

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

A.R., Appellant)
)
and)
)
DEPARTMENT OF HOMELAND SECURITY,)
U.S. IMMIGRATION & CUSTOMS)
ENFORCEMENT, Yakima, WA, Employer)
)

**Docket No. 15-0447
 Issued: September 28, 2016**

Appearances:
Lonnie L. Boylan, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 CHRISTOPHER J. GODFREY, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 19, 2014 appellant, through his representative, timely appealed the August 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The record on appeal contains evidence received after OWCP issued its August 5, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether the constructed position of shopping investigator represents appellant's wage-earning capacity effective January 23, 2014.

FACTUAL HISTORY

Appellant, a 42-year-old former immigration enforcement agent, has an accepted claim for right hip sprain, which arose on June 11, 2008 (xxxxxx067). At the time, he was 34 years old and temporarily stationed at the Federal Law Enforcement Training Center (FLETC) in Glynn County, GA.⁴ Appellant's injury occurred as a result of having run an obstacle course that was part of the required physical training program. He previously sustained a similar work-related injury, which was accepted for hip sprain, at FLETC on January 24, 2008 (xxxxxx444).⁵ OWCP combined his two right hip claims, and the June 11, 2008 injury has been designated the master file (xxxxxx067).

Because of the latest training incident, appellant was unable to complete the 13-week FLETC program. On June 16, 2008 he returned to his primary duty station in Yakima, WA. The employing establishment ultimately removed appellant from service because of his injury-related physical limitations.⁶ The termination was effective September 12, 2008. OWCP paid wage-loss compensation beginning September 15, 2008, and subsequently placed appellant on the periodic compensation rolls.

In October 2010, appellant's current treating physician, Dr. Mark B. Wagner, a Board-certified orthopedic surgeon, cleared him to return to work in a limited-duty capacity.⁷ However, the employing establishment was unable to accommodate appellant's work restrictions. OWCP subsequently developed a vocational rehabilitation plan for placement with a new employer. In June 2011, appellant obtained private-sector employment as an armed security officer.⁸ He continued to receive partial FECA compensation benefits based on a loss of wage-earning capacity denoted by actual earnings.

Because of ongoing right hip complaints, Dr. Wagner imposed additional work restrictions in November 2011.⁹ He also recommended surgery. Appellant's private-sector employer could not accommodate the latest work restrictions and, therefore, appellant stopped

⁴ The 13-week training program began on June 9, 2008.

⁵ On April 22, 2008 appellant's then-treating physician, Dr. Betty Ann Cohen, released him from her care with "no restrictions." Dr. Cohen is Board-certified in occupational and environmental medicine.

⁶ After the June 11, 2008 employment injury, appellant resumed treatment with Dr. Cohen on July 1, 2008. He started physical therapy on July 2, 2008, and Dr. Cohen imposed work restrictions that included no running and no climbing.

⁷ Dr. Wagner initially examined appellant on November 14, 2008.

⁸ OWCP subsidized appellant's private-sector job through the assisted reemployment program.

⁹ Appellant was limited to a sedentary, light-duty position with no extended walking.

work on November 3, 2011. OWCP subsequently resumed payment of wage-loss compensation for temporary total disability.

On January 9, 2012 appellant underwent right hip surgery, which OWCP authorized. Dr. Wagner performed a right hip open trochanteric bursectomy with iliotibial (IT) band windowing.

On April 3, 2012 Dr. Wagner released appellant to “full-duty -- no restrictions.” The only caveat was that appellant should wear a tactical vest versus a hip holster.¹⁰

On April 6, 2012 appellant advised OWCP that he had found private-sector employment with a transportation service. His training as a secure transport officer was to commence on April 9, 2012. Appellant anticipated beginning full-time work on May 1, 2012. The position paid \$12.50 per hour. Effective April 9, 2012, OWCP compensated appellant based on his loss of wage-earning capacity.

