

FACTUAL HISTORY

On April 12, 2013 appellant, then a 43-year-old supervisor, filed a traumatic injury claim (Form CA-1) alleging that on April 11, 2013 she sustained a right shoulder and lower back injury when performing her landscaping duties. When she picked up a bush, she experienced shooting pain. Appellant sought treatment with Dr. Timothy W. O'Brien, her treating chiropractor. Based on Dr. O'Brien's reports, OWCP accepted the claim for closed dislocation lumbar vertebra, other and unspecified disc disorders of the lumbar region, sciatica, and closed dislocation of the sacrum. Appellant lost intermittent time from work from May 8 through July 2, 2013. She returned to work on November 4, 2013 and stopped all work on March 3, 2014.

In an April 30, 2014 work capacity evaluation, Dr. O'Brien determined that maximum medical improvement (MMI) had been reached, but appellant was not capable of returning to her date-of-injury position as her job required her to sit for long periods in a high stress environment, causing an exacerbation of her symptoms. He advised that she could sit for four hours a day with breaks, walk one to two hours, stand for one hour, operate a motor vehicle at work for one hour with breaks, operate a motor vehicle to/from work for one hour, and restricted reaching above the shoulder, twisting, bending, stooping, pushing, pulling, squatting, kneeling, or climbing.

On May 19, 2014 the employing establishment offered appellant a job as an office automation assistant based on her physician's work restrictions. Appellant's position accommodated her medical conditions with sitting for no more than four hours per day with breaks, walking one to two hours, standing one hour, operating a motor vehicle at work for one hour with breaks, operating a motor vehicle to/from work for one hour, and restricted reaching above the shoulder, twisting, bending, stooping, pushing, pulling, squatting, kneeling, or climbing. She accepted the position on May 27, 2014 and returned to work on June 2, 2014.

On August 12, 2014 OWCP issued a formal LWEC decision finding that the position of office automation assistant fairly and reasonably represented appellant's wage-earning capacity as she had been working in the position for two or more months.²

In a September 15, 2014 medical report, Dr. O'Brien reported that shortly after returning to work, appellant's symptoms worsened and the radiating pain that had previously resolved returned. He noted that her job entailed sitting for the majority of the day and she was unable to perform her duties due to radiating pain in her low back and shoulder. Dr. O'Brien explained that appellant returned to work due to financial stress though was physically not ready to do so which resulted in the return of her symptoms. He advised that she remain off work for the next six weeks until she reached MMI.

On October 31, 2014 appellant filed claim for compensation forms (Forms CA-7) for disability compensation beginning October 20, 2014 and continuing. In support of the claims, an August 15, 2014 work capacity evaluation was submitted from Dr. O'Brien who revised

² On August 26, 2014 appellant received a schedule award for seven percent impairment of the left upper extremity.

appellant's work restrictions, advising that she could sit for 2 hours a day with breaks, walk .5 hours a day, stand for .5 hours a day, operate a motor vehicle at work for .5 hours a day with breaks, operate a motor vehicle to/from work for .5 hours per day, and restricted reaching above the shoulder, twisting, bending, stooping, pushing, pulling, squatting, kneeling, or climbing. Dr. O'Brien noted that her job required sitting for long periods in a high stress environment, both of which were exacerbating her symptoms. He released her to full-time work with permanent restrictions.

By letter dated November 3, 2014, OWCP informed appellant that further medical evidence was necessary to establish her claim. Appellant was requested to submit a comprehensive medical report establishing that she had disability due to the worsening of her accepted conditions.

In a November 14, 2014 medical report, Dr. O'Brien responded to OWCP's development letter and reported that appellant's condition had not worsened. Appellant had been receiving chiropractic treatment which helped relieve her symptoms and she believed she was able to return to her original job but was unable to do so after working several weeks. She was provided a new position which was considered less strenuous. This new position required substantial time filing and standing which exacerbated her symptoms, in addition to the distance she was required to travel to the job site. Dr. O'Brien explained that riding in an automobile was especially difficult given her low back injury. He opined that appellant's condition had not worsened, but that her symptoms were exacerbated by her work activities leaving her unable to perform her duties.

By decision dated December 5, 2014, OWCP denied modification of its August 12, 2014 LWEC determination, finding that the evidence failed to establish a material worsening of appellant's conditions due to the work injury. It noted that Dr. O'Brien did not note that her condition had worsened but rather related her current condition to the duties of her new position.

