

her back after removing a fixture weighing approximately 35 pounds from a table at work. OWCP accepted appellant's claim for a lumbar strain and herniated disc at L5-S1.

On May 15, 1997 appellant underwent laminotomy, partial facetectomy, and disc excision at L4-5. The surgery was authorized by OWCP. Appellant participated in an OWCP-sponsored vocational rehabilitation program and periodically worked for private-sector employers before stopping work in mid-2002.

Appellant received wage-loss compensation on the periodic rolls beginning June 16, 2002.

On October 1, 2002 appellant underwent interbody fusion surgery at L4-5 and L5-S1. The surgery was authorized by OWCP.

In November 2009 OWCP referred appellant to Dr. Thomas Sabourin, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion on her medical condition and ability to work. In a December 15, 2009 report, Dr. Sabourin indicated that appellant could work for eight hours per day with restrictions including lifting, pushing, and pulling up to 20 pounds, walking for up to six hours per day, and standing for up to six hours.

On October 26, 2010 appellant began working on a full-time basis as an office assistant for the County of Riverside, Department of Public Social Services.² The position was sedentary in nature and involved greeting and assisting clients needing social services, answering the telephone, and researching case information on a computer. The position did not require any notable lifting, pushing, or pulling, and walking/standing was extremely limited.

In a January 5, 2011 decision, OWCP reduced appellant's compensation effective October 26, 2010 based on the determination that her actual wages as an office assistant for the County of Riverside, Department of Public Social Services, fairly and reasonably represented her wage-earning capacity. It noted that this employment was effective on October 26, 2010, and that appellant had demonstrated the ability to perform the duties of the job for more than two months.³ OWCP found that the position was suitable given appellant's partially disabled condition. It applied the principles set forth in the *Shadrick* decision to determine the percentage of appellant's loss of wage-earning capacity.⁴

After the issuance of OWCP's January 5, 2011 decision, appellant continued to receive wage-loss compensation on the periodic rolls, albeit at a lesser rate to reflect the loss of wage-earning capacity determination made in that decision.

Appellant stopped work on February 21, 2013 and received pay for leave under the Family and Medical Leave Act for the period February 21 through April 8, 2013. Her employer, the County of Riverside, terminated her employment due to her inability to perform her job.

² The official title of the position was "Office Assistant III."

³ Appellant earned wages of \$526.28 per week in the office assistant position.

⁴ See *Albert C. Shadrick*, 5 ECAB 376 (1953).

In a June 11, 2013 report, Dr. Vito Caruso, an attending Board-certified orthopedic surgeon, noted that, upon physical examination, appellant had normal strength in her abdominal and back muscles, but exhibited spasm in the lumbar musculature, tenderness over the lumbar spinous processes and paravertebral spinal muscles, and decreased sensation in the L4-5 and L5-S1 dermatomes. Dr. Caruso diagnosed left S1 radiculopathy, lumbosacral disc syndrome, and status post lumbar discectomy and interbody fusion surgeries, and opined that appellant was temporarily totally disabled from work.

In a letter dated August 9, 2013, OWCP informed appellant that it appeared she was claiming disability due to a material change/worsening of the accepted work-related conditions caused by the February 13, 1992 work injury. It advised appellant regarding the definition of a recurrence of disability and requested that she submit additional factual and medical evidence in support of her claim, including a physician's report containing an opinion explaining how her original work-related condition had materially changed/worsened, without an intervening cause, to the point that she was disabled. OWCP requested that appellant complete an attached questionnaire which solicited information regarding her work duties and the circumstances of how the claimed recurrence of disability occurred.

In October 31, 2013 appellant filed a claim for compensation (Form CA-7) for disability from February 22 to November 1, 2013 due to her February 13, 1992 work injury. In a November 1, 2013 letter, OWCP advised appellant that the employing establishment needed to complete its portion of the Form CA-7 before further action would be taken on the claim. On November 12, 2013 appellant informed OWCP that she could not have her date-of-injury employing establishment complete its portion of the Form CA-7 because the employing establishment had closed.