In a June 28, 2012 follow-up report, Dr. Wagner retracted his prior full-duty release and advised that appellant was released to a “more sedentary-type job with walking.” He further noted that appellant could not do “any running or obstacle courses.” Dr. Wagner also precluded jumping.

In a July 5, 2012 narrative report, Dr. Wagner clarified that it had not been his intention to release appellant to full-duty work on April 3, 2012. He reiterated that appellant was capable of returning to work, but was restricted from doing any running or jumping. Dr. Wagner also indicated that appellant was definitely not ready to return to the obstacle-type course that initially caused his right hip injury.

On or about September 1, 2012 appellant lost his private-sector job as a secure (prisoner) transport officer. His employer had reportedly changed the job duties such that appellant was required to work more than eight hours per day and drive for longer periods. OWCP resumed payment of wage-loss compensation for temporary total disability, and placed appellant on the periodic compensation rolls.

In an October 23, 2012 follow-up report, Dr. Wagner noted that appellant was starting to have more pain again in the hip. Appellant was reportedly unsure whether the pain was really lateral or stemming from his back. Dr. Wagner noted that appellant had some history of back problems. He believed that a lot of appellant’s pain did not come from his trochanteric bursitis, but was due to other issues, including appellant’s back. Dr. Wagner described numbness and radicular pain down the leg, which was related to appellant’s back. He also noted that appellant’s back problems could be exacerbating his hip. Dr. Wagner recommended a workup for appellant’s back complaints, and surmised that he might require some therapy for the back. Although the right hip was quite a bit improved, he indicated that the hip was being irritated secondary to appellant’s other problems. Additionally, Dr. Wagner recommended a work-hardening program to better gauge appellant’s limitations and the type of work he could pursue.

¹⁰ Dr. Wagner later described it as a loadbearing vest for appellant’s equipment. He recommended a tactical vest so as to avoid increased irritation laterally over appellant’s hip, which might otherwise occur using a hip holster.

When appellant returned on January 28, 2013, Dr. Wagner noted that the recommended back workup and work hardening had not yet been done. He also noted that appellant continued with physical therapy, and reported some ongoing numbness down to his foot when sitting in a car for a while. Appellant also reported sporadic pain over the lateral trochanter. On physical examination, Dr. Wagner noted continued pain over the trochanter with some areas of sharp pain that were a bit more distal than usual. Because of the ongoing hip complaints, he recommended a follow-up magnetic resonance imaging (MRI) scan. Dr. Wagner also recommended a lumbar MRI scan to rule out nerve pathology. He reiterated the need for a work-hardening program or physical capacity evaluation, as well as a workup by a back specialist.

On February 1, 2013 OWCP referred appellant for vocational rehabilitation services.¹¹ It explained that the referral was based on Dr. Wagner's opinion that appellant could return to full-time work with restrictions of "no running or jumping and no use of a loadbearing vest." Dr. Wagner's June/July 2012 work restrictions were found to be the weight of the medical evidence.

A February 12, 2013 right hip MRI scan was essentially normal with no evidence of definite right hip joint pathology. Appellant's February 12, 2013 lumbar MRI scan revealed mild broad-based disc bulges at L4-5 and L5-S1 with articular facet degeneration. Additionally, at the L5-S1 level there was flattening of the central and right aspect of the thecal sac with slight impingement on the right S1 root sleeve within the right lateral recess.¹²

On February 15, 2013 Dr. Wagner advised that the recent MRI scan findings at L5-S1 were "significant," and noted that this could account for appellant's symptoms. He again requested a referral for a spine workup. During a February 26, 2013 follow-up visit, appellant complained of persistent lateral right hip pain. The results of his recent right hip and lumbar MRI scans were discussed, and he received a cortisone injection in his hip.

Dr. Wagner also provided an April 8, 2013 work status report advising that appellant was unable to work as of January 28, 2013.

