



posthemorrhage anemia, forehead open wound, and foot/toe abrasion. It began paying compensation for temporary total disability on December 31, 1995.

By decision dated June 9, 2008, OWCP reduced appellant's compensation effective June 10, 2008 as the selected position of cashier/checker (retail trade) represented her wage-earning capacity. It found the position was medically and vocationally suitable and reasonably available in her commuting area. OWCP further found the physical requirements of this job were within her medical restrictions of lifting up to 30 pounds limited to four hours a day and no climbing and squatting, occasional twisting and bending/stooping, and change positions sitting/standing.

This case has previously been before the Board.<sup>2</sup> In a July 21, 2010 decision, the Board found that appellant's reconsideration request dated May 14, 2009 was a request for modification of the June 9, 2008 wage-earning capacity determination. The Board remanded the case for OWCP to adjudicate this issue.<sup>3</sup> In a March 6, 2012 decision, the Board affirmed OWCP's June 15, 2011 decision finding that appellant had failed to meet her burden of proof to establish a modification of the June 9, 2008 wage-earning capacity determination.<sup>4</sup> The facts of the case contained in the Board's prior decisions are incorporated herein by reference.

Appellant again requested modification of the June 9, 2008 loss of wage-earning capacity decision.

In a February 6, 2014 report, Dr. Paul Maynard, a Board-certified orthopedic surgeon, noted the history of injury and that appellant had chronic anterior pelvic pain which she stated had progressively worsened. He noted findings on examination of hip gait antalgic both sides, full weight bearing no assistive devices, insignificant interval rotation of neither hip nor strength well maintained. Dr. Maynard also reviewed x-rays which revealed bilateral end stage osteoarthritis of the hips. The following assessments were provided: arthritis of hip; malunion; and nonunion of fracture of the pelvis. Dr. Maynard indicated that appellant could proceed with hip replacement to help with the pain. He further indicated that the malunion and nonunion of fracture was an ongoing, progressively worsening degeneration. Dr. Maynard opined that this would continue to worsen with time even if appellant proceeded with surgical treatment of her hips. He recommended activities as tolerated. Dr. Maynard further opined that appellant was not capable of working a full-time eight-hour shift given the degree of pathology.

On February 14, 2014 OWCP provided appellant the criteria for modification of a formal loss of wage-earning capacity decision and provided an explanation as to the deficiencies in Dr. Maynard's February 6, 2014 report. It advised that Dr. Maynard's report did not establish a

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<sup>2</sup> Docket No. 05-1315 (issued January 24, 2006). In a January 24, 2006 decision, the Board reversed OWCP's August 18, 2004 and February 22, 2005 decisions finding that OWCP had improperly reduced appellant's compensation to zero for refusal to participate in vocational rehabilitation.

<sup>3</sup> Docket No. 10-99 (issued July 21, 2010).

<sup>4</sup> Docket No. 11-1603 (issued March 6, 2012). The subject matter reviewed in the Board's prior decision is *res judicata* and is not subject to further consideration. See *L.K.*, Docket No. 14-1722 (issued September 29, 2015).

change in appellant's functional ability due to continued residuals of her work-related condition. Appellant was afforded 30 days to provide medical evidence to meet such criteria.

On March 13, 2014 OWCP received an undated handwritten statement from appellant, a duplicate copy of Dr. Maynard's February 6, 2014 report, and a February 11, 2014 note from Dr. Maynard referring appellant to a physician at Saint Louis University Hospital for her pelvic fracture malunion.

By decision dated May 8, 2014, OWCP denied modification of the June 9, 2008 loss of wage-earning capacity determination.

On August 8, 2014 OWCP received appellant's request for reconsideration of the May 8, 2014 decision. Evidence received in support of the reconsideration request included: one compact disc of appellant's spine films; a copy from a medical journal regarding scoliosis-spinal deformity; her July 31, 2014 statement noting her disagreement with OWCP's decision and her explanation of the evidence submitted; a May 15, 2014 note regarding appellant's appointment with Dr. John A. Boudreau, a Board-certified orthopedic surgeon.

