United States Department of Labor
Employees' Compensation Appeals Board

S.K., Appellant	)	
and	)	**Docket No. 16-0171**
	)	**Issued: April 25, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Dorris, CA, Employer	)	

Appearances:
Stephen Larkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 8, 2015 appellant, through counsel, filed a timely appeal from the October 22, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[2]

ISSUE

The issue is whether appellant established a basis for modifying OWCP's January 30, 2008 loss of wage-earning capacity (LWEC) determination.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence after OWCP rendered its October 22, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 54-year-old part-time flexible (PTF) mail processing clerk, has an accepted occupational disease claim for permanent aggravation of thoracolumbar scoliosis, which arose on or about October 26, 2005.[3] Although able to work, she could not resume her regular job duties. On November 26, 2007 appellant accepted a limited-duty assignment as a modified PTF clerk. The job was based on the November 20, 2007 permanent restrictions imposed by her then-treating physician, Dr. Benjamin F. Balme, a Board-certified orthopedic surgeon. Dr. Balme limited appellant to working four hours per day, three days per week.[4]

By decision dated January 30, 2008, OWCP determined that appellant's actual earnings as a modified PTF clerk fairly and reasonably represented her wage-earning capacity. The decision noted that the position was effective November 26, 2007, and she earned $295.80 per week. At the time, appellant's date-of-injury position paid $716.36 per week. Her then-current weekly wages represented a more than 50 percent loss of wage-earning capacity. Because appellant had been performing the modified PTF clerk position for more than two months, OWCP found the job suitable to her partially disabled condition. Accordingly, OWCP formally adjusted her wage-loss compensation to reflect her LWEC. Additionally, OWCP placed appellant on the 28-day periodic compensation rolls.

For the next several years, appellant continued to work part-time, limited-duty while receiving wage-loss compensation benefits based on the January 30, 2008 LWEC determination. She also continued to follow-up with Dr. Balme until his retirement in late 2010. Additionally, appellant regularly received acupuncture therapy, which Dr. Balme prescribed and OWCP routinely authorized.

Once Dr. Balme retired, appellant came under the care of Dr. Jason M. Conaughty, a Board-certified orthopedic surgeon, who initially examined her on December 13, 2010. He diagnosed thoracolumbar scoliosis and rib hump deformity with chronic interscapular pain. Dr. Conaughty noted that appellant was able to keep her symptoms in check with acupuncture. He believed that continued therapy was a reasonable alternative to lumbar fusion. Dr. Conaughty recommended a follow-up evaluation in six months.

When she returned on June 14, 2011, appellant reported persistent pain. Dr. Conaughty noted that she had been managing 12 hours of work per week and had reportedly found acupuncture therapy very beneficial in keeping her active. A recent x-ray showed no worsening of appellant's scoliotic curve. Dr. Conaughty recommended continued acupuncture and a follow-up examination in six months. He also renewed appellant's part-time, limited-duty work restrictions.

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[3] Appellant stopped work on November 22, 2005. The January 16, 2006 claim (Form CA-2) indicated that she regularly worked three eight-hour shifts per week. Subsequent claims for compensation (Form CA-7) confirmed that appellant did not have a fixed, 40-hour per week schedule. As a PTF employee, she worked in excess of 24 hours per week just prior to her November 22, 2005 work stoppage.

[4] Additional restrictions included 30 minutes of standing, 15 minutes of reaching/reaching above shoulder, twisting, bending/stooping, and sitting (4 hours). Dr. Balme also imposed a 10-pound weight restriction with respect to pushing, pulling, and lifting.

Appellant's next visit was on February 23, 2012. She had been able to continue working approximately three or four days a week, and she reported that the acupuncture was helping quite a bit. Dr. Conaughty noted that recent x-rays showed a stable thoracic curve. He further indicated that appellant's symptoms were well controlled with acupuncture and activity modification. Dr. Conaughty renewed her previous work restrictions, and advised appellant to follow-up in a year.