Dr. Wagner provided additional progress notes and a May 6, 2013 work status report. He indicated that for the past few months he recommended a back workup, which had yet to be done. The May 6, 2013 progress notes also reported continued numbness and tingling down appellant's leg to his toes. Dr. Wagner noted that this occurred more when appellant drove and when he was in a seated position. He also noted that appellant's lower extremity complaints were accompanied by some posterior sciatic pain. On physical examination, Dr. Wagner noted there was still some mild tenderness over the trochanter, but most of appellant's sciatic pain was posterior to this over the sciatic nerve traveling down the leg where he experiences the tingling and numbness. He further indicated that a recent MRI scan showed some thecal sac flattening and some impingement as well. Dr. Wagner reiterated that appellant needed a proper upper back workup to further evaluate his radicular-type pain, which he did not believe to be hip related. He

¹¹ OWCP referred appellant to the same rehabilitation counselor he had previously worked with in 2011.

¹² A prior August 14, 2008 lumbar MRI scan revealed some mild bulging of the L5-S1 disc without significant stenosis or nerve root compression.

further advised that appellant was to remain off work until the back workup was done. Lastly, Dr. Wagner noted that, after appellant received a proper workup and treatment, then vocational and work-hardening programs could commence.

In a follow-up report dated June 17, 2013, Dr. Wagner advised that appellant's latest lumbar MRI scan showed some changes from an MRI scan obtained approximately five years ago. He reiterated that appellant needed to see a spine/back specialist.

On July 8, 2013 OWCP approved a vocational rehabilitation plan for placement as either a private investigator Department of Labor, *Dictionary of Occupational Titles* (DOT No. 376.267-018) or security manager (DOT No. 372.167-014). The strength level for both positions was "Light." According to OWCP, appellant was capable of earning \$720.80 per week as a security manager and \$760.00 per week as a private investigator. Based on recent labor market data, both positions were reasonably available within appellant's commuting area. OWCP advised him that he would receive 90 days of placement assistance (July 18 through October 18, 2013).

In an August 13, 2013 progress note, Dr. Wagner indicated that he was uncomfortable providing work restrictions for appellant's back condition because he was not currently treating him for his back. He further noted that appellant's back issue, as prominently displayed on his MRI scan, still had not been addressed by a specialist. Dr. Wagner recommended that appellant follow up with his primary care physician regarding proper treatment for his back. He also recommended a functional capacity evaluation (FCE), which OWCP subsequently authorized.

On August 15, 2013 Dr. Kristine A. Kruger, a Board-certified family practitioner, advised that appellant was currently undergoing a workup for right hip pain and he would remain off work until further evaluation by an occupational medicine specialist.

On September 18, 2013 Daniel Hughes, a doctor of physical therapy, conducted an FCE. He noted that appellant was originally injured on June 11, 2008 while participating in a training session on a timed course. Mr. Hughes indicated that appellant crawled over a six-foot wall with a two-inch pipe on top. As appellant was going over it for the second time, appellant's right leg got caught on the top of the wall. He essentially hung there by his right foot, resulting in an injury to his right hip. Mr. Hughes also noted that he had previously treated appellant and performed an FCE in August 2010.¹³ He noted that, since the original FCE, appellant had undergone right hip surgery in January 2012, and returned to work in April 2012 as an armed transportation officer. In August 2012, appellant began experiencing a gradual increase in symptoms in his low back, right buttock, and hip. He resumed physical therapy in September 2012 and continued through July 2013. The therapy ended due to lack of progress with the physical therapist believing that appellant's complications were more related to his low back region, thus requiring further medical evaluation. Mr. Hughes further indicated that appellant reported having recently seen a physician who felt that his current complication was related to piriformis syndrome. Appellant advised Mr. Hughes that currently his greatest pain was in the right hip, low back, and right groin.

¹³ The August 18, 2010 FCE revealed functional lifting and nonmaterial handling tolerances in the "Medium" category as defined by the Department of Labor, *Dictionary of Occupational Titles*.

Mr. Hughes noted decreased range of motion (ROM) of the right hip in comparison to the left, as well as limitations in lumbar ROM. With respect to lifting tolerance testing, the maximum weight appellant could lift occasionally was 32 pounds.