On December 29, 2014 appellant requested reconsideration of OWCP's December 5, 2014 decision.

Appellant submitted a report from Dr. O'Brien, received on January 2, 2015, addressing OWCP's December 5, 2014 denial. Dr. O'Brien reported that his November 14, 2014 report explained that appellant's accepted conditions of subluxation of the lumbar and sacrum regions had not worsened, but continued to prevent her from being able to work, at both her original position and the downgraded position. He noted that no new injury occurred and this was an exacerbation of her existing injury caused by sitting all day in the office, as well as having to travel to and from work. Dr. O'Brien further explained that appellant did not continue to work in her downgraded position until October 20, 2014. Appellant was unable to work as of August 6, 2014 and utilized annual and sick leave through October 20, 2014 per the instructions of her supervisor. Dr. O'Brien reported that she was unable to return to her original job and was placed in her current position which was believed to be less strenuous. However, after working in the downgraded position for several weeks, the original symptoms from the April 11, 2013 work injury returned and appellant was unable to perform these duties. Dr. O'Brien concluded that appellant's condition had not worsened, but her symptoms were exacerbated by her work

activities leaving her incapable of performing her duties. He explained that no new injuries occurred and that she was unlikely to ever return to preinjury status.

In treatment notes dated September 24 through December 15, 2014, Dr. O'Brien provided findings on physical examination, noted complaints of lower back and right shoulder pain, and provided chiropractic manipulation and manual therapy.

By decision dated January 20, 2015, OWCP denied appellant's claim for compensation benefits for the period November 30 through December 13, 2014 finding that she had not established that the August 12, 2014 LWEC determination should be modified.

By letter dated January 21, 2015, OWCP informed appellant that a formal LWEC decision had been issued in her claim on August 12, 2014 and thus, the claim for compensation would be treated as a request for modification of the formal LWEC decision. It advised appellant of the evidence needed and allowed her 30 days to submit evidence forming the basis for modifying her LWEC determination.

On January 21, 2015 appellant requested reconsideration of OWCP's decision.

By decision dated February 11, 2015, OWCP denied appellant's claim for wage-loss compensation benefits for the period beginning December 14, 2014 through January 10, 2015 finding that the evidence failed to establish disability due to the accepted work-related medical conditions.

In a March 9, 2015 report, Dr. O'Brien reiterated that appellant stopped working at her assigned position on August 6, 2014 and used annual and sick leave until October 20, 2014. He noted that appellant was not experiencing a new injury, but her symptoms continued to worsen as a result of the original April 11, 2013 work injury which was accepted for closed dislocation lumbar vertebra, other and unspecified lumbar region disc disorders, sciatica, and closed dislocation of the sacrum. Dr. O'Brien explained that while his prior November 14, 2014 report noted that appellant's conditions had not worsened, his choice of words did not accurately reflect his intended statement. He stated that appellant could not sit for extended periods of time, could not ride in a vehicle for more than 20 minutes, could not lift in excess of five pounds, and could not stand in place without experiencing pain and numbness in her left leg. All symptoms were a result of the accepted conditions from the April 11, 2013 work injury. Dr. O'Brien reported that when appellant returned to work at her new assignment, she rapidly found that the pain and mobility issues returned to a level that prevented her from being able to continue to perform her work assignment. He concluded that appellant was not experiencing a new injury and all symptoms were a direct result of the original April 11, 2013 work injury.

On March 17, 2015 OWCP referred the case file to a district medical adviser (DMA) for an opinion regarding whether a material worsening of the accepted conditions had occurred based on objective medical evidence.

In a March 17, 2015 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon serving as a DMA, reported that appellant had chronic lower back pain, left leg pain, and left foot pain with sciatica while doing landscaping. He noted no loss of bowel or bladder control. X-ray studies confirmed multilevel disc disease with pars defects and L5-S1 with grade 1

spondylolithesis with no progression. There was no evidence of acute fracture and a magnetic resonance imaging (MRI) scan confirmed spinal cord normal signal intensity with no disease. Dr. Dyer concluded that the medical records of file did not support a material worsening of the axial spine.

By decision dated March 19, 2015, OWCP affirmed the December 5, 2014 decision finding that the evidence of record failed to establish that the August 12, 2014 LWEC determination should be modified. It explained that the medical evidence did not establish that appellant had sustained a material change in her injury-related condition such that she could no longer perform the duties of an office automation assistant.