Beginning May 7, 2012, appellant reduced her weekly work schedule to 2 four-hour shifts. She returned to see Dr. Conaughty on May 9, 2012. Dr. Conaughty's treatment notes reflect that appellant reported problems with her work restrictions. He noted that she felt she needed more restrictions because she was having a hard time keeping up with her current level of work due to pain and thoracolumbar scoliosis. Dr. Conaughty advised her that she was a palliative case, and not the type of patient amenable to surgery. He further noted that appellant's motor and neurological examinations revealed no gross changes. Dr. Conaughty also indicated that her 44-degree curve was large for an individual still in the working stages of life. He explained that he had not seen enough patients with this type of nonoperative scoliosis to be able to provide appellant an accurate assessment regarding work restrictions. Dr. Conaughty believed that an outside consultation would be more appropriate for determining appellant's limitations. He also recommended that she select a pain management specialist as her attending physician, rather than a surgeon.

Through the end of May 2012, appellant continued to work just two four-hour shifts per week.

On May 31, 2012 appellant saw Dr. Kathie J. Lang, a Board-certified family practitioner. Dr. Lang diagnosed severe thoracolumbar scoliosis and chronic pain. She advised appellant to continue her acupuncture and medications. Dr. Lang also noted that appellant had a 10-pound weight restriction and worked four hours per day, three days per week. According to her, appellant believed she could no longer adhere to her current work schedule on a regular basis. Dr. Lang advised that she was unable to evaluate appellant's ability to work. She recommended that OWCP refer appellant to a specialist for such an evaluation. Additionally, Dr. Lang noted her agreement with Dr. Conaughty's recommendation that appellant consult with a pain management specialist.

On June 4, 2012 appellant stopped work entirely. One week later she filed the first of a series of claims (Forms CA-7) for wage-loss compensation beginning May 7, 2012. While the claim was under development, appellant continued to receive wage-loss compensation in accordance with the January 30, 2008 LWEC determination. OWCP subsequently advised her regarding the process of modifying an LWEC determination, and afforded her the opportunity to submit additional evidence and/or argument.[5]

Dr. Mark R. Greenberg, a Board-certified internist and anesthesiologist with a subspecialty in pain medicine, examined appellant on June 20, 2012. He noted a history of

[5] OWCP explained that modification of an LWEC was unwarranted unless there was a material change in the nature and extent of the injury-related condition, the employee had been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.

scoliosis and mid-back pain, as well as difficulties with work and job restrictions. Dr. Greenberg indicated that appellant worked as a mail clerk, which she described as requiring heavy physical exertion. Additionally, he noted that appellant currently had restrictions in place, which included "half time" work and a 10-pound lifting limitation. Appellant had reportedly been off work since June 12, 2012 due to pain. Dr. Greenberg further noted that appellant was receiving workers' compensation benefits. He diagnosed scoliosis and thoracic spine pain. Although she had been referred for pain management, which appellant declined, Dr. Greenberg noted that she was primarily looking for a disability evaluation. He advised her to go through the disability evaluation process, and did not otherwise comment on appellant's ability to work.

OWCP also received various treatment records from Liane Venzke, a licensed acupuncturist (LAc) and Doctorate of Acupuncture and Oriental Medicine (DAOM).

By decision dated September 10, 2012, OWCP denied appellant's claim for additional wage-loss compensation as she had not established a basis for modifying the January 30, 2008 LWEC determination.

Appellant identified Dr. Jeffrey W. Grolig, a Board-certified physiatrist, as her new treating physician. He first examined her on September 6, 2012 and diagnosed severe thoracic scoliosis. Dr. Grolig noted that appellant worked as a mail clerk with restrictions. He also reported that appellant had been off work since May 7, 2012 due to pain. Dr. Grolig described appellant's employment duties as "heavy cleaning, repetitive lifting, [and] casing mail which involve[d] repetitive above shoulder activity and arm movement." He further noted that since May 2005, appellant's work decreased from 24 hours per week to zero as of May 2012.[6] Dr. Grolig stated that appellant was currently unable to work in any economically competitive capacity at the employing establishment, and her disability would continue for at least the next one to two years. Absent corrective spinal surgery, Dr. Grolig surmised that appellant was permanently disabled. He also noted that according to Dr. Conaughty, appellant was not a surgical candidate.

