

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 11, 2005 appellant, then a 43-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on March 31, 2005 she strained her low back when she fell off of a stool in the performance of duty. She stopped work on March 31, 2005. OWCP accepted appellant's claim for contusion of back and lumbosacral strain and placed her on the periodic rolls effective June 12, 2005.

Appellant continued to receive medical treatment. In a September 15, 2005 report, Dr. Bryce I. Benbow, an osteopath specializing in orthopedic surgery, indicated that she continued to have back and left leg pain. Upon physical examination, he reported pain on the paraspinous musculature of the lower lumbar spine and tenderness over the piriformis region. Strength was intact and sensory response to light touch was decreased. Dr. Benbow diagnosed lumbar scoliosis from L1 to L5, herniated disc at L2-3 on the right, lateral recess stenosis, urinary incontinence, and multi-level disc displacement.

OWCP referred appellant's claim to Dr. Robert M. Chouteau, an osteopath specializing in orthopedic surgery, for a second-opinion examination to determine whether she continued to suffer residuals and remained disabled from work as a result of her March 31, 2005 employment injury. In a January 10, 2006 report, Dr. Chouteau opined that appellant's employment injury had resolved and that she was capable of returning to her original position.

OWCP determined that a conflict in medical opinion evidence existed between Dr. Chouteau, an OWCP referral physician, and Dr. Benbow, appellant's treating physician, regarding the extent of appellant's work-related disability. It referred her case to Dr. Robert Holladay, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict. In a July 7, 2006 report, Dr. Holladay opined that appellant was capable of working at least eight hours a day with restrictions. In a work capacity evaluation (Form OWCP-5c), he indicated that she could work with restrictions of reaching above the shoulder for two to four hours, bending for four to six hours, pushing, pulling, lifting, and squatting for four to six hours, and no climbing.

On August 15, 2006 the employing establishment provided a full-time limited-duty job offer to appellant for a position as a staff nurse. The job offer noted that her work restrictions included intermittent lifting and carrying up to 10 pounds, sitting, simple grasping, and fine manipulation for four hours, standing, walking, and reaching above the shoulder for two hours, and no climbing stairs and ladders, kneeling, bending, stooping, and twisting.

² Docket No. 13-1067 (issued September 20, 2013).

On August 21, 2006 appellant returned to full-time light duty. She continued to receive medical treatment and received compensation *via* the periodic rolls for wage-loss compensation for loss for premium pay.³

On March 27, 2013 OWCP issued a formal LWEC decision finding that appellant's actual earnings in a nursing service position reasonably represented her wage-earning capacity as she had been working in the position for two months or more. It informed her that OWCP was placing her back on the periodic rolls and would reduce her compensation benefits based on her ability to perform the duties of the nursing service position.

On December 5, 2016 appellant filed a notice of recurrence (Form CA-2a) alleging that on November 2, 2016 she sustained a recurrence of disability causally related to the March 31, 2005 employment injury. She explained that she worked a permanent, light-duty job since 2007 and her initial place of work was in a secluded office with the bathroom six-feet away. Appellant alleged that the employing establishment had moved her twice and now she was in a high traffic location, with a tile floor, and the bathroom was far away. She also indicated that she continued to be under a physician's care since the March 31, 2005 employment injury and had undergone four different procedures.

The employing establishment reported on the back of the claim form that, after the original injury, appellant was reassigned to a desk job in the transfer coordinator's office. It noted that she remained in the position since her injury.

