



she underwent a right L5-S1 discectomy during which a small nick was seen at the shoulder junction of the S1 nerve root. OWCP accepted appellant's claim for herniated lumbar disc on January 9, 2004 and placed her on the periodic rolls on February 16, 2005.

In an effort to determine appellant's work capacity, OWCP referred appellant for a second opinion evaluation. In a report dated April 29, 2010, Dr. Larry M. Parker, a Board-certified orthopedic surgeon, provided a history of injury and findings on physical examination. He noted that appellant had a slightly positive straight leg raising on the right, with slight diminution of the Achilles reflex on the right side. Dr. Parker reviewed a May 17, 2008 magnetic resonance imaging (MRI) scan and concluded that she had a recurrence of disc herniation with objective findings to support lumbar radiculitis in the right lower extremity with an L5 radicular pattern in the right lower extremity. He noted that appellant could work a sedentary or light position. Dr. Parker completed a work capacity evaluation on May 11, 2010 and found that she could work eight hours a day with restrictions, and she could walk and stand for 4 to 8 hours a day with 5- to 10-minute breaks every hour. Dr. Parker opined that she could lift up to 20 pounds.

OWCP referred appellant for vocational rehabilitation services on May 13, 2010. The vocational rehabilitation counselor conducted a labor market survey based on appellant's transferable skills and considered entry level positions within her light-duty physical requirements of lifting up to 20 pounds and the need to change positions for 5 to 10 minutes each hour. She identified the positions of general office clerk, cashier II and outside delivery. The vocational rehabilitation counselor provided labor market survey information to support her finding that the position of cashier II was reasonably available. There were 11,380 cashier positions available. She provided appellant with 20 job openings as a cashier which did not require any specific education or vocational preparation.

In a letter dated August 17, 2010, OWCP informed appellant that the positions of cashier, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 211.462-10, and general office clerk, DOT No. 209.562-10, were within her physical restrictions. It stated that appellant would receive 90 days of assistance to find employment.

The vocational rehabilitation counselor determined that the position of cashier II, DOT No. 211.462-10, was within appellant's work restrictions and vocational ability. This was defined as a light position requiring lifting, carrying, pushing, and pulling up to 20 pounds occasionally, and up to 10 pounds frequently. The position required walking and standing frequently as well as pushing or pulling. On November 8, 2010 the rehabilitation specialist reported that the position of cashier II was reasonably available to appellant with an expected entry level wage of \$7.25 per hour. The position description required up to 30 days of specific vocational preparation or level 2 and the general educational requirements were reasoning level 3, mathematics level 2 and language level 2.

On November 16, 2010 OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a cashier II. Appellant, through counsel, disagreed on November 24, 2010 as the job description was not in keeping with her restrictions.

By decision dated December 20, 2010, OWCP determined that the position of cashier II represented appellant's wage-earning capacity and reduced her compensation effective that date. Appellant, through counsel, requested an oral hearing.

By decision dated July 29, 2011, the OWCP hearing representative affirmed OWCP's December 20, 2010 decision finding that the cashier II position properly reflected appellant's wage-earning capacity and was within her physical abilities.

Appellant requested reconsideration and offered a legal argument based on the Board's decision in *M.V.*<sup>2</sup> OWCP declined to reopen appellant's claim on October 12, 2011.

Counsel appealed to the Board and in an October 2, 2012 decision, the Board found that the position of cashier II represented appellant's wage-earning capacity.<sup>3</sup> The Board further found that appellant had submitted insufficient evidence to warrant modification of the wage-earning capacity decision as the findings of *M.V.* were not applicable to her case.

While the case was pending with Board, OWCP had referred appellant for a second opinion examination on May 2, 2012 with Dr. David A. West, a Board-certified orthopedic surgeon. It requested that Dr. West address two questions: whether appellant's accepted work-related condition had resolved and whether appellant could perform her date-of-injury position. OWCP provided Dr. West with appellant's date-of-injury position description which reflected the requirement of standing up to eight hours a day and generally standing three to five hours a day and walking from four to eight hours a day.

In a report dated May 17, 2012, Dr. West examined appellant and found that she walked in an upright position with no assistive device. He found negative straight leg raising and good strength of the quadriceps, hamstrings, dorsiflexors, and plantar flexors. Dr. West noted that appellant had deep tendon reflexes at two of four at her Achilles and patella. He reported that appellant was able to heel and toe walk with difficulty. Dr. West noted that appellant had a radicular pattern in the right lower extremity and that her magnetic resonance imaging (MRI) scan demonstrated a recurrent disc herniation. He opined that appellant could not return to her date-of-injury position due to the job requirements that she stand or walk for four to eight hours a day. Dr. West noted that appellant could not kneel, bend, squat or climb.

Following the Board's October 2, 2012 decision, counsel requested reconsideration on October 9, 2012 and again cited *M.V.*, as well as the second opinion report of Dr. West. OWCP acknowledged this request on December 16, 2013.

By decision dated January 27, 2014, OWCP denied modification of appellant's wage-earning capacity determination. It found that appellant had submitted no medical evidence to establish a material change in the nature and extent of the injury-related condition. OWCP noted that Dr. West had not addressed appellant's ability to perform the selected position. It further

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<sup>2</sup> Docket No. 10-1642 (June 15, 2011) (finding that as the vocational rehabilitation counselor trained appellant as an entry-level budget analyst the record should have demonstrated how many of the positions available were entry level and therefore suitable to the claimant's vocational training).