In an October 8, 2012 follow-up report, Dr. Grolig noted that appellant's condition had flared-up, and she suffered from chronic pain syndrome, chronic discogenic pain syndrome, and secondary myofascial syndrome. He described appellant as a disabled postal service worker, who had been totally disabled since May 2012. Dr. Grolig indicated that she was severely limited in terms of any pulling, pushing or scrubbing type of activities. Appellant was also unable to do any heavy cleaning or casing activities because it involved stress to the thoracic spine. Dr. Grolig explained that appellant had a rather extreme kyphoscoliosis deformity, which had progressed over the years and led to a decline in her level of function. He advised that appellant was currently disabled from performing her postal service duties, which disability was expected to continue for at least the next 12 months. Dr. Grolig's recommended treatment included acupuncture, daily walking, and avoiding disc loading activities and any other activities that would aggravate appellant's thoracic myofascial syndrome.

[6] Dr. Grolig reported that the decrease in hours was due to appellant's progressive thoracic deformity and associated myofascial pain syndrome, as well as numbness in the right upper extremity and various symptoms that were precipitated by her work at the employing establishment in conjunction with her congenital scoliosis.

On November 7, 2012 appellant requested reconsideration citing "relevant evidence not previously submitted." In addition to the September 6 and October 8, 2012 reports from Dr. Grolig, OWCP received acupuncture treatment records covering the period July 5 through October 23, 2012.

By decision dated November 19, 2012, OWCP denied modification. It found Dr. Grolig's recent reports unpersuasive, and noted that appellant's treating physician did not provide a well-reasoned opinion explaining how her work-related condition had materially changed such that appellant was totally disabled on or after May 6, 2012.

On February 5, 2013 appellant requested reconsideration. The evidence received since the last merit decision included several follow-up reports from Dr. Grolig, acupuncture and physical therapy treatment records from November 8, 2012 through February 4, 2013, and a January 7, 2013 functional capacity evaluation (FCE).

Dr. Grolig saw appellant for follow-up on November 6 and December 5, 2012, January 7, and February 4, 2013. On each occasion he diagnosed 44-degree thoracolumbar kyphoscoliosis, severe chronic pain syndrome, thoracolumbar myofascial pain syndrome, and mechanical back syndrome. In his November 6, 2012 report, Dr. Grolig recommended six weeks of physical therapy (Feldenkrais method) for appellant's chronic pain syndrome. She began the recommended therapy on December 5, 2012, and also had a follow-up visit with Dr. Grolig that same day. Dr. Grolig's December 5, 2012 treatment notes indicated that appellant improved with physical therapy. He also recommended an FCE to objectively measure her tolerances. Although it was clear to him that appellant was currently incapable of any economically competitive employment, Dr. Grolig indicated that he wanted to obtain objective measurements regarding her ability to sit, stand, lift, pull, and push. He advised appellant to continue with physical therapy, obtain a formal FCE, and return for follow-up in four weeks.

When she returned on January 7, 2013, Dr. Grolig reiterated the need for an FCE, which appellant had reportedly undergone earlier that day. At the time, she had a significant flare-up following some preliminary measurements associated with the FCE. Dr. Grolig administered a trigger point injection and advised appellant to follow-up in four weeks. In his February 4, 2013 follow-up report, he noted that the recent FCE indicated that appellant was unable to perform the duties of her required job.[7] Dr. Grolig further noted that the FCE revealed limitations in terms of sitting and standing tolerances, as well as working tolerances. He characterized the FCE as

[7] Although the January 7, 2013 FCE indicated that appellant did not meet the physical demands of her position at the employing establishment, the report did not specifically identify appellant's job by title. The essential function information was reportedly obtained from the *Dictionary of Occupational Titles* (DOT); however, the FCE did not identify a specific DOT Code for the position being evaluated. The report noted limitations with respect to material handling and nonmaterial handling/positional tolerance. Appellant met none of the material handling requirements and satisfied all but two (overhead reach and repetitive reach) of the 12 other criteria. With respect to material handling, appellant demonstrated an ability to occasionally lift and/or maneuver objects weighing between 15 and 25 pounds. The comments section of the FCE noted, *inter alia*, that appellant currently "does not meet the physical demands of her position at the [employing establishment]." The January 7, 2013 FCE report made no mention of appellant's regular duties as a mail processing clerk. It also did not mention her limited-duty assignment as a modified PTF clerk, which included a 10-pound restriction with respect to pushing, pulling, and lifting.

highly objective and detailed. Based on the information provided, Dr. Grolig concluded that appellant was unable to perform her "normal duties" at the employing establishment.[8]

In a March 12, 2013 decision, OWCP denied modification of the January 30, 2008 LWEC determination. The senior claims examiner found that the record did not demonstrate a worsening of appellant's accepted condition such that she was no longer able to perform her limited-duty assignment. In fact, he noted that the January 7, 2013 FCE results supported that appellant could perform her modified duties.

