

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a back condition causally related to factors of her federal employment; and (2) whether appellant met her burden of proof to establish modification of a December 6, 2010 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

On August 9, 2007 appellant, then a 29-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on July 30, 2007 she sustained lower back, hips, and leg injuries while pivoting a patient into bed in the performance of duty. She stopped work on August 3, 2007. OWCP assigned the claim File No. xxxxxx261 and accepted it for acute lumbar sprain/strain. On September 18, 2007 OWCP placed appellant on the periodic rolls. On April 30, 2009 appellant accepted a full-time job offer from the employing establishment as a telephone operator. She returned to work on May 11, 2009.

By decision dated March 26, 2010, OWCP reduced appellant's wage-loss compensation, effective May 11, 2009, finding that her actual wages as a telephone operator fairly and reasonably represented her wage-earning capacity. It calculated that, effective May 11, 2009 she no longer had an LWEC as her actual earnings either met or exceeded "the current wages" of her date-of-injury position. Therefore, OWCP terminated her compensation benefits for wage loss.

On December 6, 2010 OWCP modified its LWEC determination. It noted that it had received additional information from the employing establishment clarifying the amount of actual wages lost due to decreased premium pay between her date-of-injury nursing assistant position and her current telephone operator position. OWCP found that the prior LWEC decision was in error. It determined that appellant was entitled to compensation from May 11, 2009 to December 18, 2010 and that she had an 87 percent wage-earning capacity.

Appellant, on October 10, 2012, filed a claim for a recurrence of disability (Form CA-2a) commencing July 24, 2012 attributable to her July 30, 2007 work injury. She claimed that sitting eight hours a day as a telephone operator caused lower back and leg pain. Appellant asserted that pain from her original injury had never stopped.

Appellant submitted an October 26, 2012 attending physician's report (Form CA-20) from Dr. Franklin E. Caldera, an osteopath and Board-certified physiatrist. Dr. Caldera diagnosed lumbar herniated disc and indicated by marking a box "yes" that the diagnosed condition was caused or aggravated by a work activity. He related that appellant's pain would continue with strenuous activity such as, lifting and prolonged standing and sitting. Dr. Caldera advised that she was unable to resume her regular work. He indicated that appellant had chronic

³ Docket No. 10-794 (issued December 15, 2010) and Docket No. 14-0733 (issued August 18, 2015).

low back pain radiating to her right leg. Dr. Caldera concluded that appellant was permanently disabled.

In response to an OWCP request, appellant submitted additional medical evidence. In undated letters and medical reports dated October 10, 2012 to January 9, 2013, Dr. Caldera again noted a history of the July 30, 2007 employment injury and provided results on examination. He diagnosed low back pain, lumbar degenerative disc disease, lumbar radiculopathy, and status post lumbar decompression. Dr. Caldera opined that these conditions were causally related to the July 30, 2007 work injury. He maintained that appellant's pain was exacerbated with increased activity such as prolonged standing and sitting. Dr. Caldera listed her permanent physical restrictions, determined that appellant had reached maximum medical improvement (MMI), and opined that she became totally disabled from work on July 25, 2012.

In a March 7, 2013 decision, OWCP denied appellant's recurrence claim as the medical evidence of record failed to establish disability, beginning on July 25, 2012, due to a material change or worsening of her accepted work-related injury. It found that Dr. Caldera failed to explain how the accepted 2007 work injury caused her current symptoms.⁴

On March 11, 2013 counsel requested an oral hearing before an OWCP hearing representative regarding the recurrence denial. In a February 6, 2013 report, Dr. Caldera examined appellant and reiterated his diagnoses of low back pain and lumbar radiculopathy. He also restated that she was unable to work due to pain.

In an October 21, 2013 decision, an OWCP hearing representative affirmed the March 7, 2013 recurrence decision, finding that appellant had failed to submit rationalized medical evidence establishing a recurrence of disability due to the July 30, 2007 work injury.

On February 12, 2014 counsel appealed the October 21, 2013 recurrence decision to the Board.

On March 12, 2014 appellant filed an occupational disease claim (Form CA-2) alleging that she sustained a herniated disc at L5-S1 along with compression at the S1 nerve root sitting 8 to 16 hours a day at work. She first became aware of her condition on July 25, 2012 and of its relationship to her employment on February 17, 2014.⁵ Appellant stopped work on July 24, 2012. OWCP assigned the claim File No. xxxxxx047.