<sup>3</sup> Docket No. 12-228 (issued October 2, 2012).

noted that the Board had previously ruled on the reasonable availability of the cashier II position in this case and found that *M.V.* was not applicable. Counsel appealed to the Board. The Board affirmed the January 27, 2014 decision that there was no medical evidence of a change in the nature and extent of appellant's injury-related condition warranting modification of her wage-earning capacity determination.<sup>4</sup>

Following the Board's September 4, 2014 decision, appellant requested reconsideration on February 9, 2015. She submitted an MRI scan report dated March 11, 2014 from Dr. Barry Allen, a Board-certified radiologist. Dr. Allen diagnosed severe degenerative disc disease at multiple levels, especially L5-S1, as well as spinal stenosis at L5-S1 and bilateral foraminal stenosis at L5-S1 and L4-5. He also found hypolordosis of the lumbar spine. Appellant alleged that this report as well as the 2008 MRI scan demonstrated a material change in the nature and extent of her injury-related condition such that her wage-earning capacity decision should be modified.

In a report dated January 16, 2015, Dr. David H. McCord, a Board-certified orthopedic surgeon, reviewed appellant's MRI scan and diagnosed degenerative disc historically related to her injury. He opined that there was no change in her condition and no new medical evidence.

By decision dated March 24, 2015, OWCP reviewed the merits of appellant's claim and denied modification of her wage-earning capacity decision. It found that Dr. McCord did not support appellant's claim for modification of her wage-earning capacity decision as he found that her injury-related condition had not changed.

Appellant requested reconsideration on June 12, 2015. She alleged that Dr. McCord was an OWCP doctor, that he attempted to persuade her to undergo surgery, and that he was a "disgrace to his profession." Appellant submitted an internet article alleging that Dr. McCord performed unnecessary surgeries and had lost hospital privileges due to this practice.

By decision dated June 18, 2015, OWCP declined to reopen appellant's claim for review on the merits as the evidence submitted was irrelevant to the issue for which her claim had been denied.

Appellant again requested reconsideration on September 14 and November 13, 2015. She submitted additional medical evidence in support of her request. In reports dated July 10 and 14, 2015, Dr. James Fiechtl, a physician specializing in emergency medicine, examined appellant due to worsening back pain. He noted that appellant was exiting her vehicle when she felt that her back and left leg "went out." Appellant reported lateral left lower leg and toe numbness. Dr. Fiechtl found symmetric reflexes at patellar Achilles with loss of muscle strength on the left. He noted that despite appellant's description of paresthesia in the left lateral lower leg, she responded to gross touch. Dr. Fiechtl diagnosed degenerative disc changes in the lumbar spine, disc herniation at L4-5 and lumbar radiculopathy. He opined that appellant's current condition was not due to her accepted employment injuries.

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<sup>4</sup> Docket No. 14-0926 (issued September 4, 2014).

Dr. Michael J. McNamara, a Board-certified orthopedic surgeon, examined appellant on August 7, 2015 due to a new injury on July 3, 2015 which occurred while she was getting out of her car. He found normal muscle strength in all motor groups, no focal weakness, and a positive sciatic nerve root tension sign on the left. Dr. McNamara found decreased range of motion, but no muscle spasm. He diagnosed disc herniation, degenerative disc disease, L4-5 disc protrusion, prior decompression at L5-S1. In a separate August 7, 2015 report, Dr. McNamara opined that appellant's disc herniation at L4-5 was not due to her accepted employment injury. He noted that there was an objective change in appellant's condition, but that this change was not related to her L5-S1 condition.

By decision dated February 1, 2016, OWCP reviewed the merits of appellant's claim and denied modification of her wage-earning capacity decision. It reviewed the medical evidence and found that Dr. Fiechtl had not attributed her worsening back pain to her accepted employment injuries. OWCP also found that Dr. McNamara had not attributed her current condition to her employment injuries.

### **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 for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>6</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>7</sup>

Modification of a standing 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 in error.<sup>8</sup> OWCP's procedures provides 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.<sup>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>10</sup>

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<sup>5</sup> 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).

<sup>6</sup> *K.R., id.*; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>7</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>8</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>10</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

### **ANALYSIS**

The Board finds that appellant has not submitted sufficient medical opinion evidence to establish a change in the nature and extent of her injury-related condition such that her December 20, 2010 wage-earning capacity decision should be modified.

The Board has previously determined that appellant's original wage-earning capacity decision was proper. Appellant has not submitted any evidence or argument regarding an error in the original determination of her wage-earning capacity. Further, there is no argument that appellant has been otherwise vocationally rehabilitated such that the wage-earning decision is no longer appropriate. Instead, appellant has submitted additional medical evidence in an attempt to establish a change in the nature and extent of her injury-related condition such that her wage-earning capacity decision should be modified.

Appellant has submitted medical evidence from Drs. McCord, Fiechtl, and McNamara regarding her current medical conditions. None of these physicians have supported a change in her accepted injury-related condition. Dr. McCord found on January 16, 2015 no change in her condition. Drs. Fiechtl and McNamara opined in 2015 reports that appellant had sustained a new back injury and that her current back conditions and resulting sciatica were not related to her accepted employment injury. Appellant has submitted no medical evidence supporting her claim for modification of her wage-earning capacity decision based on a material change in the nature and extent of her injury-related condition. Due to the deficiencies in the medical evidence, the Board finds that appellant has failed to meet her burden of proof.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to modify the loss of wage-earning capacity decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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