In December 2013 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion on her medical condition and ability to work. It requested that Dr. Swartz provide an opinion regarding whether appellant had disability due to the February 13, 1992 injury sustained during her federal employment and to indicate whether her duties as an office assistant were competent to cause disability without reference to the February 13, 1992 work injury.

In January 30, 2014 report, Dr. Swartz discussed appellant's factual and medical history and reported the findings of his physical examination on that date. He indicated that appellant had 5/5 strength in her lower extremities, but noted that she exhibited objective findings of absent left patellar reflex, trace left Achilles reflex, and hyperthesias in the left lower leg. Dr. Swartz indicated that appellant's primary problem was that she was overmedicated with opioids and he opined that there was no medical indication for use of these opioids which caused dizziness, loss of balance, nausea, constipation, cognitive deficits, and fatigue. He found that appellant was capable of performing the job of office assistant, but noted that she needed to be weaned off of Dilaudid and Oxycontin because these medications were "her impediment to return to gainful employment and not her low back."

In a February 12, 2014 form report entitled Work Capacity Evaluation (Form OWCP-5c), Dr. Swartz determined that appellant could not perform her date-of-injury job, but could work

for eight hours per day with restrictions including lifting, pushing, and pulling no more than 20 pounds, walking for up to four hours per day, and standing for up to six hours.

On July 9, 2014 appellant filed a notice of recurrence (Form CA-2a) claiming that she sustained a recurrence of total disability beginning February 22, 2013 due to her February 13, 1992 work injury. She alleged that her original work-related condition had worsened to the point that she could no longer perform the walking, standing, and sitting required by her work as an office assistant for the County of Riverside. Appellant asserted that she had not sustained any new injuries after returning to work as an office assistant.

On July 9, 2014 appellant also again filed a claim for compensation (Form CA-7) claiming disability for the period February 22, 2013 to January 15, 2014 due to her February 13, 1992 work injury.

Appellant submitted a February 20, 2015 report in which Dr. Caruso indicated that appellant reported that her back pain had worsened. Dr. Caruso opined that appellant was totally disabled through March 20, 2015. On April 20, 2015 he diagnosed left S1 radiculopathy and lumbosacral disc syndrome, and indicated that appellant was temporarily totally disabled until her next examination in four weeks.

In an April 10, 2015 report, Dr. Sanjoy Banerjee, an attending Board-certified anesthesiologist, diagnosed lumbosacral spondylosis without myelopathy, unspecified myalgia and myositis, and bursitis of the hip. Dr. Banerjee discussed appellant's medical treatment, including her use of pain medications.

In March 2015 OWCP referred appellant to Dr. Stephen M. Ma, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion on her medical condition and ability to work. It requested that Dr. Ma identify all periods that appellant was totally disabled due to her February 13, 1992 work injury and indicate whether she could work as an office assistant.

In an April 22, 2015 report, Dr. Ma detailed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He discussed appellant's work as an office assistant for the County of Riverside and noted that she presently complained of low back pain upon extended standing, walking, or sitting with shooting pain and numbness in her legs. Dr. Ma indicated that, upon examination, appellant had 5/5 strength and intact sensitivity in her lower extremities, but that there was some limitation of back motion. Appellant did not exhibit back spasms and there was no area of point tenderness to palpation in her back. Dr. Ma indicated that he agreed with the assessment of Dr. Swartz that appellant could perform the duties of the office assistant position.⁵ He noted that he also agreed with Dr. Swartz that appellant's use of strong opioid medications was not supported by objective medical findings. In an April 22, 2015 Form OWCP-5c, Dr. Ma indicated that appellant could not perform her date-of-injury job, but could work for eight hours per day with restrictions, including walking for up to three hours per day, standing for up to three hours, pushing up to 10 pounds for

⁵ Dr. Ma noted that appellant had preexisting back arthritis which contributed to her partial disability.

up to three hours, pulling up to 10 pounds for up to three hours, and lifting up to 10 pounds for up to three hours.