Appellant submitted several reports and diagnostic test results dated August 4, 2007 to February 17, 2014 which addressed her back conditions, total disability from work, and medical treatment. On February 17, 2014 Dr. Caldera reiterated a history of the July 30, 2007 work

⁴ In an April 25, 2013 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day. It found that the weight of the medical evidence rested with Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon and an OWCP referral physician, who determined in his February 25, 2013 report that, appellant's work-related lumbar condition had resolved with no residuals. Dr. Didizian attributed her current symptomatology and work stoppage to her nonemployment-related July 25, 2012 back surgery. By decision dated December 18, 2013, an OWCP hearing representative affirmed the April 25, 2013 termination decision.

⁵ The employing establishment indicated that appellant medically retired effective July 24, 2012.

injury and noted appellant's medical treatment. He reported her present symptoms which included worsening low back pain since the accepted injury. Dr. Caldera discussed examination findings and reviewed diagnostic test results. He disagreed with Dr. Didizian that appellant had no residuals of the accepted work injury. Dr. Caldera noted that the traditional view of back pain was that 80 to 90 percent of patients recovered in six weeks and 5 to 10 percent developed chronic back pain. He maintained that current evidence showed that the recurrence rate from a back injury was up to 75 percent. Dr. Caldera related that this meant a patient's symptoms from one injury could worsen and progress over time. He maintained that appellant's condition continued to deteriorate despite her treatment and inability to work at her preinjury level. Appellant had pain over five years and was treated within the medical standard of care. Dr. Caldera restated his diagnoses of low back pain, lumbar herniated disc, lumbar radiculopathy, status post lumbar decompression, and lumbar facet arthropathy. He also reiterated that these conditions were caused by the accepted work.

By letter dated September 11, 2014, OWCP advised appellant of the deficiencies in her claim and requested that she submit additional factual and medical evidence.

In an October 3, 2014 statement, appellant noted her July 30, 2007 employment injury and again contended that this injury was aggravated by sitting 8 to 16 hours a day while working as a telephone operator. She provided a September 24, 2014 report from Dr. Caldera who restated the findings from his February 17, 2014 report.

By decision dated October 28, 2014, OWCP denied appellant's occupational disease claim. It found that the medical evidence was insufficient to establish that she sustained an injury or a medical condition causally related to accepted work events.

On November 10, 2014 appellant requested an oral hearing before an OWCP hearing representative.

In a February 3, 2015 decision, an OWCP hearing representative set aside the October 28, 2014 decision and remanded the case to OWCP for further development of the medical evidence. She found that Dr. Caldera's September 24, 2014 report was sufficient to require referral to a second opinion physician.

On remand, by letter dated February 19, 2015, OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion. In a March 27, 2015 report, Dr. Smith reviewed the SOAF and discussed appellant's medical history, including her diagnostic test results and July 25, 2012 surgical report she provided to him. He noted essentially normal findings on physical and neurological examination. Dr. Smith advised that there were no objective findings of residuals of the accepted July 30, 2007 work injury. He opined that appellant could return to her regular-duty work with no restriction. Dr. Smith further opined that her July 25, 2012 back surgery and treatment from 2009 to the present were not reasonable, necessary, or related to the accepted employment injury. He noted that recovery from a lumbar strain, with or without treatment, was expected to occur within two to three months.

In an April 7, 2015 decision, OWCP again denied appellant's occupational disease claim. It found that Dr. Smith's second opinion represented the weight of the medical evidence to establish that she did not sustain a low back condition causally related to her work as a telephone operator from 2009 to 2012.

On April 21, 2015 appellant requested an oral hearing before an OWCP hearing representative. In a May 27, 2015 decision, an OWCP hearing representative set aside the April 7, 2015 decision. She found deficiencies in Dr. Smith's report and also found that the case record in File No. xxxxxx047 did not contain all of the relevant medical evidence. The hearing representative remanded the case for OWCP to combine File Nos. xxxxxx261 and xxxxxx047 and further develop the factual and medical evidence. On remand, OWCP combined the files, with No. xxxxxx047 serving as the master file.

Subsequently OWCP, by letter dated June 18, 2015, requested that the employing establishment submit a statement verifying that appellant worked mandatory overtime as a telephone operator up to 16 hours a day and indicating how many times she worked more than 8 hours a day from May 10, 2009 to July 24, 2012. It also requested a copy of her telephone operator position description.

