

places where this employment was available would exceed the restrictions set by the physicians; that the cost of commuting to the position would exceed her income from stated position; that she did not have the physical, mental capacity, or training to perform the constructed telemarketer position; and that she required frequent breaks, which would make her unable to effectively compete for the telemarketer position. She denied that her activities in her personal life, which included raising horses and kayaking, involved extensive physical effort.

FACTUAL HISTORY

This case has previously been before the Board. A review of the facts shows that on September 18, 1990 appellant, then a 34-year-old forestry technician, filed a traumatic injury claim alleging that, while changing a tire on a vehicle on April 17, 1990, the weight of the tire hurt her lower back. OWCP accepted her claim for lumbosacral strain, herniated disc L4-5, and subsequent microsurgical discectomy. Appellant made several attempts to return to work, but has not worked for the employing establishment since May 27, 1992.

In a March 19, 2012 work capacity evaluation, Dr. Fred G. McQueary, a Board-certified orthopedic surgeon, stated that appellant will not be able to work because of a recurrent spasm that occurs after she is up for an extended period of time. He then noted that her average workday should be six hours at a maximum and may need to be limited to four hours on some days. Dr. McQueary noted that appellant had a degenerative process and will establish a tendency to become progressively more severe over time. He did not feel that she will improve enough to return to a physically demanding job. Dr. McQueary limited appellant to 2 hours and 30 minutes of sitting, 1 hour of standing, and 4 hours each of walking, reaching, and operating a motor vehicle. In a January 2, 2003 letter, he indicated that he believed that she should have the option of having a break every hour or so. Dr. McQueary indicated that this may not always be necessary but on the days that appellant is having more spasms, the flexibility of having such a break will allow her to maintain her employability.

Appellant was referred to vocational rehabilitation. In a September 2, 2004 report, the vocational rehabilitation specialist indicated that she was capable of working as a telemarketer. The position of telemarketer was described as:

“Solicits orders for merchandise or services over telephone. Calls prospective customers to explain type of service or merchandise offered. Quotes prices and tries to persuade customer to buy, using prepared sales talk. Records names, addresses, purchases, and reactions to prospects solicited. Refers orders to other workers for filing. Keys data from order card into computer, using keyboard. May develop lists of prospects from city and telephone directories. May type report on sales activities. May contact driver, sales route to arrange delivery of merchandise.”

The vocational rehabilitation specialist noted that the position was available full time and referred OWCP to job searches conducted in 2003 for indications of area state employment offices and direct employing establishment contact. He indicated that the job was being performed in sufficient numbers to make it reasonably available to the claimant within appellant’s commuting area, and indicated that this was confirmed with the state employment

service representative in Jefferson City, Missouri. On November 4, 2004 OWCP received a new version of the September 2, 2004 report, wherein the vocational rehabilitation specialist indicated that the position of telemarketer was available both full time and part time.

In a January 4, 2006 memorandum to file, a vocational rehabilitation specialist noted that Dr. McQueary indicated that appellant can sit 2.5 hours at a time with a break every 30 to 60 minutes. He noted that appellant's permanent work restrictions, specifically being able to sit up to 2.5 hours at a time, change position and stand at will at a telemarketing station while talking on headset, and the fact that she could work four hours a day allow her to work as a telemarketer and to remain within restrictions. On January 4, 2006 OWCP received a portion of an unsigned report indicating that positions were available as a telemarketer in Kansas City, Missouri and Lawrence, Wichita, and Topeka, Kansas. It also received handwritten notes identifying certain positions as a telemarketer.

In a decision dated December 14, 2004, OWCP reduced appellant's compensation based on her ability to earn wages as a telemarketer working 20 hours a week. It noted that the vocational counselor stated that the position was within her commuting area. OWCP noted that the Springfield Metropolitan Statistical area includes a five county area with a population of 385,000 people. It noted that appellant relocated to a rural area outside of Ava, Missouri with a population of 11,000 approximately 38 miles from Ozark, Missouri, which is a city of 12,000 and included in the metropolitan area of Springfield. OWCP noted that she lives approximately 52 miles from the southeast side of Springfield, and that commuting to work in the Springfield area would not be unreasonable.

