

**United States Department of Labor
Employees' Compensation Appeals Board**

R.L., Appellant

and

**DEPARTMENT OF THE NAVY, MILITARY
SEALIFT COMMAND, Norfolk, VA, Employer**

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**Docket No. 16-0072
Issued: February 11, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

On October 16, 2015 appellant filed an application for review of a July 22, 2015 decision of the Office of Workers' Compensation Programs (OWCP). The appeal was docketed as No. 16-0072.

In August 1994, OWCP accepted that appellant, a clerk typist, sustained bilateral carpal tunnel syndrome due to the repetitive typing required by her job. It later accepted her claim for work-related bilateral tenosynovitis of the hands/wrists, bilateral localized primary osteoarthritis of the hands, and left radial styloid tenosynovitis. Appellant initially stopped work in 1994 and returned to work on September 29, 2014 as a print operator for a private printing business. On February 6, 2015 a formal loss of wage-earning capacity decision was issued, based upon appellant's ability to work in this light-duty job. Appellant stopped working on or about May 15, 2015, but she continued to receive OWCP compensation based on the February 6, 2015 wage-earning capacity decision. In mid-May 2015, she claimed that she sustained a recurrence of disability due to the accepted employment injuries such that she was totally disabled beginning

on or about May 15, 2015.¹ In a July 22, 2015 decision, OWCP denied appellant's ostensible claim that she sustained a recurrence of disability on or about May 15, 2015.

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.² OWCP's procedure manual provides, "If a formal loss of wage-earning capacity (LWEC) decision has been issued, and the claim is for recurrent disability, it should be processed in accordance with procedures for modifying a formal LWEC."³ 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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

In this case, OWCP essentially determined that the issue presented was whether appellant had established a recurrence of disability on or about May 15, 2015. Under the circumstances of this case, however, the Board finds that the issue presented was whether the February 6, 2015 wage-earning capacity determination should be modified. Appellant stopped work on or about May 15, 2015 and submitted evidence which indicated that she had worsening symptoms of her employment injuries. It is clear that the claim in this case was that appellant could not work in the print operator position, the position that OWCP determined had represented her wage-earning capacity, for the foreseeable future. The Board has held that, when a wage-earning capacity determination has been issued and a claimant submits evidence alleged to show disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁵ As noted, OWCP's procedure manual directs the claims examiner to consider the criteria for modification when a claimant alleges recurrent disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. The Board finds that OWCP should have considered the issue of modification of the wage-earning capacity determination.⁶

¹ Appellant also submitted evidence which she believed showed that she could no longer work in her limited-duty position. For example, she submitted June 20 and 27, 2015 reports in which Dr. John T. Schwartz, an attending Board-certified orthopedic surgeon, indicated that she had worsening upper extremity problems related to the injuries she sustained as a clerk typist for her former federal employing establishment.

² See *Sharon C. Clement*, 55 ECAB 552 (2004).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (February 2013).

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ See *Katherine T. Kreger*, 55 ECAB 633 (2004). The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. See *id.*

⁶ See *id.*

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the February 6, 2015 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2015 is set aside and the case remanded for further action consistent with this order of the Board.

Issued: February 11, 2016
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