OWCP received a March 25, 2015 lumbar MRI scan report from Dr. Linda J. Bagley, a Board-certified radiologist, who found status post right L5-S1 hemilaminectomy and discectomy with postoperative sequelae. Dr. Bagley found residual/recurrent degenerative changes at this level, including a diffuse disc bulge with superimposed right paracentral and lateral disc protrusion with possible superimposed epidural scar formation narrowing the right subarticular and lateral recesses and neural foramen and likely compressing the right L5 and S1 nerve roots. A right S1 nerve root appeared enlarged. Dr. Bagley recommended a Gadolinium-enhanced MRI scan. Additional degenerative changes included multilevel facet arthropathy and a diffuse disc bulge with unchanged small superimposed right lateral disc protrusion, narrowing of the right neural foramen, and contacting the right L4 nerve root. There were multiple incompletely characterized bilateral renal lesions. Dr. Bagley suggested dedicated imaging.

In a June 30, 2015 letter, the employing establishment indicated that appellant worked overtime 193 times from May 10, 2009 to July 24, 2012. It was unable to determine whether it or she had requested the overtime work. The employing establishment submitted a position description for a telephone operator.

By letter dated July 22, 2015, OWCP requested that Dr. Smith review an updated SOAF and the medical records in File Nos. xxxxxx047 and xxxxxx261 and submit a rationalized report to clarify whether appellant sustained a low back injury caused or aggravated by working as a telephone operator from May 10, 2009 to July 24, 2012.

In an August 18, 2015 decision,⁶ the Board set aside the October 21, 2013 recurrence decision, finding that OWCP's hearing representative should have adjudicated the issue of modification of OWCP's December 6, 2010 LWEC determination rather than issuing a decision

⁶ *Supra* note 3.

denying appellant's claim for a recurrence of disability. The Board remanded the case to OWCP for proper adjudication of this issue.⁷

In an August 19, 2015 supplemental report, Dr. Smith reviewed the updated SOAF, position description of a telephone operator, and medical record. He opined that there were no objective findings to support a back injury, need for surgery, or prolonged disability causally related to appellant's employment as a telephone operator from May 10, 2009 to July 24, 2012.

On August 26, 2015 OWCP found a conflict in medical opinions between Drs. Smith and Caldera as to whether appellant sustained a low back injury and resultant total disability caused or aggravated by working as a telephone operator from May 10, 2009 to July 24, 2012. By letter dated September 2, 2015, it referred her, together with a SOAF, the medical record, and a list of questions, to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination (IME).

In an October 19, 2015 report, Dr. Simon noted examining appellant on October 14, 2015. He reviewed her medical records and the SOAF. Appellant had current complaints of pain in her back and legs, right side greater than left. She noted constant pain in the middle of her back, but related that it was tolerable with pain medicine. Appellant's pain radiated down her buttock to the back of her legs to her feet, right side greater than left, with numbness in her right fourth and fifth toes. She rated her pain as 10 on a scale of 0 to 10. On examination, appellant was in no acute distress. She did not utilize any aids to ambulate. Appellant had slight difficulty arising from a chair due to back pain. She walked initially with a mild, right-sided limp and then walked normally on her heels and toes. Appellant could walk up on her toes and back on her heels without difficulty. Lumbar spine range of motion included 75 degrees of forward flexion, 10 degrees of extension, 20 degrees of lateral bending, and 35 degrees of rotation. Appellant had mild discomfort on motion extremes. She had full cervical spine range of motion. On examination of the legs, Dr. Simon reported no atrophy with straight leg raising and Lasegue signs negative. Appellant had normal range of motion and power about her hips, knees, ankles, and toes. Deep tendon reflexes were hyporeactive, but symmetrical about the knees and ankles. There were no pathologic reflexes and sensation was intact. Examination of the arms revealed normal ranges of motion and good grip strength bilaterally. Neurologic examination was normal. Examination of the spine revealed no tenderness to light to medium palpation from the cervical spine to the lumbosacral area. There was no tenderness in the left or right lumbosacral angle and no involuntary paravertebral muscle spasm.