Dr. Mike Shah, Board-certified in physical medicine and rehabilitation, provided a November 11, 2016 narrative report, which noted appellant's accepted conditions of lumbosacral sprain, back contusion, and lumbar degenerative disc disease. He related her complaints of low back pain radiating to her left leg, along with numbness and tingling. Dr. Shah reviewed appellant's diagnostic examination reports. Upon physical examination of her lumbar spine, he reported limited range of motion for flexion and extension, pain with facet loading (left greater than right), and trigger points and spasms in the quadrants lumborum. Dr. Shah noted some mild scoliosis in the upper lumbar spine. Straight leg raise testing was positive on the left. Upon neurological examination, Dr. Shah reported slight decrease to sensation on the distal L4 and L5 pattern on the left side, otherwise intact. He explained that appellant was unable to perform her duties as she was unable to sit or stand for long periods or walk for any distance due to her lower

³ OWCP provided appellant with several CA-1032 forms and informed her in various letters that she was required to provide information in connection with her receipt of benefits under FECA. In an October 26, 2012 letter, it advised her that it had not received a completed Form CA-1032. OWCP again notified her that, if appellant did not complete and return the enclosed Form CA-1032 within 30 days, her compensation benefits would be suspended in accordance with 20 C.F.R. § 10.528. It did not receive a response or a completed Form CA-1032. By decision dated November 27, 2012, OWCP suspended appellant's compensation benefits as of November 18, 2012 based on her failure to report earnings and employment information as required. On December 7, 2012 it received her completed CA-1032 form dated September 17, 2012. OWCP reinstated appellant's compensation benefits and placed her back on the periodic rolls. Appellant also received compensation for retroactive payments for the period November 18, 2012 through March 9, 2013. On March 27, 2013 she filed an appeal before the Board. Appellant alleged that she had submitted a completed Form CA-1032 on December 7, 2012, but her compensation benefits had not yet been restored retroactively for the period. By decision dated September 20, 2013, the Board affirmed the November 27, 2012 decision and found that OWCP had properly suspended appellant's compensation benefits for failure to timely submit a Form CA-1032. *See supra* note 2.

back and leg. Dr. Shah indicated that appellant was unable to walk or stand for any distance, bend or lift over 10 pounds, and was limited in kneeling, crawling, stooping, and climbing. He related that appellant's prognosis was poor if she continued working at her current employment. Dr. Shah opined that appellant's medical conditions were permanent and prevented her from performing the duties of her position with the employing establishment.

In a December 9, 2016 prescription note, Dr. Shah diagnosed lumbosacral sprain and lumbar degenerative disc disease. He recommended physical therapy evaluation and treatment.

By letter dated December 19, 2016, OWCP informed appellant that, because a formal LWEC decision was previously issued in her case on March 27, 2013, her claim for recurrence of disability was being treated as a request for modification of her formal LWEC decision.⁴ It advised her that the medical evidence in the record was insufficient to support a modification of the LWEC decision in her case. OWCP requested that appellant submit additional evidence or argument to support a modification of the March 27, 2013 LWEC decision. Appellant was afforded 30 days to submit the necessary evidence.

Thereafter, appellant submitted an October 21, 2015 lumbar spine magnetic resonance imaging (MRI) scan report by Dr. Kenneth Layton, a Board-certified diagnostic and neuro-radiologist. Dr. Layton noted her history of a fall in 2005 and related her complaints of low back pain, lumbar radiculopathy, and left leg pain, tingling, numbness, and weakness. He reported levoconvex scoliotic curvature of the lumbar spine, chronic compression deformity at L3, without evidence for an acute compression fracture, multilevel lumbar spondylosis and facet arthropathy, and an 11-millimeter partially visualized STIR hyperintense lesion in the presacral space at S2, which may represent a small vascular lesion.

On December 30, 2016 OWCP received an undated, handwritten prescription note from Dr. Shah who indicated that appellant was under his care for a work-related injury and was having an acute relapse episode of her symptoms. Dr. Shah explained that physically she had a decrease in her lumbar spine range of motion in extension and flexion, muscle spasm, and trigger points throughout her quadrants. He related that he was referring appellant for physical therapy. Dr. Shah also requested authorization for injections. He noted that appellant was totally incapacitated from work.

In a letter dated January 4, 2017, an injury compensation specialist for the employing establishment related that the employing establishment was disputing appellant's recurrence claim. He alleged that she did not meet her burden of proof to establish that she sustained a recurrence of the original injury, which would prevent her from working the limited-duty position.