Appellant requested reconsideration on May 16, 2013. OWCP received additional acupuncture and physical therapy treatment records, as well as follow-up reports from Dr. Grolig dated March 25, May 6, and July 9, 2013. Dr. Grolig continued to diagnose 44-degree thoracolumbar kyphoscoliosis, severe chronic pain syndrome, thoracolumbar myofascial pain syndrome, and mechanical back syndrome. In his March 25, 2013 report, he expressed disagreement with OWCP's denial of benefits, accusing the OWCP claims examiner of being "obstreperous" for second-guessing the FCE results. Dr. Grolig's reiterated that appellant had ongoing disability based on his February 4, 2013 findings. His May 6, 2013 report similarly noted that appellant had been disabled and unable to work based on the detailed FCE. Dr. Grolig's July 9, 2013 follow-up report did not specifically comment on appellant's ability to work.

In an August 8, 2013 decision, OWCP again denied modification of its prior LWEC determination.

On July 2, 2014 appellant's counsel requested reconsideration.[9] He argued that the January 30, 2008 LWEC determination was erroneous because it was based on a part-time position. Counsel claimed that appellant was a full-time employee at the time of her October 26, 2005 employment injury. He also claimed that OWCP improperly adjusted appellant's wage-loss compensation prior to the expiration of the 60-day period for issuing a formal LWEC determination. Lastly, counsel argued that a June 25, 2014 FCE and a July 2, 2014 report from Dr. Grolig established that appellant's accepted condition had worsened.

According to the June 25, 2014 FCE, appellant demonstrated a standing tolerance of 15 minutes duration and a sitting tolerance of 30 minutes. The evaluation also revealed reduced grip and pinch strength in the right hand, which demonstrated significantly below average strength necessary to perform activities of daily living. Additional findings included the ability to push or pull a 10-pound weight. The FCE further noted that appellant was able to reach to perform hand manipulations for a two-minute period for an extended horizontal reach. Bilateral lift testing demonstrated the ability to safely lift up to five pounds from the floor to waist level. However, lifting with one hand demonstrated a three-pound limitation on the right and a six-pound limit on the left. With respect to lifting and carrying, appellant demonstrated the ability to

[8] Dr. Grolig did not comment on whether appellant was able to perform her previous limited-duty assignment as a modified PTF clerk.

[9] Although the request was dated "June 2, 2014," counsel referenced medical evidence dated June 25 and July 2, 2014.

safely carry a five-pound weight a distance of 100 yards, as well as the ability to safely carry a three-pound weight with the right hand and a five-pound weight with the left hand. Lastly, lifting to a variety of shelf heights demonstrated the ability to safely lift a 5-pound weight to an average shelf height of 20 inches.

Suzanne Cresswell, an occupational/physical therapist who administered the June 25, 2014 FCE, indicated that appellant exhibited maximal effort and participated to the best of her ability throughout the evaluation. She noted that appellant had worked as a mail processing clerk, which appellant described as requiring frequent repetitive and sustained reaching in a static sit or stand posture. Ms. Cresswell was also aware that appellant worked a modified schedule from 2006 to 2012, averaging a 12-hour workweek. However, she did not identify the specific duties appellant performed prior to her 2012 work stoppage. Ms. Cresswell also did not specifically comment on what, if any, type of work appellant was currently capable of performing.

In his July 2, 2014 report, Dr. Grolig indicated that appellant suffered from chronic pain syndrome and chronic discogenic pain syndrome. He reviewed the results of her latest FCE and found that she was unable to perform the standing tolerance required of 30 minutes and was unable to engage in repetitive pulling and pushing. Dr. Grolig explained that appellant could not tolerate standing more than 15 minutes, which was incompatible and inconsistent with the job requirements. He indicated that appellant remained disabled from the requirements of the current job offer.[10] Dr. Grolig further indicated that he did not see her condition improving in the future.