Dr. Simon diagnosed lumbar spine degenerative joint disease and degenerative disc disease and status post lumbar laminectomy and foraminotomy on the right side at L5-S1. He opined that appellant had no evidence of residual from her 2007 work-related lumbosacral strain. Dr. Simon advised that any such strain, a soft tissue injury of the lumbar spinal musculature and ligaments, would heal within three to four months and would not leave an objective residual. He noted that there was no changing objective residual in appellant's spine based on a negative electromyogram (EMG) or multiple MRI scans which showed findings similar to those in 2007

⁷ In the August 18, 2015 decision, the Board also affirmed OWCP's hearing representative's December 18, 2013 termination decision. The Board determined that OWCP met its burden of proof to justify termination of compensation benefits, effective April 25, 2013, based on Dr. Didizian's February 25, 2013 report.

and between the time that she returned to work in 2009 and the time she underwent surgery in 2012. Dr. Simon reported that the operative note clearly indicated that there were no additional changes at the L5-S1 area that could be specifically caused by sitting at a workstation between 2009 and 2015. He also noted that although literature was filled with evidence of the progression of degenerative changes in the lumbar spine over a period of years, there was no evidence that sitting itself caused the progression of degenerative changes or any type of aggravation or acceleration of previous lumbar sprain or strain. Therefore, Dr. Simon agreed with Dr. Smith that appellant had no objective residual trauma from the July 30, 2007 employment injury and the time she spent sitting as a telephone operator did not cause further progression, aggravation, or acceleration of any changes in her lumbar spine that would warrant decompressive surgery.

Dr. Simon noted that appellant had retired on disability, but opined that she could return to light work as long as she was allowed to take her medication and to change position as needed. He concluded by noting that degenerative joint disease and degenerative disc disease would progress slowly on their own without any additional trauma. Dr. Simon maintained that while this may have happened to appellant, there was no evidence by virtue of any objective testing that these changes, which may have occurred on the passage of time, were notable on any objective testing, such as an MRI scan, x-ray, or EMG. He further maintained that these changes were not noticeable during appellant's back surgery.

In an October 28, 2015 decision, OWCP denied appellant's occupational disease claim. It found that Dr. Simon's report was entitled to special weight accorded an IME to establish that she did not sustain a low back injury causally related to the accepted work events.

On November 2, 2015 appellant requested an oral hearing before an OWCP hearing representative.

On remand following the Board's August 18, 2015 decision, regarding the recurrence claim, OWCP issued a decision on December 16, 2015 denying appellant's recurrence claim and modification of the December 6, 2010 LWEC decision. In a December 21, 2015 letter, counsel requested an oral hearing. Later, on March 22, 2016, he requested a change from an oral hearing to a review of the written record.

In an April 4, 2016 addendum, Dr. Caldera discussed his findings on examination and reviewed appellant's diagnostic test results. He advised that, after reviewing the reports of Drs. Simon and Smith, his opinions and conclusions about appellant's medical condition had not changed. Dr. Caldera disagreed that appellant's July 30, 2007 work-related lumbar strain injury resolved in six weeks. He noted that, while lumbar strain injuries existed, a September 14, 2007 MRI scan showed right foraminal disc protrusion that abutted the L5 nerve root. Dr. Caldera advised that this finding excluded lumbar strain as appellant's primary diagnosis. He related that while repeated EMGs did not show any signs of denervation, they did not exclude radiculopathy as her symptoms matched the distribution of her MRI scan findings. Dr. Caldera indicated that electrodiagnostic testing helped to diagnose radiculopathies, but had poor sensitivity to detect sensory radiculopathies, as in appellant's case. He maintained that since there was no gold standard for diagnosing radiculopathy, it was unknown what percentage of radiculopathies, were purely sensory. Dr. Caldera noted that appellant had no objective findings as multiple MRI

