



On appeal counsel argues that the April 2, 2013 loss of wage-earning capacity determination was erroneously issued.

### **FACTUAL HISTORY**

On August 31, 2010 appellant, then a 38-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that on August 23, 2010 he first became aware of the relationship between his lumbar back condition and factors of his federal employment. He stopped work on August 24, 2010. OWCP accepted the claim for lumbar intervertebral disc displacement without myelopathy and aggravation of lumbar radiculitis. It authorized surgery, which was performed on October 25, 2010. Appellant received wage-loss compensation benefits.

By letter dated May 3, 2011, OWCP placed appellant on the periodic rolls for temporary total disability.

On October 18, 2011 Dr. Lawrence A. Lesnak, a treating, osteopath and Board-certified physiatrist, recommended a functional capacity evaluation (FCE). On November 3, 2011 appellant underwent a FCE to determine his work capability and restrictions. The results noted his ability to perform 28 minutes of sustained sitting, 25 minutes of sustained standing, 14 minutes of sustained walking, up to 13 pounds maximum bilateral lifting of 1 lift every 2 minutes from floor to waist, and 23 pounds from waist to shoulder, maximum bilateral lift of 1 lift every 5 minutes of 15 pounds from floor to waist and from shoulder to overhead, and maximum occasional lifting of 1 lift every 30 minutes of 40 pounds from floor to knuckle, 30 pounds from knuckle to shoulder and from shoulder to overhead. It further noted that appellant's lifting requirement fell within, but did not fully meet a medium work category.

In a report dated November 16, 2011, Dr. Lesnak reviewed the November 3, 2011 FCE and provided work restrictions. The restrictions included: lifting only up to 35 to 40 pounds from the floor to overhead, frequent floor to overhead lifting up to 15 to 20 pounds, and avoidance of repetitive twisting or bending. Dr. Lesnak noted that there was no specific evidence suggesting limitations on standing and walking although it would be reasonable for appellant to be able to change his position every hour. In an attached OWCP work capacity evaluation form (OWCP-5c), he indicated that appellant had permanent work restrictions on walking and sitting up to one hour, up to two to four hours of stooping, and pushing, pulling, and lifting up to 20 pounds.

On January 31, 2012 appellant was referred for vocational rehabilitation based on work restrictions provided by Dr. Lesnak. The certified rehabilitation counselor recommended a 90-day job placement plan and noted that appellant could perform light-physical demand category eight hours per day with restrictions of ability to walk/stand hourly with brief breaks, two to four hours of stooping/bending, occasional pushing/pulling up to 120 pounds, occasional lifting of 35 to 40 pounds, frequent lifting of 15 to 20 pounds, squatting two to four hours daily, and up to four hours of kneeling daily. A rehabilitation plan was prepared with the objective of obtaining a position of bank teller or receptionist with weekly wages of \$400.00 to \$440.00 for a bank teller or \$320.00 to \$330.00 for a receptionist. The rehabilitation counselor stated that these jobs were within appellant's educational capabilities based on vocational testing services. Appellant related that he had excellent communication skills and self-taught computer skills.

The rehabilitation counselor noted that these positions were reasonably available in his commuting area and attached job classification for the positions. Appellant signed the Individual Rehabilitation Job Search Plan and Agreement on April 11, 2012 and agreed that he met the qualifications for a bank teller and receptionist based on prior work and educational experience.

An April 5, 2012 labor market survey for bank teller noted that the bank teller position was light-duty work with occasional lifting of up to 20 pounds, frequent lifting of up to 10 pounds, no climbing, balancing, kneeling or crawling, and occasional stooping and crouching. The demands for sitting, standing, and walking were not indicated. The survey noted that the position required six months to one year of specific vocational preparation, which appellant met based on his successful completion of Denver Business College, his self-acknowledged good math skills, and excellent customer service and communication skills. The report also noted that reasonable accommodations were discussed with employing establishment employers', such as alternate sitting/standing options, to enable him to perform the position.

In a May 4, 2012 rehabilitation action report, the rehabilitation counselor noted that appellant was obstructing rehabilitation as he failed to carry out agreed upon actions and failed to appear for scheduled meetings. She related that he informed her that he was totally disabled and unable to participate in vocational rehabilitation.

In a May 16, 2012 report, Dr. Lesnak noted meeting with appellant. Although there was no physical examination, he noted reviewing objective findings, diagnoses, appellant's symptoms and counseling appellant on his prognosis and treatment options. Under recommendations, Dr. Lesnak reported that appellant continued having significant L5-S1 disc pathology, worsening electrodiagnostic study, worsening functional status, and progressive low back, and right leg symptoms.