The September 18, 2013 FCE also included an assessment of 14 nonmaterial handling activities. Appellant was unrestricted with respect to four activities -- kneeling, overhead reach, fine manipulation, and operating hand controls. Of the 10 remaining categories, Mr. Hughes imposed various limitations and/or prohibited the activity outright (no high level agility/running). With respect to sitting, appellant was restricted to 45 minutes at a time, with a maximum of 5 hours in an 8-hour day. As to standing and walking, Mr. Hughes noted that appellant was restricted to one hour at a time and a maximum of six hours over an eight-hour day. Other restrictions included “occasional” squatting (½-hour), bending/stooping, twisting, and crawling.¹⁴

Mr. Hughes explained that appellant’s above-noted functional lifting and nonmaterial handling tolerances were in the “Light” category as defined by the Department of Labor, *Dictionary of Occupational Titles*. He also noted that appellant presented in a consistent fashion throughout testing and he performed all aspects of the test as requested. Mr. Hughes represented that the results accurately defined appellant’s current physical abilities.

In a September 30, 2013 follow-up report, Dr. Wagner indicated his approval with the recent FCE.

In mid-November 2013 OWCP realized that the previously identified positions of private investigator (DOT No. 376.267-018) and security manager (DOT No. 372.167-014) both required licensing. Because appellant did not possess the appropriate license(s), the identified positions were not considered vocationally suitable. However, OWCP’s rehabilitation specialist represented that the labor market research supported alternative employability as a shopping investigator (DOT No. 376.267-022) and fraud investigator (DOT No. 376.267-014). The shopping investigator position was in the “Light” strength category, and the fraud investigator position was “Sedentary.” The average weekly wage for a shopping investigator was \$1,357.20, and a fraud investigator was capable of earning \$786.40 per week. The rehabilitation specialist also represented that current data revealed that both positions were reasonably available in appellant’s commuting area.

In a November 26, 2013 notice of proposed reduction, OWCP advised appellant that it anticipated reducing his wage-loss compensation to zero based on his ability to earn \$1,357.20 per week as a shopping investigator (DOT No. 376.267-022).¹⁵ It further explained that the selected position was both vocationally and medically suitable. In determining medical suitability, OWCP noted that it relied on Dr. Wagner’s April 3, 2012 work restrictions. It further explained that the shopping investigator position was more appropriate for appellant based on

¹⁴ Mr. Hughes noted that the restrictions with respect to bending/stooping and twisting were secondary to appellant’s low back. All other reported restrictions were either nonspecific as to cause or secondary to hip complications.

¹⁵ OWCP noted that the current weekly wage of appellant’s date-of-injury position was \$870.35.

minimal physical requirements with respect to his right lower extremity. Lastly, OWCP noted that the FCE identified a right lower back condition that appellant reportedly developed in August 2013. It explained that this subsequently-acquired condition was not considered in determining whether the constructed position -- shopping investigator -- was medically suitable.

In a December 17, 2013 progress report, Dr. Wagner noted that appellant recently went to Kaiser where he received an injection in his lower back that provided tremendous relief of his back and hip pain. Appellant informed Dr. Wagner that the burning in his hip was essentially gone. Although he still had some soreness with long-term sitting, overall things were much better. According to Dr. Wagner, the treatment appellant received from Kaiser supported the fact that the problems and pain referring into his hip actually emanated from appellant's back. He reiterated once again that appellant should have a proper workup by a back surgeon.

