

ISSUE

The issue is whether appellant met her burden of proof to establish modification of a November 22, 2006 loss of wage-earning capacity determination.

On appeal counsel contends that the evidence of record establishes that the November 22, 2006 wage-earning capacity decision was erroneous. He also asserts that the medical evidence of record establishes that appellant's accepted work condition has worsened.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 24, 1992 appellant, then a 26-year-old respiratory therapist, filed a traumatic injury claim (Form CA-1) alleging that she injured her back while lifting a patient on April 13, 1992. She stopped work on April 16, 1992. OWCP accepted the claim for cervical and lumbosacral sprains and herniated disc at L3-4 and L4-5. Appellant received intermittent wage-loss compensation benefits on the supplemental rolls from November 29, 1993 until she was placed on the periodic rolls commencing October 6, 2001.⁴

On November 22, 2006 OWCP determined that appellant had a 35 percent wage-earning capacity in the constructed position of telephone sales representative. It found that vocational testing established that she had basic computer skills, good customer service skills, and a Bachelor's degree in Health Services, based on the report of OWCP's rehabilitation counselor. OWCP also found that the position was within the restrictions for sedentary work provided by OWCP's second opinion physician, Dr. Richard L. Collins, a Board-certified orthopedic surgeon.

On January 30, 2007 appellant requested modification of the November 22, 2006 wage-earning capacity determination and by decision dated December 18, 2007, OWCP denied modification. On May 22, 2009 she again requested modification of the November 22, 2006 determination, but OWCP denied reconsideration.⁵

³ Docket No. 95-0619 (issued August 25, 1997). Docket No. 99-1516 (issued July 24, 2001). Docket No. 08-1157 (issued June 16, 2009). Docket No. 09-1977 (issued June 10, 2010). Docket Nos. 11-0514 & 11-0654 (issued November 9, 2011). Docket No. 13-1441 (issued October 25, 2013). Docket No. 14-1287 (issued March 25, 2015).

⁴ On August 25, 1997 the Board set aside OWCP decisions which denied a November 29, 1993 recurrence of disability. Docket No. 95-0619 (issued August 25, 1997). The Board found the evidence of record sufficient to warrant further development as to whether appellant sustained a recurrence of disability beginning November 29, 1993 causally related to her accepted April 13, 1992 employment injury. In the second appeal, the Board issued a decision on July 24, 2001, in which it found that there was an unresolved conflict in the medical opinion evidence with regards to whether appellant sustained a recurrence of disability beginning November 29, 2003. Docket No. 99-1516 (issued July 24, 2001). Thus, the Board set aside OWCP's February 1, 1999 decision denying her claim for a recurrence of disability beginning November 29, 1993 and remanded for further development.

⁵ The Board issued a decision on June 16, 2009 affirming a January 17, 2008 overpayment decision. Docket No. 08-1157 (issued June 16, 2009).

On July 28, 2009 appellant appealed to the Board. By order dated June 10, 2010, the Board remanded the case and set aside the June 30, 2009 nonmerit decision.⁶ The Board found that OWCP erred in denying a merit review of appellant's request for modification of the November 22, 2006 wage-earning capacity determination.⁷

OWCP continued to deny modification of the November 22, 2006 determination and on December 28, 2010 appellant appealed the most recent denial to the Board.

By decision dated November 9, 2011, the Board affirmed the November 29, 2010 OWCP decision, which denied modification of the November 22, 2006 determination.⁸

On September 18, 2012 appellant, through counsel, again requested modification of the November 22, 2006 wage-earning capacity decision. In support of her request, she provided argument that the original determination was in error. She argued that OWCP erred in relying upon the opinion of Dr. Levine, a Board-certified orthopedic surgeon, who had been selected to resolve the conflict in the medical opinion evidence between Dr. Ratzan, appellant's treating physician, and Dr. Collins, OWCP's second opinion physician, as the report was speculative and failed to consider preexisting and nonwork-related impairments in determining her work capacity. In addition, appellant submitted medical evidence she contended showed a material change in her condition warranting modification of the determination.

By decision dated May 3, 2013, OWCP denied appellant's request for modification of the November 22, 2006 determination, finding that the request was untimely filed and did not demonstrate clear evidence of error.