LEGAL PRECEDENT -- ISSUE 1

A loss of 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.³ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁴ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁵

Modification of a standing loss of wage-earning capacity 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 erroneous.⁶ OWCP's procedures provide that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁷ The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained closed dislocation lumbar vertebra, other and unspecified disc disorders of the lumbar region, sciatica, and closed dislocation of the sacrum.

³ 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

⁴ *K.R.*, *supra* note 3; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁵ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁶ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4(a) (June 2013).

⁸ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

On August 12, 2014 a formal LWEC decision was issued finding that the position of office automation assistant fairly and reasonably represented her wage-earning capacity.

In its March 19, 2015 decision, OWCP denied modification of the August 12, 2014 LWEC determination. It found that the duties of the office automation assistant fairly and reasonably represented appellant's wage-earning capacity. OWCP stated that she had worked in this full-time position over 60 days and had demonstrated her ability to perform the duties of the position. The record established that appellant began working as an office automation assistant on June 2, 2014 and worked at that position until she filed CA-7 forms for leave without pay beginning October 20, 2014 and continuing.

OWCP properly found that appellant was not entitled to wage-loss compensation when she stopped work, as her wage-earning capacity had previously been established. As a formal wage-earning capacity decision has been issued, the decision will remain in place, 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.⁹

Appellant has not alleged that she had been retrained or otherwise vocationally rehabilitated. She alleges that her accepted conditions worsened such that she is disabled as a result of her accepted employment injuries. Once OWCP found that appellant could perform the duties of an office automation assistant, the issue is whether there has been a material change in her work-related condition that would render her unable to perform those duties.¹⁰ This is primarily a medical question.¹¹ The multiple reports from Dr. O'Brien do not establish a material worsening of an employment-related condition. In reviewing the medical evidence, the Board finds appellant has failed to provide sufficient evidence to establish that a modification is warranted.¹²

As a chiropractic physician, Dr. O'Brien may only provide a medical opinion regarding issues regarding subluxation of the spine. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist. The record evidence reflects that Dr. O'Brien diagnosed subluxation based on the results of an x-ray.¹³ Dr. O'Brien's reports do not contain a rationalized opinion explaining how the subluxation sequelae of appellant's employment injury prevented her from continuing her employment on the dates in question. His

⁹ *Supra* note 5.

¹⁰ *Phillip S. Deering*, 47 ECAB 692 (1996).

¹¹ *R.S.*, Docket No. 15-1229 (issued October 2, 2015).

¹² *J.I.*, Docket No. 15-0516 (issued September 21, 2015).

¹³ Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the secretary." See *Merton J. Sills*, 39 ECAB 572, 575 (1988).

blanket statement that appellant experienced a return of her symptoms after returning to work does not constitute probative medical evidence.¹⁴ The Board has long held that medical conclusions, unsupported by rationale, are of little probative value.¹⁵ Although Dr. O'Brien provided examination findings, he did not explain how those findings resulted in appellant's disability or a material worsening of her conditions. He noted that she had experienced an increase in pain and mobility issues following her return to work which prevented her from continuing her work assignment. However, an increase in pain alone does not constitute objective evidence of disability.¹⁶ As Dr. O'Brien failed to provide objective evidence to support disability on the dates in question due to this condition, his opinion is of limited probative value and unsupported by the objective medical evidence of record.¹⁷ His generalized statement that appellant was not experiencing a new injury and all symptoms were a direct result of the original April 11, 2013 work injury failed to provide a rationalized medical opinion explaining the change in appellant's disability status or how her accepted conditions had materially worsened.¹⁸ Simply stating that it aggravated an underlying condition does not constitute a sound medical explanation and is insufficient to establish a material worsening of her condition.¹⁹

Dr. O'Brien further explained that appellant's accepted conditions of subluxation of the lumbar and sacrum regions had not worsened but continued to prevent her from being able to work. The employing establishment provided appellant a position as an office automation assistant based on the restrictions provided in Dr. O'Brien's April 30, 2014 report.²⁰ Dr. O'Brien failed to accurately describe why appellant's current conditions would prevent her from performing her job duties, which were based on his recommendation. He noted that no new injury occurred and this was an exacerbation of her existing injury caused by sitting all day in the office as well as having to travel to and from work. Dr. O'Brien failed to explain why appellant's current conditions would prevent her from performing her duties, how her conditions had been exacerbated physiologically, or explain why the original August 12, 2014 LWEC determination was in error as he provided appellant with the very work restrictions he deemed unsuitable.