In a December 20, 2004 work capacity evaluation, Dr. Nancy Hayes, a family practitioner, indicated that appellant could work two hours sitting, one hour standing and four hours each walking and reaching. She indicated that appellant could operate a motor vehicle to and from work 30 minutes each way and required 30-minute breaks every 1 to 2 hours.

In a January 4, 2005 memorandum to file, Leslie Nelson, a vocational rehabilitation specialist, indicated that appellant's restrictions as set forth by Dr. McQueary on March 19, 2002 indicate that she can sit 2.5 hours at time and that she needs a break every 30 to 60 minutes. He noted that he contacted telemarketing offices and was told that a telemarketer was provided a handset or a regular telephone with handset that the workstation generally is a cubicle, that the worker has the ability to stand up, sit down, change position, and move around the workstation at will while talking on the telephone. Mr. Nelson noted that workers are provided at least one break in the morning and an afternoon and a lunch break and that they may have more breaks depending on the job. He indicated that appellant's permanent work restrictions, specifically being able to sit for 2.5 hours at a time, the ability to change position and stand at will at a telemarketing station while talking on the headset performing the job, and the fact that she is only released to work 4 hours a day, allow her to stay within work restrictions. Mr. Nelson listed several places he called that had telemarketing positions available in Kansas City, Missouri and Wichita and Topeka, Kansas.

In a letter from appellant dated March 29, 2007, she listed several telemarketer positions within 75 miles from her home and argued the reasons that these positions were not suitable,

including that they would not allow her to walk around, that they required skills or experience that she did not have or they required her to work more than 20 hours a week.

OWCP referred appellant to Dr. Todd J. Harbach, a Board-certified orthopedic surgeon, for a second opinion. In a July 10, 2008 report, Dr. Harbach assessed her with intractable low back pain status post an accepted on-the-job injury while working as a fire firefighter in 1990; status post left-sided L5-S1 microlumbar discectomy that has been successful with near complete resolution of her left lower extremity pain and some residual paresthesias in an S1 distribution with mild scar entrapped left S1 nerve root; and multilevel lumbar degenerative disc disease. He recommended a functional capacity evaluation. Dr. Harbach did not think that appellant was capable of performing the jobs required of a firefighter, but opined that she was certainly able to perform some sort of employment. He did note that she would have a hard time driving or commuting a long distance to go to work, and opined that any distances more than 30 minutes would give her difficulties and that she should probably not be required to travel more than that. Dr. Harbach noted that appellant certainly could move to a different area for a different government job if one became available and could be retained with clerical skills to accomplish that. In his work capacity evaluation, he indicated that she was unable to perform her usual work, but could work with restrictions of two to four hours each sitting, walking, and standing and that she could operate a motor vehicle at work for one hour and to and from work for one hour. Dr. Harbach noted that appellant will need breaks of 15 minutes three times in an 8-hour shift.

In a decision dated November 15, 2007, OWCP further reduced appellant's compensation, as it used incorrect figures to compute her compensation. Appellant requested reconsideration. In decisions dated November 12, 2008, September 11, 2009, and November 2, 2010, OWCP denied modification of its decisions after conducting a merit review. By decision dated November 16, 2011, it denied appellant's request for reconsideration as it was untimely and failed to establish clear evidence of error.

In a January 23, 2012 report, Dr. Michael Ball, an osteopath, stated that appellant had multilevel degenerative disc disease. He noted that she will never be able to perform the firefighting job she had at the time of injury and that she had permanent restriction from her low back. Dr. Ball noted that appellant required frequent breaks so that she can lie down and reduce the load on the spine regardless of what type of activity she engages in. He further noted that she required frequent position changes from sitting to standing and walking. In an attached work capacity evaluation, Dr. Ball indicated that appellant could operate a motor vehicle to and from work for 30 minutes and could operate a motor vehicle at work for 3 hours. He noted that she could sit for three hours, walk for four hours, and stand for one hour. Dr. Ball noted that appellant required 30-minute breaks every 30 to 60 minutes.