OWCP referred appellant for a second opinion evaluation. In a September 12, 2014 report, Dr. Ronald L. Teed, a Board-certified orthopedic surgeon and OWCP-referral physician, diagnosed preexisting chronic idiopathic thoracolumbar scoliosis with secondary spine pain and functional overlay. He noted that appellant's claim had been accepted for permanent aggravation of thoracolumbar scoliosis. Dr. Teed further indicated that appellant developed spondylosis of the thoracolumbar spine secondary to her idiopathic scoliosis. He explained that the spondylosis contributed to appellant's current pain and activity limitations. Dr. Teed further explained that appellant's worsening complaints and radiographic changes were due to the natural progression of the underlying, nonindustrial condition and were not work related.[11] He advised that appellant should be limited to lifting 18 to 20 pounds and she should be allowed to sit and stand intermittently, as needed. The noted work restrictions were related to appellant's chronic, preexisting thoracolumbar spine condition. Dr. Teed specifically indicated that the restrictions were unrelated to appellant's accepted employment injury.

According to Dr. Teed, appellant's accepted condition of permanent aggravation of thoracolumbar scoliosis had not worsened. He explained that aggravation was not currently indicated, having noted that appellant had been off work for a number of years, and prior to that

[10] Dr. Grolig did not identify which "current job offer" he was referring to.

[11] Dr. Teed noted that appellant's January 6, 2014 imaging studies revealed thoracic and lumbar scoliosis, facet joint arthropathy at L5-S1, and a slight right paracentral disc protrusion at T4-5, which was consistent with mild cord compression.

she was on very limited work activities for a number of years. Dr. Teed indicated that the accepted aggravation certainly would have been expected to resolve after appellant stopped work in May 2012. He reiterated that there had been no worsening of her accepted condition, but rather a progression of degenerative changes related to appellant's chronic, preexisting idiopathic scoliosis. Dr. Teed further explained that recent imaging studies revealed age-related lumbar spondylosis. He also indicated that the medical evidence of record did not support total disability as of May 6, 2012. Dr. Teed noted that appellant's May 2012 work stoppage was based mainly on subjective findings. He also found that appellant was currently able to return to her November 26, 2007 light-duty job.

Additional evidence received subsequent to OWCP's August 8, 2013 decision included physical therapy and acupuncture treatment records from June 5, 2013 through August 13, 2014. OWCP also received follow-up reports from Dr. Grolig dated August 15, September 25, October 24, November 5, December 3, 2013, January 6, February 5, March 24, and May 5, 2014. Dr. Grolig also submitted duty status reports (Form CA-17) dated October 24, 2013 and February 5, 2014.[12]

The majority of Dr. Grolig's above-noted follow-up reports did not specifically address appellant's disability status and/or work restrictions. In his January 6, 2014 report, he discussed the results of appellant's recent imaging studies, which he noted revealed severe changes associated with scoliosis. Dr. Grolig advised that appellant was unable to perform her prior job, and that she might be a candidate for surgery should her T4-5 disc protrusion worsen. He noted that, based on the recent imaging studies, appellant's condition had clearly worsened. Dr. Grolig further stated that it was clear that appellant's current condition was due to the progression of her previous industrial condition. He reiterated that appellant was unable to perform her previous job "any hours per week," and that she was clearly disabled as an outgrowth of her industrial condition. When appellant returned for follow up on February 5, 2014, Dr. Grolig indicated that she suffered from chronic pain syndrome and secondary myofascial syndrome. He also noted that she had limitations that precluded her return to work, which were outlined in the latest Form CA-17.

OWCP also received an October 4, 2013 report from Dr. Scott H. Kitchel, a Board-certified orthopedic surgeon, who diagnosed idiopathic scoliosis and chronic back pain. Although he noted an October 26, 2005 date of injury, Dr. Kitchel did not identify the cause of injury. His October 4, 2013 report also did not include information regarding work limitations and/or disability.