¹⁴ *D.C.*, Docket No. 08-2185 (issued April 10, 2009).

¹⁵ *Willa M. Frazier*, 55 ECAB 379 (2004).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5(b)(1)(b) (June 2013).

¹⁷ *T.G.*, Docket No. 13-76 (issued March 22, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁸ *Supra* note 12.

¹⁹ *Supra* note 13.

²⁰ Dr. O'Brien determined that MMI had been reached, but appellant was not capable of returning to her date-of-injury position as her job required her to sit for long periods in a high stress environment which caused an exacerbation of her symptoms. He released her to full-time work and advised that appellant could sit for four hours a day with breaks, walk one to two hours, stand for one hour, operate a motor vehicle at work for one hour with breaks, operate a motor vehicle to/from work for one hour, and restricted reaching above the shoulder, twisting, bending, stooping, pushing, pulling, squatting, kneeling, or climbing.

The Board notes that Dr. O'Brien also relates appellant's disability to her work commute. The Board has previously explained that, if a claimant's accepted condition worsens such that she can no longer commute to work, this would constitute a recurrence of disability. On the other hand, if the commute itself caused an increase in disability this would not be compensable as driving to and from work is not a work factor under FECA.²¹ The Board has explained that to be of probative value the medical evidence of record must explain why a claimant is disabled due to the commute.²²

On March 17, 2015 OWCP referred the case file to Dr. Dyer, a DMA, for an opinion regarding whether a material worsening of the accepted conditions had occurred based on objective medical evidence. Dr. Dyer reviewed diagnostic testing and reported that x-ray and MRI scan studies did not support a material worsening of the axial spine. As the medical evidence of record fails to provide support for a material worsening of the accepted employment-related conditions such that appellant was precluded from performing her duties as an office automation assistant, appellant has not met her burden of proof.

The evidence does not establish that appellant's accepted work-related medical conditions have materially changed, that the original LWEC determination was in error, or that she had been retrained or otherwise vocationally rehabilitated. For these reasons, the Board finds that appellant has not established that the August 12, 2014 LWEC determination should be modified and properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Under FECA,²³ the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.²⁴ Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.²⁵ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.²⁶ The Board will not require OWCP to pay compensation for disability without any medical evidence directly addressing the

²¹ See *K.E.*, Docket No. 13-0296 (issued June 6, 2013).

²² See generally *Betty S. Thompson*, Docket No. 01-2039 (issued July 2, 2002).

²³ 5 U.S.C. §§ 8101-8193.

²⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

²⁵ See *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

²⁶ *G.T.*, 59 ECAB 447 (2008); see *Huie Lee Goal*, 1 ECAB 180,182 (1948).

specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.²⁷

ANALYSIS -- ISSUE 2

The Board notes that while OWCP's February 11, 2015 decision denied wage-loss compensation for the period December 14, 2014 through January 10, 2015, the Board has held that OWCP may accept a limited period of disability without modifying a standing LWEC determination.²⁸ This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of an LWEC determination. This narrow exception is only applicable for brief periods of medical disability.²⁹

The Board notes that the relevant medical evidence of record, consisting primarily of reports from Dr. O'Brien, also fails to establish that appellant was totally disabled due to her accepted employment injury from December 14, 2014 through January 10, 2015.³⁰ Appellant failed to submit rationalized medical opinion evidence, based on a complete factual and medical background, either establishing that she was totally disabled from December 14, 2014 through January 10, 2015 or supporting a causal relationship between her claimed disabling condition and the accepted injury.³¹

CONCLUSION

The Board finds that appellant did not meet her burden of proof to modify OWCP's August 12, 2014 LWEC determination. The Board further finds that appellant did not meet her burden of proof to establish entitlement to compensation due to total disability for the period December 14, 2014 through January 10, 2015.

²⁷ See *supra* note 25.

²⁸ See *S.R.*, Docket No. 14-0733 (issued August 18, 2015). The Board noted 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 loss of wage-earning capacity determination.

²⁹ *Id.*, see also *supra* note 16.

³⁰ *Supra* note 15.

³¹ *A.D.*, Docket No. 06-1183 (issued November 14, 2006). Dr. O'Brien stated that appellant's work required her to sit for long periods of time and that she had experienced a significant increase in back and right shoulder pain after returning to work. The Board notes that appellant's allegation may constitute a claim for a new injury, rather than a claim for modification of LWEC or disability compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 19 and February 11, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 27, 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