



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The facts relevant to the instant appeal are set forth.

OWCP accepted that on May 2, 1978 appellant, then a 41-year-old warehouseman, sustained a back sprain and exacerbation of preexisting congenital lumbar spondylosis without myelopathy as a result of picking up a box of paper in the performance of duty. She stopped work on May 3, 1978 and returned to work on August 1, 1978. Appellant stopped work again on February 5, 1979 and has not returned to work at the employing establishment. She underwent authorized lumbosacral fusion on July 24, 1979.<sup>3</sup> OWCP paid medical benefits and wage-loss compensation.

In an April 17, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 5, 2012. It found that the weight of the medical evidence rested with the February 27, 2012 medical opinions of Dr. Jonathan D. Black, a Board-certified orthopedic surgeon and OWCP referral physician, that appellant's accepted lumbar strain had resolved, her spondylolisthesis had been successfully surgically treated, and she could perform sedentary work duties with restrictions related to her nonwork-related conditions.

Appellant requested an oral hearing, which was held on April 10, 2013.

In a decision dated June 12, 2013, an OWCP hearing representative affirmed the April 17, 2012 decision. He found that the medical opinion of Dr. J. Mandume Kerina, an attending Board-certified orthopedic surgeon, that appellant continued to be disabled due to her accepted work condition of exacerbation of preexisting congenital lumbar spondylosis without myelopathy, was insufficient to outweigh Dr. Black's opinion. The hearing representative noted that his opinion was not based on a thorough review of the medical record and was not supported by objective findings and adequate medical rationale.

Appellant requested reconsideration on April 7, 2014.

By decision dated May 2, 2014, OWCP denied modification of its termination decision. It found that Dr. Kerina's March 31, 2014 report was not sufficiently rationalized to outweigh the weight accorded to Dr. Black's report or to create a conflict in the medical opinion evidence.

On May 21, 2014 appellant, through counsel, filed an appeal before the Board. In a decision dated November 25, 2014, the Board reversed OWCP's termination of appellant's compensation finding that a conflict existed in the medical opinion evidence between Drs. Black

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<sup>2</sup> Docket No. 14-1304 (issued November 25, 2014).

<sup>3</sup> On January 5, 1982 appellant was involved in a nonwork-related motor vehicle accident. She was hospitalized from January 5 to 18, 1982 for recurrent lumbar disc syndrome. In January 1993 appellant sustained a back injury while getting into her car. She was unable to walk for six days. On February 19, 1983 appellant's legs gave out as she got up from a seated position and fell to the ground. She was unable to walk for several days. In December 1984 appellant reinjured her back in a second nonwork-related motor vehicle accident.

and Kerina as to whether appellant had continuing residuals and disability causally related to her accepted May 2, 1978 employment injuries.

Appellant signed a Form EN1032 on February 12, 2015 indicating that she had received \$200.00 a week since December 2013 from her incapacitated 93-year-old neighbor. She related that he had appointed her power-of-attorney. Appellant paid her neighbor's bills and was the contact person for his nursing home. She noted that she would continue to receive payments from him until his death.

In a June 24, 2015 decision, OWCP reduced appellant's wage-loss compensation effective December 1, 2013 based on its finding that her actual wages as a caretaker of \$200.00 per week fairly and reasonably represented her wage-earning capacity. It noted that, because she had shown the ability to perform the duties of the position for 60 days, the position was considered suitable to her partially disabled condition. OWCP then applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity (LWEC).<sup>4</sup> This calculation showed that, effective December 1, 2013, she had a 29 percent wage-earning capacity. The payment of wage-loss compensation every four weeks was reduced to \$1,467.00.

In letters dated March 29 and June 26, 2016, appellant informed OWCP that her neighbor died on March 3, 2016 and as of that date, she no longer received any remuneration from him or his estate. She requested a review of her status. In response to these letters, OWCP, on December 6, 2016, informed appellant that her compensation benefits had been restored and no further action was necessary on her part.

On January 10, 2017 OWCP further advised appellant that its LWEC determination was not automatically canceled because her neighbor had died. It advised that the decision was permanent and instructed her to exercise the appeal rights that accompanied her decision.

In an appeal request form dated January 13, 2017, received on January 17, 2017, appellant, through a checkmark, requested reconsideration.

By decision dated January 30, 2017, OWCP denied appellant's January 13, 2017 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error.

### **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>5</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup> Section 10.511 of OWCP regulations provide that if a formal LWEC decision has been issued, the rating is left in place until that determination is

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

<sup>5</sup> *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>6</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

modified by OWCP. Modification is only warranted where the party seeking modification establishes 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.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup> In addition, Chapter 2.1501 of OWCP procedures contains provisions regarding the modification of a formal LWEC.<sup>9</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision. In a decision dated June 24, 2015, OWCP reduced appellant's compensation effective December 1, 2013 based on its finding that her actual wages as a caretaker fairly and reasonably represented her wage-earning capacity. On January 13, 2017 appellant requested reconsideration because her neighbor had died and she would no longer receive the additional compensation.

It is well established that a claimant may request a modification of a wage-earning capacity if there is a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.<sup>10</sup> Although appellant indicated with a checkmark on her January 13, 2017 appeal request form that she was requesting reconsideration, she was in essence requesting a modification in her wage-earning capacity determination. The Board finds that the January 13, 2017 appeal request form from appellant constituted a request for modification of the June 24, 2015 LWEC determination.<sup>11</sup> The Board has held that, when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>12</sup> In its January 30, 2017 decision, however, OWCP evaluated her request under the clear evidence of error standard applicable to untimely requests for reconsideration. The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.

### CONCLUSION

The Board finds that OWCP should have adjudicated appellant's January 13, 2017 request for reconsideration under the modification of LWEC standard.

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<sup>7</sup> 20 C.F.R. § 10.511.

<sup>8</sup> See *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>9</sup> Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>10</sup> 20 C.F.R. § 10.511; see *P.C.*, 58 ECAB 405 (2007).

<sup>11</sup> See *A.C.*, Docket No.15-710 (issued June 5, 2015); *E.L.*, Docket No. 14-1434 (issued March 18, 2015); *M.N.*, Docket No. 10-51 (issued July 8, 2010).

<sup>12</sup> See *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 6, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board