scans showed a herniated disc which could cause pain. He reaffirmed his prior statement about the percentages of patients who recover from back pain and those who develop chronic back pain. Dr. Caldera also reiterated that appellant's pain continued to deteriorate despite her treatment. He noted Dr. Simon's finding that there was no disc material seen during her surgery, but maintained that he failed to mention that the S1 nerve appeared inflamed and a laminectomy was performed to decompress the area. Dr. Caldera related that S1 nerve inflammation was the reason appellant had leg symptoms. He further related that the July 30, 2007 work injury resulted in her chronic lumbar back pain which was exacerbated with increased activity, such as prolonged standing and sitting. Dr. Caldera advised that cumulative trauma over time worsened her condition. Appellant's pain progressively worsened and she never recovered from her original injury. Dr. Caldera indicated that appellant's pain was exacerbated even when she changed to a sedentary position as it involved prolonged sitting. The progression of appellant's condition was evident by a lumbar spine MRI scan. Dr. Caldera advised that her condition continued to deteriorate and the lumbar MRI scan after her July 25, 2012 surgery still showed evidence of a herniated disc touching the nerve root. He related that she had reached MMI and addressed her treatment plan. Dr. Caldera reiterated his prior diagnoses of low back pain, lumbar herniated disc, lumbar radiculopathy, status post lumbar decompression, and lumbar facet arthropathy and opinion that these conditions were caused by the July 30, 2007 work-related incident and resulted in her disability from work as of July 25, 2012.

In a May 16, 2016 decision, an OWCP hearing representative affirmed the October 28, 2015 decision denying appellant's occupational disease claim. He found that the special weight of medical evidence rested with Dr. Simon's October 19, 2015 impartial report and established that there was no connection between any low back problem and appellant's telephone operation job or the July 30, 2007 work injury.

By decision dated July 25, 2016, another OWCP hearing representative affirmed the December 16, 2015 decision denying appellant's recurrence claim and denying modification of the December 6, 2010 LWEC determination.⁸

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.¹⁰

⁸ In the July 25, 2016 decision, the hearing representative incorrectly adjudicated the issue of appellant's recurrence claim, by affirming OWCP's December 16, 2015 decision. In the Board's August 18, 2015 decision, the case was remanded to rule only on appellant's LWEC claim.

⁹ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty, and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS -- ISSUE 1

OWCP found that a conflict existed between the medical opinion of appellant's treating physician, Dr. Caldera, and the second opinion physician, Dr. Smith, with regard to whether appellant had a low back condition causally related to her job duties as a telephone operator from May 10, 2009 to July 24, 2012. It properly referred appellant to Dr. Simon to resolve the conflict.¹³

The Board finds that Dr. Simon's opinion is well rationalized and represents the special weight of the medical evidence. Dr. Simon October 19, 2015 report establishes that appellant did not sustain an occupational disease due to job duties from May 10, 2009 to July 24, 2012. He found no clinical findings showing a causal relationship between appellant's diagnosed lumbar degenerative joint disease and lumbar degenerative disc disease and the accepted July 30, 2007 employment-related acute lumbar sprain/strain and time spent and established employment factor of sitting as a telephone operator. Dr. Simon noted that a soft tissue injury of the lumbar spinal musculature and ligaments healed within three to four months and did not have any objective residuals. He further noted that while literature was filled with evidence of the progression of degenerative changes in the lumbar spine over a period of years, there was no evidence that sitting itself caused the progression of degenerative changes or any type of aggravation or acceleration of a previously sustained lumbar sprain or strain. Dr. Simon accurately summarized the relevant medical evidence, provided detailed examination findings

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams, id.*

¹² *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ *See C.B.*, Docket No. 15-2015 (issued July 24, 2015).

which were essentially normal with the exception of limited range of motion and mild discomfort on motion extremes, and reached conclusions about appellant's condition which comported with his findings.¹⁴ As his report is detailed, well rationalized, and based on a proper factual background, his opinion is entitled to the special weight accorded an IME.¹⁵ Dr. Simon's report represents the special weight of the evidence and establishes that appellant's lumbar degenerative joint disease and lumbar degenerative disc disease were unrelated to established sitting as a telephone operator or to the resolved July 30, 2007 employment injury.

As the special weight of the evidence rests with the rationalized opinion of the IME, appellant has not met her burden of proof to establish a low back condition causally related to her job duties as a telephone operator from May 10, 2009 to July 24, 2012 or to the resolved July 30, 2007 work injury.

Dr. Caldera's April 4, 2016 report is insufficient to overcome the special weight accorded Dr. Simon as an IME. He merely reiterated his findings and conclusions and noted his disagreement with the opinions of Dr. Simon and Dr. Smith. The Board has long held that reports from a physician who was on one side of a medical conflict that an IME resolved, are generally insufficient to overcome the weight accorded to the report of the IME, or to create a new conflict.¹⁶ Dr. Caldera had been on one side of the conflict resolved by Dr. Simon. His report is therefore insufficient to outweigh Dr. Simon's opinion or to create a new conflict in medical evidence.¹⁷

Other medical evidence, including reports of diagnostic testing, is insufficient to establish the occupational disease claim as the evidence does not address how a diagnosed condition is causally related to sitting at her job or to the resolved July 30, 2007 work injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.¹⁸ Consequently, there is insufficient medical evidence of record to establish that appellant's claimed low back condition was caused or aggravated by her federal employment. Appellant did not meet her burden of proof.