OWCP also received June 4 and 5, 2014 notes from Dr. Boudreau. Dr. Boudreau reported that appellant had a history of pelvic right fracture sustained in 1995 that was treated nonoperatively. Appellant's injury occurred after a motor vehicle accident while she was on the job (mail delivery) and was covered by workers' compensation. Since then she developed a malunion of her pelvic fracture and had not been able to return to work. Appellant ambulated with a walker for safety issues because of left leg weakness and feelings of instability. Findings on examination were provided and review of films showed malunited pelvis with superior migration of left hemipelvis. Dr. Boudreau opined that appellant could continue activities as tolerated; that she could not stand for eight hours, and could not return to her previous occupation. In a June 5, 2014 patient status report, he opined that she was disabled due to her pelvic fracture nonunion. Dr. Boudreau advised that appellant could not stand for an eight-hour period and required a walker. A functional capacity evaluation for disability rating was recommended.

By decision dated November 7, 2014, OWCP denied modification of its May 8, 2014 decision and the June 9, 2008 loss of 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>5</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup>

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

<sup>6</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>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

### ANALYSIS

OWCP accepted that appellant sustained closed sacrum/coccyx fracture, closed pubis fracture, closed spleen hematoma, closed four fibula fractures, closed lumbar vertebra fracture, posthemorrhage anemia, forehead open wound, and foot/toe abrasion as a result of a November 15, 1995 motor vehicle accident. In a June 9, 2008 decision, it adjusted her compensation to reflect its determination that she was capable of earning wages in the selected position of cashier-checker (retail trade). The issue is whether appellant established that the June 9, 2008 LWEC decision should be modified.

Appellant has not argued that she has been retrained or otherwise vocationally rehabilitated. She argued that there has been a material change in the nature and extent of her injury-related condition. The medical evidence of record establishes that appellant continues to suffer residuals of the accepted work injury due to the nonunion or malunion fractures of her pelvis. However, the medical evidence is insufficient to establish a material change or worsening of the accepted condition(s), such that she could not perform the duties of the constructed position. Dr. Maynard, in his February 6, 2014 report, provided an assessment of end stage arthritis of hip and malunion and nonunion of fracture. He opined that appellant was not capable of working a full-time eight-hour shift given the degree of pathology, that she needed a hip replacement, and that the malunion and nonunion of fracture was an ongoing, progressively worsening degeneration of her pelvic malunion, which would continue to worsen with time. The Board notes that appellant's arthritic hip condition has not been accepted by OWCP as causally related to the 1995 employment injury. To meet her burden of proof, appellant must establish a change in the work-related condition.<sup>9</sup> Dr. Maynard's statement is speculative in nature as he does not explain, citing diagnostic findings or examination findings, that her accepted condition had worsened. He merely states a conclusion.

Dr. Maynard's opinion does not explain why the work restrictions he notes are due to the accepted work-related conditions, and he does not explain how appellant's functional ability due to her accepted conditions changed. He provides no discussion of the LWEC position and whether she could perform the duties of the cashier/checker position, which does not require eight hours of standing.<sup>10</sup> For these reasons, Dr. Maynard's report is of limited probative value and is insufficient to establish modification of the LWEC determination.

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<sup>7</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> *W.W.*, Docket No. 11-1248 (issued April 17, 2012).

<sup>10</sup> *Id.*

In his medical reports dated June 4 and 5, 2014, Dr. Boudreau noted that, after the November 15, 1995 work injury, appellant developed malunion of the pelvic fracture. This condition was considered when appellant was rated for a cashier/checker position in the June 9, 2008 LWEC decision. Dr. Boudreau also noted that appellant was walking with a cane and required a walker, but he offered no explanation, supported by objective findings, that gait assistance was required due to a material change or worsening of the accepted work conditions, rather than her other nonwork-related conditions. Furthermore, he also did not explain how her functional ability had changed such that she could not perform the duties of the cashier/checker position. While Dr. Boudreau recommended that appellant undergo a functional capacity evaluation, there is no indication that she underwent such an evaluation. For these reasons, his reports are insufficient to modify OWCP's wage-loss decision.

The other evidence of record is insufficient to support either the original loss of wage-earning capacity decision was erroneous or that there had been a material change in the nature and extent of appellant's injury-related condition.

Appellant has failed to meet her burden of proof to establish a material change in the nature and extent of her injury-related condition, that the original determination was in fact erroneous, or that she was vocationally rehabilitated. She failed to establish that the June 9, 2008 loss of wage-earning capacity decision should be modified.

On appeal, appellant argues the current medical evidence of record supports that her malunion pelvic condition had worsened and she is totally disabled. For the reasons noted, the Board 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 modify the June 9, 2008 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board