In an August 8, 2012 report, Dr. Lesnak found appellant able to work full time with current work restrictions of no frequent lifting more than 10 to 15 pounds; no intermittent lifting more than 25 to 30 pounds; a five-minute break after one hour of continuous walking/standing activities; refrain from frequent bending, twisting at the waist or kneeling activities, and no pushing/pulling more than 50 pounds intermittently.

A September 18, 2012 report of the vocational rehabilitation counselor noted that the 90-day placement services had expired with no participation by appellant. She noted that he had stopped responding to her attempted contacts. The rehabilitation counselor recommended closing the file due to appellant's failure to participate in vocational rehabilitation.

In an October 2, 2012 memorandum, the vocational rehabilitation specialist advised that the market was favorable for a bank teller, and that the positions were readily available in sufficient numbers in appellant's commuting area. The average weekly wages of a bank teller, (U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 211.362.018) at the high end was \$440.00 based upon college business coursework and work experience. The rehabilitation specialist further noted that Dr. Lesnak opined that appellant was capable of working full time with restrictions and that the latest report, dated August 8, 2012, noted frequent lifting restrictions of 10 to 15 pounds and occasional lifting of 25 to 30 pounds, which were within the restrictions of the bank teller position.

On February 8, 2013 OWCP issued a notice proposing to reduce appellant's compensation as the position of bank teller was medically and vocationally suitable for him and represented his wage-earning capacity. It advised him that he had the capacity to earn wages as a bank teller, (DOT No. 211.362.018,) a light-work position, at a rate of \$440.00 per week, in accordance with the factors outline in 5 U.S.C. § 8115(a).<sup>3</sup> OWCP calculated that appellant's compensation should be adjusted to \$430.40 using the *Shadrick*<sup>4</sup> formula. It indicated that the monthly salary for his job when injured was \$1,024.77, that the current monthly salary for his job and step as of February 7, 2013 was \$1,056.20 and that he was currently capable of earning \$440.00 per week, as a bank teller. OWCP therefore determined that appellant had a 75 percent wage-earning capacity. It found that his current adjusted compensation rate per four-week period was \$1,840.00. OWCP stated that the case had been referred to a vocational rehabilitation counselor who determined that the bank teller position was suitable for appellant, given his work restrictions, and was reasonably available in his commuting area. It allowed him 30 days in which to submit any contrary evidence.

In a letter dated March 3, 2013, appellant noted his disagreement with OWCP's finding that the position of bank teller was suitable both medically and vocationally. Specifically, he contended that the bank teller position was outside of his work restrictions, that he did not have any customer service skills with the public or prior bank teller experience, and that he was not up to date with his computer skills, higher math, or other requirements for a bank teller position.

Appellant subsequently submitted a June 8, 2012 report by Dr. Hugh D. McPherson, an examining Board-certified orthopedic surgeon, who diagnosed chronic low back pain, right leg radicular pain, L5-S1 severe degenerative disc disease, right L5 radiculopathy, L2-S1 degeneration, and status post L5-S1 percutaneous decompression. Dr. McPherson recommended a fusion and exploration of the nerve root given the damage to appellant's L5 nerve root. As an alternative to surgery, he recommended a spinal cord stimulator, which would also be considered even if surgery was performed. Dr. McPherson opined that surgery was appellant's best chance of improving his symptoms.

In a March 27, 2013 report, Dr. Lesnak noted that appellant had not yet undergone the recommended lumbar surgery, and that he had increasing lower extremity weakness and pain. He provided physical examination findings and adjusted appellant's work restrictions based on the clinical findings and progressive symptoms. The adjusted work restrictions allowed appellant to perform 5 to 10 pounds of frequent lifting, a maximum of 15 pounds of lifting no more than 4 hours per day, standing or walking for no more than 15 minutes at a time. He was also to refrain from kneeling, bending, twisting at the waist, or stooping activities, and no pushing/pulling more than 20 pounds for no more than two hours per day.

By decision dated April 2, 2013, OWCP reduced appellant's benefits, effective that date, to reflect that he was capable of performing the duties of a bank teller earning \$440.00 per week.

Subsequently, OWCP received reports dated May 9, June 20, and August 1, 2013 from Dr. Lesnak, which provided physical examination findings, diagnoses, and reiterated the work

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<sup>3</sup> 5 U.S.C. § 8113.

<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

restrictions noted in his March 27, 2013 report. In an October 10, 2013 report, Dr. Lesnak reported no changes to appellant's work restrictions.

On January 9, 2014 appellant underwent authorized L5-S1 lateral decompression, revision decompression, and transforminal lumbar interbody fusion surgery.