On February 1, 2017 OWCP received a letter from appellant noting that the position description of her job required that she be a registered nurse with a nursing license. Appellant

⁴ 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. *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

alleged that according to state rules and regulations she could not practice with her nursing license while she was under the influence of pain medication. She indicated that her physician had prescribed her pain medication for her continued lumbar pain and symptoms.

Appellant submitted a May 3, 2016 letter from OWCP, which denied authorization for her request for various procedures and treatment, and included a handwritten notation in the margins that it was an “example of treatment denial, forcing continued use of narcotic for pain control.” She also provided handwritten follow-up notes dated April 20 to November 9, 2016 by Dr. Shah for continued treatment of her lumbar pain and symptoms.

In November 9, 2016 and February 8, 2017 attending physician’s reports (Form CA-20), Dr. Shah noted a date of injury of March 31, 2005 and history of “fell and injured low back.” He related examination findings of decreased range of motion of the lumbar spine, localized tenderness, positive facet loading, muscle spasm, and trigger points. Dr. Shah indicated that appellant was totally disabled from November 2, 2016 to May 2, 2017.

By decision dated March 3, 2017, OWCP again informed appellant that, since a formal LWEC decision had been issued in her claim, her recurrence of disability was being treated as a request for modification of her formal March 27, 2013 LWEC decision. It determined that the medical evidence of record was insufficient to establish that appellant sustained a material change or worsening of her work-related injury and was no longer able to perform the duties of her nursing service position.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages.⁵ Actual wages earned is generally the best measure of wage-earning capacity.⁶ In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee’s wage-earning capacity, such earnings must be accepted as representative of the individual’s wage-earning capacity.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.⁹ OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal LWEC.¹⁰

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

⁶ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁷ *Id.*

⁸ See *Kreger*, *supra* note 4.

⁹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501.3(a) (June 2013).

The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.¹¹

The burden of proof is on the party attempting to show modification.¹² There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹³

ANALYSIS

Appellant filed a traumatic injury claim alleging that on March 31, 2005 she strained her low back in the performance of duty. She stopped work. OWCP accepted appellant's claim for back contusion and lumbosacral strain. It paid wage-loss compensation and placed her on the periodic rolls. Appellant returned to full-time limited duty on August 21, 2006. She continued to receive compensation on the periodic rolls for wage-loss compensation due to loss of premium pay. On March 27, 2013 OWCP issued a formal LWEC decision, which reduced her compensation benefits based on her actual earnings and ability to perform the duties of the nursing service position.

On November 3, 2016 appellant again stopped work. She filed a recurrence claim alleging a recurrence of disability of the March 31, 2005 employment injury. By letter dated December 19, 2016, OWCP informed appellant that, because it previously issued an LWEC decision in her case on March 27, 2013, her recurrence claim was being treated as a request for modification of her formal LWEC decision.¹⁴ In a decision dated March 3, 2017, it denied modification of its March 27, 2013 LWEC decision.

Appellant has alleged that the LWEC decision should be set aside because the original March 27, 2013 determination was erroneous. The Board finds that she has failed to provide any evidence to establish that she was unable to perform the duties of the modified position on the date that the March 27, 2013 LWEC decision was issued. The evidence of record has demonstrated that the August 15, 2006 job offer contained a clear position description, identified the title of the job, a set schedule, and the duties of the position. It was not a temporary position and the physical requirements of the position were within Dr. Holladay's work restrictions.¹⁵ The Board further notes that the fact that she worked this position for 10 years supports that the physical requirements of this position were within her work restrictions.¹⁶

¹¹ *Id.*

¹² *Darletha Coleman*, 55 ECAB 143 (2003).

¹³ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

¹⁴ *See C.M.*, Docket No. 14-1716 (issued February 4, 2015).

¹⁵ *L.W.*, Docket No. 15-1898 (issued April 15, 2016).

¹⁶ *See R.S.* Docket No. 14-1426 (issued April 20, 2015).