By decision dated July 13, 2015, OWCP determined that appellant had failed to meet her burden of proof to modify OWCP's January 5, 2011 loss of wage-earning capacity determination. It noted that appellant had failed to establish that the original loss of wage-earning capacity determination was erroneous, that there was a material change in the nature and extent of her injury-related condition, or that she had been retrained or otherwise vocationally rehabilitated.

On September 23, 2015 appellant requested reconsideration of OWCP's July 13, 2015 decision. She submitted several reports in which Dr. Caruso found appellant totally disabled from work. In a July 28, 2015 report, Dr. Caruso reported findings on examination, diagnosed left S1 radiculopathy and lumbosacral disc syndrome, and noted that appellant was temporarily totally disabled. In a July 31, 2015 report, he requested that various conditions be accepted by OWCP, including left S1 radiculopathy, lumbosacral disc syndrome, and spinal stenosis. Dr. Caruso indicated that appellant was totally disabled from work until August 25, 2015, noting that she had reported that her back symptoms had increased to the extent that she was not able to perform activities of daily living. He found that appellant was experiencing a spontaneous worsening of symptoms of her previously accepted lower back condition without an intervening cause and noted, "She is having a recurrence with no apparent, identifiable cause for the worsening of her condition other than the original condition itself."

In a September 4, 2015 report, Dr. Caruso noted that appellant reported difficulty ambulating and sitting for extended periods of time beyond 10 minutes, secondary to pain and weakness. He indicated that appellant complained that she had a continuous burning sensation in her left mid-to-lower back and that her back gave out when she attempted to rise from a sitting position. She reported that her back symptoms had increased to the point that she was unable to perform activities of daily living. Dr. Caruso again indicated that appellant was totally disabled from work. On October 9, 2015 he noted similar symptom complaints and indicated that appellant was temporarily totally disabled from work.

In several reports dated between July 6 and November 2, 2015, Dr. Banerjee reported the findings of his examinations and discussed his treatment of appellant's pain symptoms.

In a decision dated December 18, 2015, OWCP denied modification of its July 13, 2015 decision. It noted that appellant had not met her burden of proof to modify its January 5, 2011 loss of wage-earning capacity determination. OWCP found that appellant failed to submit sufficient probative medical evidence to establish a material change in the nature and extent of her injury-related condition.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ OWCP's

⁶ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁸ A determination regarding whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.⁹ Wage-earning capacity may not be based on an odd-lot or makeshift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.¹⁰

Once the wage-earning capacity of an injured employee is determined, a modification of such 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 fact, erroneous.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS

OWCP accepted that on February 13, 1992 appellant sustained a lumbar strain and herniated disc at L5-S1 due to removing a fixture from a table at work. She underwent OWCP-authorized surgery, including laminotomy, partial facetectomy, and disc excision at L4-5 on May 15, 1997 and interbody fusion surgery at L4-5 and L5-S1 on October 1, 2002. Appellant received wage-loss compensation on the periodic rolls beginning June 16, 2002. She began working as an office assistant for the County of Riverside, Department of Public Social Services, on October 26, 2010. The position was sedentary in nature and involved greeting and assisting clients needing social services, answering the telephone, and researching case information on a computer. The position did not require any notable lifting, pushing, or pulling, and walking/standing was extremely limited.

⁷ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *E.W.*, Docket No. 14-584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

¹⁰ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

¹¹ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹² See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

In a January 5, 2011 decision, OWCP adjusted appellant's compensation effective October 26, 2010 based on the determination that her actual wages as an office assistant fairly and reasonably represented her wage-earning capacity. It noted that this employment was effective on October 26, 2010, and that appellant demonstrated the ability to perform the duties of the job for more than two months.