On April 16, 2012 appellant requested reconsideration. She argued that the commuting time to the telemarketer jobs was too long as evinced by Dr. Ball's January 23, 2012 report. Appellant also argued that in 2008, Dr. Harbach stated that her commuting time should not be over 30 minutes one way. She also argued that the pay rate was not set based on jobs in her area.

By decision dated August 3, 2012, OWCP denied reconsideration without conducting a merit review. However, on October 21, 2013, the Board issued an order remanding this case.

The Board found that OWCP should have adjudicated the issue of modification of the LWEC determination.²

By letter dated January 15, 2014, appellant again argued that OWCP's LWEC determination should be modified as the commute to the telemarketer positions was far too long, her restrictions preclude her from competing in an open market, and the wages used to determine her LWEC were incorrect.

By decision dated February 18, 2014, OWCP determined that appellant had not submitted sufficient evidence to modify LWEC decisions of December 14, 2004 and November 15, 2007.

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.³ OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.⁴ The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.⁷ Accordingly, the evidence must establish that the jobs in the position selected or determining wage-earning capacity are reasonably available in the general labor market in the commuting area where the employee lives.⁸

² Docket No. 13-649 (issued October 21, 2013).

³ *Katherine T. Kreeger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501 (June 2013).

⁵ *Id.* at § 2.1501.3(a).

⁶ *R.E.*, Docket No. 14-1217 (issued October 6, 2014).

⁷ *T.B.*, Docket No. 14-1529 (issued December 4, 2014).

⁸ *J.O.*, Docket No. 10-785 (issued September 21, 2011).

ANALYSIS

OWCP accepted appellant's claim for lumbosacral strain, herniated disc L4-5, and subsequent microsurgical discectomy. In a decision dated December 14, 2004, it reduced her compensation based on her ability to earn wages as a telemarketer working 20 hours a week. This decision was modified on November 15, 2007 as OWCP found that incorrect figures were used to compute appellant's compensation. OWCP most recently denied her request for a modification of LWEC in its February 18, 2014 decision.

The Board finds that the original LWEC determination was in error, as it was never established that the position of telemarketer was available within appellant's reasonable commuting distance. Appellant lives outside of Ava, Missouri, a rural area. The vocational rehabilitation counselor first noted that the telemarketer position was suitable in a September 2, 2004 report. In that report, he stated that the position was available in appellant's commuting area, and for support referenced job searches that he conducted in 2003. However, the vocational counselor's 2003 reports were prepared for the positions of cashier 2, security guard, and recreational leader.

In its December 14, 2004 decision on LWEC, OWCP noted that appellant was approximately 38 miles from Ozark, Missouri and was 52 miles from the southeast side of Springfield, Missouri.

Furthermore, subsequent to OWCP's December 14, 2004 LWEC decision, a December 20, 2004 work capacity evaluation by Dr. Hayes indicated that appellant could operate a motor vehicle to and from work for only 30 minutes. Thereafter, the vocational counselor submitted a January 4, 2006 report which concluded that positions for telemarketer and sales representatives were available in *inter alia*, Wichita and Topeka, Kansas, as well as Kansas City, Missouri. All of these positions were further from appellant's residence than Springfield, Missouri, and all involved a commute outside of the 30 minutes time period for commuting recommended by Dr. Hayes.

In a July 28, 2008 report, Dr. Harbach, the second opinion physician, agreed that appellant could not commute longer than 30 minutes each way. In a January 23, 2012 report, Dr. Paul also indicated that appellant could only operate a motor vehicle to and from work for 30 minutes. Although OWCP determined that the position of telemarketer was suitable it did not properly discuss appellant's ability to commute. The proposed employment, a commute which appears to involve driving considerably further than 30 minutes each way. Therefore, OWCP was in direct controversion of Drs. Hayes, Harbach, and Paul's opinions relative to the ability of appellant to go to, and return from her proposed worksite. OWCP, thus, did not meet its burden of proof in reducing appellant's compensation.⁹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof when it made its LWEC determination.

⁹ *L.D.*, Docket No. 12-816 (issued April 9, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensations Programs dated February 18, 2014 is reversed.

Issued: May 12, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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