The employing establishment indicated that, after appellant returned to work following the March 31, 2005 employment injury, she was reassigned to a desk job and has remained in that position. Although appellant asserts on appeal that her job position required a nursing license and that state regulations did not allow her to work as a nurse while she took the pain medication prescribed by her physician, she has not provided any evidence in the record to support her arguments. Accordingly, the Board finds that OWCP properly reduced her wage-loss compensation in its March 27, 2013 LWEC decision based on her actual earnings and ability to perform the duties of the nursing service position.

Furthermore, the Board finds that appellant has not submitted medical evidence sufficient to establish that her condition worsened such that the March 27, 2013 LWEC decision should be modified. As noted above, appellant has demonstrated the physical ability to perform the functions of the limited-duty nursing service position for 10 years.¹⁷ The medical evidence of record is also insufficient to support a material change in the nature and extent of her work-related condition. Appellant submitted a November 11, 2016 narrative report by Dr. Shah, who related appellant's complaints of low back pain radiating to her left leg. Dr. Shah provided physical examination findings and diagnosed lumbosacral sprain, back contusion, and lumbar degenerative disc disease. He reported that appellant's medical conditions were permanent and prevented her from being able to perform the duties of her nursing service position. Although Dr. Shah opined that she was unable to work, he did not specifically relate her total disability to her accepted March 31, 2005 employment injury or otherwise explain whether there had been a material change in her employment-related condition.¹⁸ Furthermore, he did not discuss any causal relationship between appellant's March 31, 2005 employment injury and her lumbar condition. Dr. Shah failed to provide a rationalized medical opinion that establishes a material change in her employment-related lumbar condition.¹⁹

In a prescription note received by OWCP on December 30, 2015, Dr. Shah further related that appellant was having an "acute relapse episode" of her symptoms of her work-related injury. He provided physical examination findings and opined that she was incapacitated from work. In November 9, 2016 and February 8, 2017 attending physician's reports, Dr. Shah noted the March 31, 2005 work-related low back injury and indicated that appellant was totally disabled from work beginning November 2, 2016. He did not, however, provide any medical rationale or discussion regarding the cause of her inability to work. The Board has found that a medical report that does not contain any medical rationale for a conclusion regarding disability is of diminished probative value.²⁰ Dr. Shah did not specifically explain whether appellant's inability to work beginning November 2016 was causally related to her work-related injury, discuss her limited-duty position, or otherwise indicate whether she had experienced a material change in her work-related injuries, such that she was no longer able to perform the nursing service position, which she had performed for 10 years.

¹⁷ *Id.*

¹⁸ See *J.B.*, Docket No. 15-0726 (issued October 20, 2015).

¹⁹ See *R.G.*, Docket No. 13-0272 (issued May 9, 2013).

²⁰ *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

The October 21, 2015 lumbar spine MRI scan report by Dr. Layton and the December 9, 2016 prescription note by Dr. Shah also do not relate any condition or disability to appellant's March 31, 2005 employment injury. Because none of the physicians provided an opinion that she was totally disabled due to a worsening of her accepted employment-related conditions, these reports are insufficient to meet her burden of proof to establish a material change in her work-related condition.²¹

On appeal, appellant alleges that she was not requesting a modification of the March 27, 2013 OWCP decision, but was requesting wage-loss compensation because Dr. Shah took her off work on November 2, 2016 due to her March 31, 2005 employment injury. She explains that she has continued to have medical problems and physical limitations as a result of this injury. Appellant also asserts that her treating physician had submitted sufficient documentation to show a worsening in the nature and extent of her work-related injury. The Board finds, however, that she has failed to submit rationalized medical evidence, based on a complete background, establishing a material change in her employment-related condition which prevented her from performing her limited-duty nursing service position. As noted above, it is appellant's burden of proof to establish that modification of an LWEC decision is warranted.²² The Board has reviewed the relevant evidence of record and finds that she has not established that the March 27, 2013 LWEC determination should be modified. The evidence of record is insufficient to establish that appellant's work-related medical conditions have materially changed, that the original LWEC determination was in error, or that she had been retrained or otherwise vocationally rehabilitated.

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to modify OWCP's March 27, 2013 LWEC determination.

²¹ See *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

²² *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2017
Washington, DC

Christopher J. Godfrey, 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