The record also included three additional reports from Dr. Conaughty, dated November 11 and 14, 2013, and January 10, 2014. When he examined appellant on November 11, 2013 Dr. Conaughty diagnosed thoracic scoliosis. Appellant's x-ray reportedly

[12] Both Form CA-17s identified the same work restrictions; however, the reports indicated that appellant had not yet been advised to resume work. Dr. Grolig imposed a 10-pound lifting/carrying limitation. He also noted that appellant could sit for 30 minutes, stand for 30 minutes continuously and up to one hour intermittently, walk for an hour continuously and up to two hours intermittently, and climb for two hours. Dr. Grolig precluded all bending/stooping/twisting and limited appellant to 30 minutes of pulling/pushing, 30 minutes kneeling, and one hour of reaching above shoulder.

revealed a stable thoracic spine curve. Dr. Conaughty referred her for physical therapy and advised her to continue with a pain management specialist. Appellant was to return in 12 months for a follow-up x-ray. Dr. Conaughty also provided a return to work form with the notation "See old restrictions."[13] His November 14, 2013 attending physician's report (Form CA-20) referenced the November 11, 2013 treatment notes and included a diagnosis of thoracic scoliosis. Dr. Conaughty did not identify any period(s) of partial or total disability. Regarding appellant's work restrictions, he referred to the November 11, 2013 return to work form.

In his January 10, 2014 report, Dr. Conaughty noted that appellant had an established diagnosis of thoracic scoliosis, and for many years she received palliative treatment with physical therapy to enable her to continue working for the employing establishment and to keep her pain in check. He indicated that physical therapy had been very successful in the past, and when he last examined her on November 11, 2013, Dr. Conaughty noted that he recommended that appellant continue physical therapy.

By decision dated October 1, 2014, OWCP again denied modification of the January 30, 2008 LWEC determination. As to the alleged error, it refuted counsel's claim that appellant was a full-time employee when she was injured on or about October 26, 2005.[14] The senior claims examiner also noted that OWCP waited at least 60 days after appellant began her November 26, 2007 limited-duty assignment before issuing a formal LWEC determination. Lastly, OWCP found that appellant had not demonstrated that her work-related condition had materially worsened. The senior claims examiner specifically found that Dr. Grolig had not explained how appellant's current condition was the result of a progression of her previous industrial condition. In contrast, OWCP found that Dr. Teed provided a well-reasoned opinion explaining how appellant's current complaints and her claimed disability were not employment related.

OWCP subsequently received a July 2, 2014 duty status report (Form CA-17) from Dr. Grolig. The noted limitations were the same as he previously identified on February 5, 2014.[15] OWCP also received physical therapy treatment records from September 17 and October 8, 2014, as well as Dr. Grolig's September 17, 2014 follow-up report and a November 20, 2014 supplemental report. The September 17, 2014 follow-up report did not specifically address disability and/or work restrictions.

[13] Appellant had not seen Dr. Conaughty since he last examined her on May 9, 2012. Prior to that date, she had been working part-time (12 hours week), limited duty in accordance with Dr. Conaughty's May 26, 2011 permanent work restrictions.

[14] The employing establishment repeatedly identified appellant's October 26, 2005 date-of-injury clerk position as either part time or PTF. The January 16, 2006 claim (Form CA-2) similarly identified appellant as a part-time employee. According to the employing establishment, appellant's regular work hours were 9:00 a.m. until 5:00 p.m., three days per week. During the week of November 13 to 19, 2005, appellant was scheduled to work 33 hours over five days. On November 22, 2005 she stopped work after completing only 3.5 hours of a scheduled 8-hour shift. That same week appellant had been scheduled to work 29.5 hours over four days. While the record demonstrates that appellant worked in excess of 24 hours per week just prior to her November 22, 2005 work stoppage, counsel's claim that she was in full-time pay status is unsubstantiated.

[15] *See supra* note 13.