On July 9, 2014 appellant filed a claim for a recurrence of disability (Form CA-2a) in which appellant claimed that she sustained a recurrence of disability on February 22, 2013 due to her February 13, 1992 work injury. Because a formal loss of wage-earning capacity decision had been issued on January 5, 2011, OWCP treated appellant's recurrence of disability claim as a request for modification of the January 5, 2011 loss of wage-earning capacity decision.¹³ In decisions dated July 13 and December 18, 2015, it found that appellant had failed to meet her burden of proof to establish modification of its January 5, 2011 loss of wage-earning capacity decision.

The Board finds that OWCP properly denied appellant's request to modify the January 5, 2011 loss of wage-earning capacity determination.

OWCP based its January 5, 2011 loss of wage-earning capacity determination on appellant's actual earnings as an office assistant since October 26, 2010. The Board finds that the evidence reveals that the office assistant position was medically and vocationally suitable for appellant. The record does not show that appellant was required to exceed her physical limitations or that her assignment was vocationally unsuitable.¹⁴ Appellant has not argued that the position upon which the rating was based, *i.e.*, office assistant, was makeshift or odd-lot in nature such that it could not be used to justify the loss of wage-earning capacity determination.¹⁵

As noted, actual earnings are generally the best measure of wage-earning capacity and OWCP properly used appellant's actual wages in the office assistant position to determine her wage-earning capacity.¹⁶ Appellant worked in the office assistant position for more than 60 days and OWCP properly determined that her actual wages in the position fairly and reasonably represented her wage-earning capacity.¹⁷ There is no clear probative evidence that OWCP's January 5, 2011 loss of wage-earning capacity determination was erroneous and appellant has not satisfied this prong of the test for modifying a loss of wage-earning capacity determination.¹⁸

¹³ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁴ See *H.S.*, Docket No. 11-1791 (issued March 23, 2012).

¹⁵ See *supra* note 10.

¹⁶ See *supra* note 8.

¹⁷ OWCP complied with its procedures by making its January 5, 2011 loss of wage-earning capacity determination after appellant worked in the office assistant position for more than 60 days. See *supra* note 9.

¹⁸ See *supra* note 11.

Appellant also argued that she experienced a worsening of her injury-related condition which prevented her from working in the office assistant position.¹⁹ However, she has failed to provide rationalized medical evidence to establish that her injury-related condition worsened such that she could no longer perform the duties of the office assistant position.²⁰

In December 2013, OWCP referred appellant to Dr. Swartz for a second opinion examination and an opinion on her medical condition and ability to work. In a January 30, 2014 report, Dr. Swartz determined that appellant could perform the duties of the office assistant position.²¹ In a February 12, 2014 Form OWCP-5c, Dr. Swartz determined that appellant could work for eight hours per day with restrictions including lifting, pushing, and pulling no more than 20 pounds, walking for up to four hours per day, and standing for up to six hours. The Board notes that these restrictions would have allowed appellant to perform the sedentary duties of the office assistant position.

In March 2015 OWCP determined that updated medical evidence was needed and it referred appellant to Dr. Ma for a second opinion examination and a rationalized medical report on her medical condition and ability to work. In an April 22, 2015 narrative report, he indicated that he agreed with the assessment of Dr. Swartz that appellant could perform the duties of the office assistant position.²² In an April 22, 2015 Form OWCP-5c, Dr. Ma opined that appellant could work for eight hours per day with restrictions including walking for up to three hours per day, standing for up to three hours, and pushing, pulling, and lifting up to 10 pounds for up to three hours. The Board notes that these restrictions would allow appellant to work as an office assistant.

On appeal appellant argues that Dr. Ma's report was "unprofessional" and that it appeared that "there was a personal agenda involved." However, appellant did not articulate the basis for making these assertions.²³ The Board has held that allegations of bias by OWCP

¹⁹ *See id.*

²⁰ *See M.S.*, Docket No. 16-1287 (issued March 7, 2017) (noting that the claimant did not submit rationalized medical evidence showing a worsening in the injury-related condition such that modification of a prior OWCP loss of wage earning capacity determination was established).