On December 19, 2013 appellant responded to OWCP's notice of proposed reduction of wage-loss compensation. He noted, *inter alia*, that the shopping investigator position was not part of the rehabilitation plan OWCP approved on July 18, 2013. Additionally, appellant claimed to have informed the rehabilitation counselor as early as August 12, 2013 that he did not have the required state certification to work as a private investigator. Consequently, he questioned the effectiveness of the 90-day placement services provided. Appellant also questioned why OWCP repeatedly ignored Dr. Wagner's numerous reports indicating ongoing disability beginning January 28, 2013. Lastly, he questioned OWCP's refusal to accept his back condition as part of the June 11, 2008 employment injury. Appellant noted that an August 14, 2008 lumbar MRI scan showed a mild disc bulge at L5-S1. He also indicated that OWCP should have accepted his lumbar disc bulge and/or back pain as related to the June 11, 2008 employment injury. Lastly, appellant questioned why OWCP would authorize physical therapy for his low back and piriformis muscle, yet ignore Dr. Wagner's repeated request for referral to a back specialist to determine if the low back and right hip conditions were both due to one injury.

On January 8, 2014 OWCP asked Dr. Wagner if he concurred with the results of the September 18, 2013 FCE. On January 21, 2014 Dr. Wagner noted his agreement with the recent FCE findings. He also submitted a work capacity evaluation (OWCP-5c), which specifically incorporated the sitting, walking, and standing limitations identified by Mr. Hughes in the September 18, 2013 FCE.

In a January 23, 2014 decision, OWCP reduced appellant's wage-loss compensation to zero based on his ability to earn \$1,357.20 per week as a shopping investigator (DOT No. 376.267-022). It explained that appellant's wage-earning capacity based on the selected position was either equal to or greater than the current wages of his date-of-injury position (\$870.35). Additionally, OWCP noted that it reviewed and considered the September 18, 2013 FCE as part of the analysis. It found appellant's restrictions were more in line with a medium position than a light position, but the shopping investigator position was in the light category. OWCP further declined to expand the claim to include appellant's back condition. It explained that the medical evidence was insufficient to establish a causal relationship between appellant's back condition and the June 11, 2008 employment injury.

Appellant's representative timely requested a review of the written record before an OWCP hearing representative. He argued, among other things, that OWCP incorrectly found

that appellant was capable of “medium work,” noting instead that the September 18, 2013 FCE restricted appellant to light or sedentary level of work.

OWCP also received monthly progress notes from Dr. Wagner dated February 25, March 25, April 22, May 20, June 17, and July 22, 2014. The progress notes revealed that the relief appellant received from the December 2013 lumbar injection subsided. Appellant reported a return of nerve-type symptoms in February 2014. Dr. Wagner believed an additional injection would be worthwhile given its past effectiveness. Appellant anticipated receiving another injection in mid-May 2014, but the treatment was postponed due to diabetes-related complications. By the time he returned on June 17, 2014, appellant had received another steroid injection in his back, which reportedly helped the majority of his posterior buttock burning-type pain. When Dr. Wagner last saw appellant on July 22, 2014, he reported that appellant was still getting some relief from the back injection. However, appellant also reported some sporadic hip pain when doing a lot of activities during the day.

By decision dated August 5, 2014, the hearing representative affirmed OWCP’s January 23, 2014 loss of wage-earning capacity determination. She found that the shopping investigator position was both medically and vocationally suitable, and reasonably available within appellant’s commuting area. As to medical suitability, the hearing representative noted that the September 18, 2013 FCE established that appellant could perform work in the light category. She further noted that the shopping investigator position was rated at the light level, and the physical requirements comported with appellant’s restrictions related to the accepted work injury. Additionally, the hearing representative indicated that OWCP was not required to consider limitations resulting from conditions arising subsequent to the work injury.

With respect to appellant’s back complaints/condition, the hearing representative indicated that there was no medical evidence diagnosing a back condition or rationalized physician’s opinion attributing a diagnosed back condition to the June 11, 2008 employment injury. She further found that the medical evidence contemporaneous to and following the June 11, 2008 employment injury did not relate a complaint of back pain until a January 29, 2009 physical therapy note. The hearing representative explained that, because there was no evidence of any prior back injury or condition, appellant’s back complaints were considered to have arisen subsequent to the June 11, 2008 employment incident.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.¹⁶ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.¹⁷ An employee’s actual earnings generally best reflect his wage-earning capacity.¹⁸ Absent evidence that actual earnings do not fairly and reasonably represent the

¹⁶ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

¹⁷ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹⁸ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹⁹ But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.²⁰

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.²¹ The medical evidence it relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.²² Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to post injury or subsequently-acquired conditions.²³

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience.²⁴ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.²⁵ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.²⁶

ANALYSIS

Appellant initially sustained a work-related injury on January 24, 2008, which OWCP accepted for right hip sprain. He subsequently returned to work and suffered another employment injury on June 11, 2008, which OWCP similarly accepted for right hip sprain.