In his November 20, 2014 supplemental report, Dr. Grolig explained appellant's need for ongoing professional therapy, including acupuncture and physical therapy. He indicated that therapy was a way of avoiding stronger opioid medications, as well as a means of preserving what little function appellant had left. In reviewing her history, Dr. Grolig noted he first evaluated appellant in September 2012, and that she had a long employment history as a mail processing clerk. He also noted that appellant had scoliosis for many years. Dr. Grolig indicated that appellant's work created muscle tension, spasm, and a progressive increase in her thoracolumbar curvature, which when last measured revealed 44 degrees of thoracolumbar kyphoscoliosis. He also indicated that appellant's muscles had weakened due to repetitive trauma at work. According to Dr. Grolig, appellant's many years of therapy prevented her condition from becoming far worse. He believed the June 25, 2014 FCE demonstrated the extent of appellant's disability. In closing, Dr. Grolig opined that the extent of damage shown and appellant's disability were the direct result of her many years of work for the employing establishment. He believed that had appellant not worked for the employing establishment, her current condition would be substantially better.

On February 3, 2015 appellant accepted a limited-duty assignment as a modified mail processing clerk.[16] The job required that she work four hours per day, three days a week. Appellant's duties included up to two hours "walling mail" and "notify packages" and up to two hours working the window/retail counter. Additional duties included undeliverable bulk business mail (UBBM) and second notices (up to one hour). The physical requirements involved up to two hours of walking, up to one hour of standing, up to 30 minutes sitting, and up to four hours of fine manipulation and lifting. Appellant's current hourly pay was $27.79.[17]

On April 24, 2015 appellant's counsel filed another request for modification of OWCP's January 30, 2008 loss of wage-earning capacity determination. He submitted a February 9, 2015 report from Dr. Grolig in support of the request. Counsel argued that the report explained how and why appellant's condition worsened from the work she had actually been doing.

In his February 9, 2015 report, Dr. Grolig noted that appellant had recently returned to modified duty, working a maximum of four hours per day, three days per week. Appellant's medical problems included 44-degree thoracolumbar kyphoscoliosis, severe chronic pain syndrome, thoracolumbar myofascial pain syndrome, and mechanical back syndrome. Dr. Grolig reported that appellant had been diagnosed with thoracic scoliosis exacerbated by her employment. He described her job duties as involving manual distribution of letter-sized mail, as well as moving hands full of flat-sized mail. Dr. Grolig indicated that appellant spent two hours each day sorting mail. He also noted that she removed parcels from yellow bags, handled large stacks of mail, and worked with Eastern Regional Mail Containers (ERMC). Additionally, appellant lifted mail pouches from ERMCs and dumped the contents onto a metal table. Dr. Grolig also reported that she performed basic window operations during her four-hour workday. He explained that as a result of repetitive lifting of stacks of mail, twisting to sort letter-sized mail, and moving ERMCs weighing 300 to 400 pounds, appellant experienced some

[16] The offer referenced medical documentation dated February 5, 2014, which appears to be information provided by Dr. Grolig.

[17] The January 30, 2008 LWEC determination was based on a then-current hourly rate of $24.65.

extreme exertion of her shoulder and back. Dr. Grolig opined that these activities caused appellant's condition to worsen over time. He further explained that even though she only worked four hours a day, three days per week, the repetitive bending, lifting, and twisting exacerbated appellant's thoracic scoliosis.

OWCP subsequently received Dr. Grolig's May 15 and August 12, 2015 follow-up reports. Dr. Grolig noted that appellant continued to work modified duty for four hours a day, three days a week. He continued to treat appellant's flare-ups, which included prescribing topical agents, additional acupuncture, and administering trigger point injections.

In an October 22, 2015 decision, OWCP again denied modification of its January 30, 2008 LWEC determination.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[18] Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.[19] Modification of an LWEC determination is unwarranted 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 erroneous.[20] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[21]

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.[22] The position must conform to the established physical limitations of the injured employee; the employer must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.[23] If these circumstances are present, a determination may be made that the position constitutes "regular" federal employment.[24]

[18] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[19] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[20] 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

[21] 20 C.F.R. § 10.511.

[22] *Id.* at § 10.510.

