative retrolisthesis of L4 on L5 with underlying spondylosis and no nerve root compression and a shallow noncompressive disc displacement at L3-4.

Appellant also submitted an equal employment opportunity commission decision dated July 24, 2013. The decision found that, under the Rehabilitation Act of 1973 as amended, she met her burden of proof to establish that she was discriminated against at the employing establishment when it failed to accommodate her disability and terminated her from employment in May 2011.

By decision dated November 21, 2013, OWCP denied modification of the wage-earning capacity determination, finding that appellant did not establish a material worsening of the accepted lumbar strain. It noted that the pay rate issue had previously been addressed and that when she stopped work in May 2011, it was the result of a nonwork-related condition.

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<sup>2</sup> Docket No. 13-115 (issued April 16, 2013). On November 19, 1985 appellant, a part-time store worker, sustained low back strain. On September 10, 1986 she sustained a second employment-related low back strain. Appellant returned to part-time work at the commissary as a cashier on July 17, 1988. The 1985 claim was adjudicated by OWCP under file number xxxxxx105 and the 1986 claim under file number xxxxxx322. OWCP doubled the claims. In late 1988 appellant relocated from Hawaii to Georgia and on December 5, 1988 began work, 24 hours a week, at the Fort Benning commissary. By decision dated January 4, 1989, OWCP reduced her compensation benefits, based on her actual part-time earnings as a sales store checker. On May 13, 2006 appellant increased her hours to 40 hours a week. She continued to receive FECA benefits based on the January 4, 1989 wage-earning capacity determination, until November 29, 2011 when OWCP modified her wage-earning capacity to reflect that she had no loss. Appellant had stopped work on May 13, 2011 to undergo shoulder surgery, unrelated to this claim.

<sup>3</sup> On October 10, 2012 appellant requested that her claim be accepted to include a bulging disc L5-S1 disc syndrome and referenced 1986 medical reports. In a letter dated November 16, 2012, OWCP advised her that it was unable to accept the claimed condition, noting that the letter was not a final decision and informed her that she could request a formal decision. On December 15, 2012 appellant requested a hearing from the November 16, 2012 correspondence. On January 4, 2013 the Branch of Hearings and Review informed her that, as the November 16, 2012 correspondence was informational and not a formal decision, the case was not in posture for a hearing.

## 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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup> Section 10.511 of OWCP regulations provide that if a formal loss of wage-earning capacity (LWEC) decision has been issued, the rating is left in place until that determination is modified by OWCP. Modification is only warranted where the party seeking modification establishes 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>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup> In addition, Chapter 2.1501 of OWCP procedures contains provisions regarding the modification of a formal loss of wage-earning capacity.<sup>7</sup>

Applicable case law and OWCP procedures require that once a formal wage-earning capacity decision is in place, 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>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

Appellant requested modification of the January 4, 1989 wage-earning capacity determination on August 19, 2013. She asserted that the decision was based on an incorrect pay rate and that her employment-related condition had materially worsened.

Appellant's attending orthopedic surgeon, Dr. Bernard submitted monthly reports dated from July 12, 2012 to October 14, 2013. He diagnosed degenerative lumbar spondylosis. An October 10, 2012 electrodiagnostic study of the lower extremities demonstrated evidence of acute denervation in the left L5-S1 paraspinals and an October 28, 2013 MRI scan study demonstrated degenerative changes and a disc displacement at L3-4. The Board notes that subsequently acquired conditions are not considered in determining wage-earning capacity.<sup>10</sup>

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<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>5</sup> 20 C.F.R. § 10.511.

<sup>6</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> *See John D. Jackson*, 55 ECAB 465 (2004).

The Board therefore finds that Dr. Bernard's reports and the diagnostic studies do not establish appellant's accepted 1985 and 1986 low back strains materially worsened such that the wage-earning capacity determination should be modified.

As the medical evidence submitted by appellant does not adequately explain a material worsening of her accepted low back strains, it is insufficient to establish that she was unable to perform her work duties beginning May 13, 2011 when she stopped work.<sup>11</sup>

Appellant, however, also asserted that the January 4, 1989 wage-earning capacity determination was based on an incorrect pay rate. In a July 11, 2012 decision, an OWCP hearing representative stated:

"It first appears that the January 4, 1988 LWEC determination was erroneous as it was not based on a correct pay rate. By letter dated December 21, 1988, the employing establishment advised that the claimant was initially being paid at the GS-03/01 level until they receive her Official Personnel Folder, at which time a pay adjustment can be made. [OWCP] proceeded to base its LWEC determination on the claimant's actual earnings at the GS-3/1 pay rate. With its December 6, 2006 letter, the employing establishment submitted a table/overview of the claimant's SF-50s from her Official Personnel File. This record shows that after initially being paid at the GS-3/1 rate, the claimant received a pay retention entitlement effective December 4, 1988 and began being paid effective that date at the GS-3/9 pay rate. Thus, the January 4, 1988 LWEC, instated of being based on the GS-3/1 rate of \$12,038 per year, should have been based on the claimant's actual earnings at the GS-3/9 rate of \$15,875 per year."

In its November 21, 2013 decision denying modification of the January 4, 1989 wage-earning capacity determination, OWCP stated that the pay rate issue had previously been addressed. The record, however, does not establish that following the July 11, 2012 hearing representative decision, OWCP has not made any further determination as to whether appellant was compensated properly. As OWCP did not adjudicate whether appellant was compensated properly following the July 11, 2012 decision, the Board finds the case is not in posture for decision regarding whether the January 4, 1989 wage-earning capacity determination relied on an erroneous payrate. The Board will set aside the November 21, 2013 OWCP decision and remand the case for further development regarding the pay rate issue. Following further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's request for modification.<sup>12</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for decision. Further development is warranted on whether appellant was compensated at the correct rate.

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<sup>11</sup> P.C., 58 ECAB 504 (2007).

<sup>12</sup> The Board, however, notes that appellant continued to receive compensation after her return to work 40 hours a week in May 2006 until November 2011.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 21, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: October 6, 2014  
Washington, DC

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

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

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