In a letter dated April 1, 2014, appellant's counsel requested reconsideration of the April 2, 2013 OWCP decision. Counsel argued that the work restrictions utilized to select the position were stale by the time the loss of wage-earning capacity determination was issued and appellant's medical condition had worsened based on a June 8, 2012 report by Dr. McPherson who recommended surgery, which was performed on January 9, 2014.

By decision dated July 11, 2014, OWCP denied modification of the April 2, 2013 loss of wage-earning capacity determination.

In a letter dated July 18, 2014, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on February 11, 2015.

By decision dated August 20, 2014, OWCP "temporarily interrupted" the April 2, 2013 loss of wage-earning capacity determination and approved a payment for the period January 9 to August 23, 2014 due to the approved January 9, 2014 surgery.<sup>5</sup> It noted that appellant had previously received a partial payment for the period in question and that the new payment would be the difference between what he had been paid under the loss of wage-earning capacity determination and the rate of pay for full disability. Appellant was further advised that, effective August 24, 2014, his rate of pay would continue at the "full disability" rate until he was released to return to work by his physician.

By decision dated April 8, 2015, an OWCP hearing representative affirmed the July 11, 2014 decision denying modification of the April 2, 2013 loss of wage-earning capacity determination.

### **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>6</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>7</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally

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<sup>5</sup> A review of the Compensation History under case query in IF ECS shows that appellant continued to receive wage-loss compensation on the periodic rolls for total disability.

<sup>6</sup> *D.M.*, 59 ECAB 64 (2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>7</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

rehabilitated.<sup>8</sup> OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity determination has the burden to prove that one of these criteria has been met.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar intervertebral disc displacement without myelopathy and aggravation of lumbar radiculitis as a result of his employment duties. In an April 2, 2013 loss of wage-earning capacity determination, appellant's compensation was adjusted to reflect its determination that he was capable of earning wages in the constructed position of bank teller for 40 hours per week. By decision dated July 11, 2014, OWCP denied his request for modification, which was affirmed by an OWCP hearing representative on April 8, 2015. The issue on appeal is whether appellant met his burden of proof to establish that the April 2, 2013 loss of wage-earning capacity determination was erroneous and should be modified.

In a November 16, 2011 OWCP work capacity evaluation form, Dr. Lesnak found that appellant could work full time with permanent work restrictions on walking and sitting up to one hour, up to two to four hours of stooping, and pushing, pulling, and lifting up to 20 pounds. Based on these restrictions, OWCP referred him for vocational rehabilitation. Following the closure of vocational rehabilitation, it determined that appellant's wage-earning capacity should be reduced based upon his ability to perform the selected position of bank teller and that it fell within the physical restrictions established by Dr. Lesnak.

The Board finds that the April 2, 2013 loss of wage-earning capacity determination was proper as the selected position of bank teller was within appellant's physical restrictions.

The issue of whether an employee has the physical ability to perform a selected position is a medical question that must be resolved by probative medical evidence.<sup>10</sup>

The February 8, 2013 proposed reductions of compensation to the constructed bank teller position was based on the November 1, 2011 restrictions provided by Dr. Lesnak. Prior to the April 2, 2013 finalization of the loss of wage-earning capacity determination appellant submitted a new March 27, 2013 report from Dr. Lesnak received by OWCP on April 10, 2013. These new restrictions included the limitation that appellant was not to stand or walk for more than 15 minutes at a time. Dr. Lesnak, however, failed to provide any rationalization as to why he had changed appellant's work restrictions. The Board has previously held that a physician must provide a reasoned explanation regarding whether appellant's accepted conditions had materially worsened such that he was unable to perform the duties of his modified position.<sup>11</sup> The Board finds that Dr. Lesnak failed to provide any objective evidence that appellant's conditions had

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<sup>8</sup> *D.M.*, *supra* note 5; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification Loss of Wage-Earning Capacity*, Chapter 2.1501.3(a) (June 2013). *See also E.F.*, Docket No. 11-2056 (issued May 14, 2012).

<sup>9</sup> *Id.* at Chapter 2.1501.4 (June 2013).

<sup>10</sup> *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

<sup>11</sup> *See A.P.*, Docket No. 13-101 (issued June 24, 2013).

materially worsened. It is appellant's burden of proof to submit a probative medical opinion establishing a material change in the nature and extent of his accepted condition.<sup>12</sup>

Appellant has thus not met his burden of proof to modify the April 2, 2013 loss of wage-earning capacity determination.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to modify the April 2, 2013 loss of wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 8, 2015 is affirmed.

Issued: September 9, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>12</sup> See *D.D.*, Docket No. 14-1503 (issued November 24, 2014).