[23] *Id.*

[24] *Id.*

With respect to part-time employment, the FECA Procedure Manual provides: (1) a part-time position may form the basis of an LWEC determination if the employee was a part-time worker at the time of injury; and (2) for an employee who was a full-time employee on the date of injury, a part-time position may form the basis of an LWEC determination if the employee's stable, established work restrictions limit him or her to part-time work.[25] For a part-time position to fairly and reasonably represent the wage-earning capacity of an individual who was a full-time employee on the date of injury, the position should involve the number of hours the employee is capable of working as indicated in the current, stable work restrictions.[26]

As long as there is no work stoppage due to the accepted condition(s), a formal LWEC determination should be issued following 60 calendar days from the date of return to work.[27]

ANALYSIS

Appellant seeks modification of the January 30, 2008 LWEC determination, therefore, she bears the burden of proof.[28] The Board notes that neither appellant, nor her counsel, claim that modification is warranted on the basis that she has been retrained or otherwise vocationally rehabilitated. Counsel's April 24, 2015 request for modification also did not allege that the January 30, 2008 LWEC determination was issued in error. His only contention was that the medical evidence of record established a material change in the nature and extent of appellant's injury-related condition.

Modification of an LWEC determination is appropriate where the evidence demonstrates a material change in the nature and extent of the injury-related condition.[29] The current medical evidence must demonstrate a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability.[30]

Prior to receiving counsel's April 24, 2015 request for modification, OWCP received physical therapy treatment records dated September 17 and October 8, 2014. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, acupuncturists, and social workers are not considered "physician[s]" as defined under FECA.[31] Consequently, their medical findings and/or opinions are not of sufficient probative value to establish

[25] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(1)(b) (June 2013).

[26] *Id.*

[27] *Id.* at Chapter 2.815.6a.

[28] 20 C.F.R. § 10.511.

[29] *Id.*

[30] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3a(2) (June 2013).

[31] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

entitlement to FECA benefits.[32] In this instance, appellant's voluminous physical therapy and acupuncture treatment records are insufficient to establish a material change in the nature and extent of her injury-related condition.

OWCP also received a July 2, 2014 duty status report (Form CA-17), as well as Dr. Grolig's September 17, 2014 follow-up report and a November 20, 2014 supplemental report. The July 2, 2014 Form CA-17 did not address whether appellant's work-related condition had materially changed. Dr. Grolig's September 17, 2014 follow-up report did not specifically address disability and/or work restrictions.

In his November 20, 2014 supplemental report, Dr. Grolig indicated that the June 25, 2014 FCE demonstrated the extent of appellant's disability. He found that appellant's disability was the direct result of her many years of work for the employing establishment. Dr. Grolig believed that had appellant not worked for the employing establishment, her current condition would be substantially better. While it is evident that Dr. Grolig believed that appellant's employment activities contributed to her current condition, he did not explain how her accepted condition materially changed on or about May 7, 2012 such that appellant was no longer capable of performing the part-time, limited-duty position she held since November 26, 2007. It is also unclear from the November 20, 2014 supplemental report whether Dr. Grolig believed that appellant's post-November 2007 employment activities exacerbated her condition.

In conjunction with the April 24, 2015 request for modification, appellant's counsel submitted Dr. Grolig's February 9, 2015 report. He argued that the report explained how and why appellant's accepted condition worsened from the work she had actually been doing. In his February 9, 2015 report, Dr. Grolig identified what he understood to be appellant's modified job duties. He then explained that even though she only worked four hours a day, three days per week, the repetitive bending, lifting, and twisting exacerbated her thoracic scoliosis. As noted, the current medical evidence must demonstrate a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability.[33] In essence, Dr. Grolig attributed appellant's worsening condition to performing her modified mail processing clerk duties, which is akin to an intervening injury. As such, his belief that appellant's limited-duty assignment exacerbated her thoracic scoliosis does not establish a basis for modification. Appellant was examined by and submitted reports from Drs. Conaughty, Lang, Greenberg, and Kitchel. None of these physicians addressed the issue of whether appellant's condition had materially changed. Accordingly, the Board affirms OWCP's October 22, 2015 decision, finding that appellant failed to establish a basis for modifying the January 30, 2008 LWEC determination.

[32] *J.L.*, Docket No. 15-1935 (issued January 27, 2016) (acupuncturist); *C.K.*, Docket No. 14-1235 (issued September 11, 2014) (acupuncturist); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

[33] *Supra* note 30.

CONCLUSION

Appellant has not established a basis for modifying OWCP's January 30, 2008 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board