On appeal counsel contends that the weight of the medical evidence is not represented by the medical opinion of the IME as it is not well reasoned. For the reasons stated above, Dr. Simon's opinion is entitled to the special weight of the medical evidence as an IME because it was detailed, well rationalized, and based on a complete factual and medical history. Counsel further contends on appeal that OWCP's October 28, 2015 decision should be vacated because he did not receive a copy of the decision at the time it was issued. His contention is not supported by the record. The Board notes that the record indicates that the reason the

¹⁴ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁵ *See Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁶ *I.J.*, *supra* note 11.

¹⁷ *See B.T.*, Docket No. 08-1885 (issued June 3, 2009).

¹⁸ *See K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

October 28, 2015 decision was not received by counsel was that he did not become the attorney of record until February 29, 2016, after issuance of the decision. Furthermore, after counsel was authorized, he appeared at the March 4, 2016 hearing, argued on appellant's behalf, and was duly provided a copy of the May 16, 2016 decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁹

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.²⁰ OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.²¹ The relevant part provides that a formal loss of wage-earning capacity 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.²²

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²³

ANALYSIS -- ISSUE 2

In File No. xxxxxx261 OWCP accepted appellant's claim for acute lumbar sprain/strain. It issued a December 6, 2010 decision finding that her actual earnings as a telephone operator fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly. Beginning on July 24, 2012, appellant requested total disability compensation. On July 25, 2012 she underwent a lumbar decompression performed by Dr. Arlet to treat her lumbar herniated disc.

As a formal LWEC determination was in effect at the time appellant claimed total disability, she must show a basis for modification of that decision to be entitled to wage-loss compensation. The Board finds that the evidence of record is insufficient to establish that the

¹⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004).

²⁰ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

²² *Id.* at § 2.1501.3(a).

²³ *Jennifer Atkerson*, 55 ECAB 317 (2004).

original LWEC determination was erroneous or to establish a material change in appellant's employment-related conditions.²⁴

Appellant has submitted several reports of Dr. Caldera. In reports dated October 10, 2012 to August 8, 2013, Dr. Caldera diagnosed lumbar herniated disc, low back pain, lumbar degenerative disc disease, lumbar radiculopathy, and status post lumbar decompression. He opined that these conditions were causally related to the accepted July 30, 2007 work-related injury and found that appellant was totally disabled from work as of July 25, 2012.

As noted above, the accepted lumbar condition in this case is acute lumbar sprain/strain. Dr. Caldera did not sufficiently explain why this accepted condition prevented appellant from performing the telephone operator duties, in light of his additional diagnoses that included a lumbar herniated disc that required surgery on July 25, 2012 which has not been accepted.²⁵ He has not provided a reasoned explanation as to how appellant's accepted condition worsened such that she was unable to perform the duties-of-the job in which her LWEC determination was based. Dr. Caldera attributed her symptoms to conditions not accepted as employment related. The Board has held that appellant has the burden of proof to establish that the unaccepted conditions are employment related.²⁶ The Board finds that appellant did not submit sufficient medical evidence to establish a material change in the nature and extent of her injury-related condition and, therefore, she did not meet her burden of proof to show that the December 6, 2010 LWEC determination should be modified.²⁷

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

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish a back condition causally related to factors of her federal employment. The Board further finds that appellant has failed to meet her burden of proof to establish modification of a December 6, 2010 loss of wage-earning capacity determination.

²⁴ *Supra* note 20.

²⁵ Where residuals of an accepted employment-related condition prevent the employee from performing regular duties, physical ailments that preexisted the accepted condition must be taken into consideration. Physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from any wage-earning determination. *Lee A. Dent*, 54 ECAB 704 (2003).

²⁶ *See G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, *supra* note 8; *Alice J. Tysinger*, 51 ECAB 638 (2000).

²⁷ *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 25 and May 16, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2017
Washington, DC

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

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

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