

FACTUAL HISTORY

This case has previously been before the Board. By order issued July 10, 2014,² the Board remanded the case for OWCP to combine claim File No. xxxxxx093 with the current claim. The circumstances surrounding the Board's prior order are incorporated herein by reference with the relevant evidence set for the below.

On December 18, 2006 appellant, then a 50-year-old licensed practical nurse, filed an occupational disease claim (Form CA-2) alleging that on December 14, 2006 she first realized that her neck and back pain were due to her employment duties.³ She filed a second Form CA-2 alleging that on December 14, 2006 she first realized that her bilateral carpal tunnel syndrome and right shoulder pinched nerve were caused or aggravated by her employment duties.⁴ OWCP accepted the claims for right neck sprain, right shoulder, upper arm, and rotator cuff sprain, right shoulder calcifying tendinitis, right shoulder impingement syndrome, and right median neuropathy. Subsequently, it also accepted a recurrence of disability beginning May 18, 2010.

On March 9, 2011 appellant accepted an accommodated licensed practical nurse position. By decision dated August 1, 2011, OWCP issued a loss of wage-earning capacity (LWEC) decision in which it found that her actual earnings in her accommodated licensed practical nurse position met or exceeded the current wages of the job she held when injured.

On October 24, 2011 appellant filed an occupational disease claim alleging that on October 6, 2011 she first realized that her cervical sprain with right-sided radiculopathy, right medial neuropathy, radial tunnel, and right rotator cuff tear had been aggravated by her duties in the accommodated position she had performed since March 9, 2011 (OWCP File No. xxxxxx523). She subsequently explained that from March 9 through April 22, 2011 she was required to type and drag a computer from room to room. From April 22 through June 8, 2011 appellant was required to perform injections and computer input, and from June 8 through October 6, 2011 she was required to write in an awkward position either sitting next to a patient's bed, or utilizing a small table next to the bed.

In a January 19, 2012 statement, appellant alleged that the employing establishment failed to accommodate her restrictions and reassigned her on June 8, 2011 from the modified job it provided under OWCP File No. xxxxxx093. After she was moved from her modified job to one that required observing patients who were threats to themselves and/or others or at risk of falling started experiencing tingling, stiffness, and burning in her neck, and bilateral upper back, which radiated down into her hand and arm. As of September 28, 2011, appellant was also required to sort mail where she experienced the same symptoms. Next, she alleged that the employing establishment failed to provide her with ergonomic furniture needed to perform her

² Docket No. 14-84 (issued July 10, 2014).

³ This was assigned claim File No. xxxxxx093.

⁴ This was assigned claim File No. xxxxxx067. On April 15, 2010 OWCP combined claim File Nos. xxxxxx067 and xxxxxx093, with claim File No. xxxxxx093 as the master claim file.

job. Lastly, appellant contended that the repetitive motions involving her neck exacerbated her cervical radiculopathy.

The record under claim File No. xxxxxx093 contains a functional capacity evaluation report (FCE) dated October 28, 2011 detailing appellant's work capabilities. The report noted that appellant became symptomatic on her right side when performing repetitive and heavy lifting tasks. Restrictions included occasional light fine manipulation and firm grasping, no repetitive work, avoid frequent firm grasping, fine manipulation, and repetitive tasks, and under 10 pounds of lifting or carrying. Under physical demands, the report found that appellant was capable of: up to six hours of sitting, standing, and walking; up to one hour of sitting, standing, and walking at one time; occasional static position, rotational movements, flexing movements, bending/stooping, squatting, crawling, climbing stairs, reaching above left shoulder level, kneeling, and balance; no repetitive fine manipulation; occasional fine manipulation; no climbing a ladder or reaching above the right shoulder; frequent extension movements. Lifting and carrying restrictions of up to 10 to 24 pounds were also provided for the left and right hands. The report concluded that appellant was capable of performing sedentary work requiring up to 10 pounds of carrying and/or lifting items and occasional walking/standing.

In March and April 2013, OWCP received reports covering the period October 6, 2011 to April 26, 2013 from Dr. Scott M. Fried, a treating Board-certified osteopathic orthopedic surgeon, diagnosed neuropathy, right brachial plexopathy/cervical radiculopathy, cervical strain/sprain, long thoracic neuritis, and right shoulder capsulitis, partial rotator cuff tear, and acromioclavicular joint synovitis.

In an October 6, 2011 report, Dr. Fried noted that appellant reported increased symptoms and that she was having difficulty with her current job duties which required prolonged neck and head flexion. He was concerned that the pushing and pulling of a cart as this type of activity aggravated her injuries. Dr. Fried reported that appellant could perform brief and limited computer work in an ergonomic environment. He also opined that she should avoid repetitive activities and prolonged positioning. Dr. Fried recommended functional capacity testing to determine appellant's current limitations and capabilities.

On December 22, 2011 Dr. Fried noted that appellant was not working as the result of her employment injuries. He reported that her last limited-duty job was a mobile computer position. Dr. Fried expressed concerns with appellant using a computer in relation to it requiring prolonged head flexion and positioning and using her arms pushing and pulling a cart. He indicated that she remained disabled from working until an appropriate modified job was found within her capabilities and restrictions.