²¹ Dr. Swartz indicated that appellant's primary problem was that she was overmedicated with opioids, particularly Dilaudid and Oxycontin, and he opined that there was no medical indication for use of these opioids. He noted that she needed to be weaned off of opioids because these medications were "her impediment to return to gainful employment and not her low back." The Board notes that there is no probative medical evidence of record showing that appellant's opioid usage was necessitated by the February 13, 1992 work injury.

²² Dr. Ma also agreed with Dr. Swartz that appellant's use of opioids was not necessitated by the February 13, 1992 work injury.

²³ On appeal appellant argues that OWCP did not properly consider all the relevant medical evidence of record, including the opinion of Dr. Swartz. The Board notes that, by the time the July 13 and December 18, 2015 decisions were issued, OWCP had obtained updated medical evidence from Dr. Ma and it placed its focus on the opinion of Dr. Ma in these decisions. Moreover, both Dr. Swartz and Dr. Ma explicitly indicated that appellant could work as an office assistant.

physicians must be supported by the record on appeal, and the current record does not support appellant's claims of bias.²⁴

Appellant submitted several reports dated between June 2013 and October 2015 from Dr. Caruso, an attending physician, who found that she had total disability from work. However, Dr. Caruso's reports lack probative value regarding the modification of the January 5, 2011 loss of wage earning capacity determination. He failed to provide a rationalized medical opinion that total disability was due to the February 13, 1992 work injury for which OWCP had accepted lumbar strain and herniated disc at L5-S1. In his reports, he diagnosed conditions, including left S1 radiculopathy and lumbosacral disc syndrome, which had not been accepted as work related. None of his reports contain a rationalized medical opinion that appellant sustained a worsening of her medical condition related to the accepted February 13, 1992 work injury such that she could no longer work as an office assistant. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.²⁵

In a June 11, 2013 report, Dr. Caruso diagnosed left S1 radiculopathy, lumbosacral disc syndrome, and status post lumbar discectomy and interbody fusion surgeries, and noted that appellant was temporarily totally disabled from work. In a July 31, 2015 report, Dr. Caruso indicated that appellant was totally disabled from work until August 25, 2015, noting that she had reported that her back symptoms had increased to the extent that she was not able to perform activities of daily living. He indicated that appellant was experiencing a spontaneous worsening of symptoms of her previously accepted lower back condition without an intervening cause and noted, "She is having a recurrence with no apparent, identifiable cause for the worsening of her condition other than the original condition itself." These reports, as well as Dr. Caruso's other reports finding total disability, are of limited probative value on the relevant issue of this case because Dr. Caruso failed to explain how appellant's current medical conditions were related to the February 13, 1992 work injury. He did not describe the February 13, 1992 work injury in any detail, cite objective findings of the February 13, 1992 work injury, or explain the process through which the February 13, 1992 work injury could have worsened to the extent that appellant could no longer work as an office assistant. Dr. Caruso's opinion on disability appears to be based primarily on appellant's subjective complaints, rather than on objective medical findings, but the Board has found that such opinions are of limited probative value.²⁶

In several reports dated between April and November 2015, Dr. Banerjee, an attending physician, reported the findings of his examinations and discussed his treatment of appellant's pain symptoms. However, he did not provide any opinion on appellant's ability to work or the cause of her medical condition. The Board has held that medical evidence which does not offer a

²⁴ See *G.G.*, Docket No. 12-1168 (issued February 25, 2013).

²⁵ *C.M.*, Docket No. 14-88 (issued April 18, 2014).

²⁶ See *James Eversole*, Docket No. 04-1904 (issued December 14, 2004).

clear opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.²⁷

Appellant has not made any argument that the January 5, 2011 loss of wage-earning capacity determination should be modified because she has been retrained or otherwise vocationally rehabilitated.²⁸

For these reasons, appellant failed to meet her burden of proof to modify the January 5, 2011 loss of wage-earning capacity determination.

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

CONCLUSION

The Board finds that appellant did not meet her burden of proof to modify OWCP's January 5, 2011 loss of wage-earning capacity determination.

²⁷ See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

²⁸ See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2017
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