¹⁹ *Id.*

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

²¹ *M.A.*, 59 ECAB 624, 631 (2008).

²² *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

²³ *N.J.*, 59 ECAB 171, 176 (2007); *id.* at Chapter 2.816.4c (June 2013).

²⁴ *Id.* at Chapter 2.813.7b (February 2011).

²⁵ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n. 9 (2004); *id.* at Chapter 2.816.6.

²⁶ 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

Appellant was unable to resume his regular duties as an immigration enforcement agent. Consequently, the employing establishment terminated his services effective September 12, 2008. Appellant underwent OWCP-approved right hip surgery on January 9, 2012. Following surgery, he returned to work in the private sector as a secure transport officer. Appellant worked in this capacity from April 9 through September 1, 2012. OWCP resumed payment of compensation for temporary total disability effective September 1, 2012, which continued through January 23, 2014. As noted, it reduced appellant's wage-loss compensation to zero based on his ability to earn \$1,357.20 per week as a shopping investigator (DOT No. 376.267-022).

On appeal, appellant's representative raised a number of issues with respect to the vocational rehabilitation services OWCP provided. He also questioned whether the selected position was medically suitable and if OWCP properly accounted for all of appellant's limitations, including those related to his low back. The Board notes that there is no definitive, rationalized medical opinion linking appellant's L5-S1 disc bulge and/or piriformis syndrome to either the January 24 or June 11, 2008 employment injuries. Although Dr. Wagner repeatedly recommended that appellant be seen by a back specialist, OWCP opted not to refer him for a second opinion examination. The Board finds that OWCP properly denied expanding the accepted condition to include a back or lumbar injury.²⁷ Further the Board finds OWCP properly determined that the back condition was not relevant in determining the wage-earning capacity as it was a subsequently-acquired condition.²⁸

The Board finds that OWCP has met its burden of proof to justify modification of appellant's wage-loss compensation benefits.²⁹ The record establishes that the selected position of shopping investigator is medically suitable. The September 18, 2013 FCE indicated that appellant was restricted to light or sedentary level work and the actual physical limitations reported by Mr. Hughes demonstrate that appellant is capable of either category of work.

The position of shopping investigator (DOT No. 376.267-022) is classified as light and the duties are as follows:

“Shops in commercial, retail, and service establishments to test integrity of sales and service personnel, and evaluates sales techniques and services rendered customers: Reviews establishment's policies and standards to ascertain employee-performance requirements. Buys merchandise, orders food, or utilizes services to evaluate sales technique and courtesy of employee. Carries merchandise to check stand or sales counter and observes employee during sales transaction to detect irregularities in listing or calling prices, itemizing merchandise, or handling cash. Delivers purchases to agency conducting

²⁷ Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

²⁸ *Supra* note 23.

²⁹ *Supra* note 16.

shopping investigation service. Writes report of investigations for each establishment visited. Usually works as member of shopping investigation crew.”

Based on the above-noted job duties, Dr. Wagner found that appellant would be able to work full-time, eight hours per day as a shopping investigator. The Board finds that OWCP properly found the position of shopping investigator medically and vocationally suitable. As such, OWCP met its burden of proof to justify modification of appellant’s wage-loss compensation benefits.³⁰

CONCLUSION

The Board finds that OWCP properly found that the constructed position of shopping investigator represented appellant’s wage-earning capacity effective January 23, 2014.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2014 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: September 28, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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

³⁰ *Supra* note 20.