In an April 22, 2013 report, Dr. Fried provided physical examination findings and detailed appellant's injury and treatment history from the October 28, 2009, the date he began treating her. He reported that she returned to work on March 9, 2011 and on June 20, 2011 she noted an aggravation of her symptoms. A physical examination was markedly positive and any increased activities caused a flare up in appellant's symptoms. On October 6, 2011 appellant reported a significant flare up of her symptoms involving her arm, right neck, and plexus. At the time of the flare up she was in a new modified job, which required frequent writing, prolonged sitting, and pulling a cart with a laptop, which Dr. Fried opined aggravated her symptoms.

According to Dr. Fried, appellant's condition continued to be markedly positive and she continued to have symptom flare ups with any increased activity. He reviewed her statement, noted that she requested voice activated software as an accommodation on several times, and noted the different jobs and duties assigned to her. Dr. Fried reported that on September 20, 2011 appellant's duties included filing paid invoices and processing mail, which involved bending and "prolonged posture of the head and neck." He also opined that her repetitive computer activity aggravated her condition. Dr. Fried reported that appellant had accepted employment injuries of right median neuropathy, carpal tunnel, cervical radiculopathy, and right rotator cuff strain, and sprain, which were aggravated by her computer work, the lack of voice-activated software to limit writing and keying activities, and nonergonomic seating. He also opined that the work duties she was performing in her modified position were outside of the restrictions noted in an October 2011 FCE.

In an April 25, 2013 addendum, Dr. Fried opined that as of October 6, 2011 appellant was totally disabled from work due to the work injuries outlined in his prior report. He further noted that the October 2011 FCE testing supported that her disability was due to her work injuries and she was unable to perform her modified job duties.

By decision dated October 24, 2014, OWCP combined OWCP files as instructed by the Board and found that the evidence from the combined files failed to establish appellant's claim that she sustained a new occupational injury. It found that the medical evidence of record failed to explain how her modified employment duties aggravated the conditions accepted under prior claims.

In an October 30, 2014 letter appellant's counsel requested an oral hearing before an OWCP hearing representative, which was held on March 27, 2015.

By decision dated May 22, 2015, the hearing representative affirmed the denial of appellant's claim. She found that none of the reports from Dr. Fried were sufficient to establish that appellant's diagnosed conditions had been aggravated by the job duties appellant performed during the period March 9 to October 6, 2011.

LEGAL PRECEDENT

An LWEC 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.⁵ Compensation for LWEC is based upon loss of the capacity to earn and not on actual wages lost.⁶ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁷

⁵ 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).

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

⁷ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

Modification of a standing LWEC 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.⁸ OWCP's procedures provide that, if a formal LWEC 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 LWEC.⁹ The burden of proof is on the party attempting to show a modification of LWEC determination.¹⁰

ANALYSIS

The Board finds that this case is not in posture for a decision.

OWCP accepted that appellant sustained neck sprain, right rotator cuff sprain, right median neuropathy, right rotator cuff tendinopathy, and right shoulder impingement syndrome and that she had been assigned a modified accommodated licensed practical nurse job under File No. xxxxxx093. On August 1, 2011 it found that her earnings in her accommodated licensed practical nurse position met or exceeded the current wages of the position she held when injured and fairly and reasonably represented her wage-earning capacity.

Appellant alleged on October 24, 2011 that her accepted cervical sprain with right-sided radiculopathy, right medial neuropathy, radial tunnel, and right rotator cuff tear were aggravated by the duties performed in the accommodated position. OWCP developed the evidence submitted in support of the occupational disease claim, but denied the claim finding that the record was devoid of any rationalized medical evidence explaining how her diagnosed conditions had been caused or aggravated by duties of her modified position.

The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted, even if she has not specifically requested modification of LWEC.¹¹ Appellant is in fact requesting modification of the wage-earning capacity determination, in that she is alleging that the duties of the federal position, which purportedly represented her wage-earning capacity, aggravated her accepted conditions. The decisions denying her October 24, 2011 occupational disease claim focused on whether she had established that new duties caused aggravation of the accepted conditions. The issue to be addressed, however, was whether appellant had established a worsening of her

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

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4(a) (June 2013).

¹⁰ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹¹ *See generally, M.S.*, Docket No. 15-685 (issued June 12, 2015).

accepted conditions, such that she could no longer perform the duties of the LWEC position.¹² OWCP's procedures note that to establish modification of a wage-earning capacity determination the medical evidence must demonstrate a worsening of the accepted condition without intervening injury.¹³ The Board has previously found that, although a claimant requested total disability compensation, appellant had not established entitlement to modification of an LWEC determination if her disability increased from partial to total disability due to factors she encountered in her private employment, and with her family, as these factors constituted independent intervening cause.¹⁴

On remand, OWCP shall determine whether appellant has established total disability due to aggravation of her accepted conditions such that her LWEC determination should be modified. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for a decision

¹² *In J.B.*, Docket No. 15-0726 (issued October 20, 2015) the Board reviewed whether an LWEC determination should be modified. The Board framed the issue as whether appellant had submitted medical evidence sufficient to establish that he was unable to perform the duties of his modified clerk position.

¹³ *Supra* note 9 at Chapter 2.1501(3) (June 2013).

¹⁴ *See C.H.*, Docket No. 13-2179 (issued April 23, 2014); *see also S.M.*, 58 ECAB 166 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 22, 2015 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: May 26, 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