In an October 25, 2013 decision, the Board set aside OWCP's May 3, 2013 nonmerit decision and remanded the case for OWCP to perform a merit review.⁹ The Board found that as appellant sought modification of the November 22, 2006 wage-earning capacity determination, OWCP should review the merits of the claim

On March 7, 2014 OWCP received October 17, 2013 progress notes from Dr. Ratzan which provided physical examination findings and diagnoses of lumbosacral sprain, herniated

⁶ Docket No. 09-1977 (issued June 10, 2010).

⁷ On September 24, 2007 OWCP referred appellant to Dr. Jeffrey S. Levine, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Sanford A. Ratzan, appellant's treating Board-certified orthopedic surgeon, and Dr. Collins, a second opinion Board-certified orthopedic surgeon, regarding her work restrictions. In an October 31, 2007 report, Dr. Levine concluded that appellant was capable of work full-time with restrictions. The restrictions he found were no lifting more than 10 pounds or 5 pounds on a repetitive basis; refrain from strenuous pulling and pushing; no remaining in one position for more than 2 hours; a 15-minute break every 2 hours; and the ability to frequently change position as needed. On September 10, 2009 OWCP terminated appellant's compensation benefits finding that she had refused an offer of suitable work.

⁸ Docket No. 11-0514 & 11-0653 (issued November 9, 2011). The Board also reversed the September 10, 2009 OWCP decision terminating appellant's compensation benefits under 5 U.S.C. § 8106(c). The Board found that OWCP failed to meet its burden of proof to establish that she refused an offer of suitable work.

⁹ Docket No. 13-1441 (issued October 25, 2013).

lumbar disc, post-traumatic degenerative disc disease, cervical sprain, cervical radiculitis and left hip trochanteric tendinitis, and bursitis. Dr. Ratzan opined that appellant was unable to perform part-time sedentary work based on her restrictions. Appellant's work restrictions included up to two hours standing; up to 30 minutes of sitting; no more than a total of two hours per day of sitting, standing and walking; no more than two to three hours total of moving from a sitting to a standing position; no repetitive standing or sitting; carrying up to 10 pounds; and less five pounds of repetitive carrying.

OWCP also received a February 10, 2014 report, wherein Dr. Ratzan stated that magnetic resonance imaging (MRI) scans and x-ray interpretations from August 2010 and current studies revealed chronic L4 and L4-5 herniated lumbar discs. Based on the objective data and findings from prior reports, Dr. Ratzan concluded that appellant was permanently disabled due to her lumbosacral spine condition from performing her date-of-injury job and "sedentary activities as noted."

On April 15, 2014 OWCP again denied modification of the wage-earning capacity determination.

The Board, in a March 25, 2015 order, set aside the April 15, 2014 decision denying modification of the November 22, 2006 determination.¹⁰ The Board found that OWCP failed to consider all of the medical evidence when denying modification. The Board remanded the case to OWCP for consideration of all the medical evidence to determine whether modification was warranted.

By decision dated August 18, 2015, OWCP again denied appellant's request for modification. It found that Dr. Ratzan failed to explain how the accepted conditions had worsened to the point that appellant was unable to perform any type of work.

On August 16, 2016 OWCP received July 25, 2015 MRI scans of the lumbar and cervical spine and a previously submitted August 16, 2010 cervical spine MRI scan. The lumbar MRI scan revealed minimal L3-S1 degenerative disc disease, a tiny left paracentral disc protrusion traversing the L5 and S1 nerve roots, tiny L4-5 broad-based disc bulges, and mild bilateral L3-5 facet degenerative disc disease. The MRI scan of the cervical spine showed progression of now advanced C5-6 degenerative disc disease and now moderate C4-5 degenerative disc disease, mild multilevel left-sided degenerative joint disease, minimal left C4-5 neural foraminal narrowing, and a slight increase in the size of the broad-based posterior disc osteophyte complex which mildly narrows the spinal canal and causes severe left and right moderate neural foraminal narrowing.

In a May 5, 2016 report, Dr. Ratzan noted that appellant was not working. He provided examination findings, and diagnosed cervical degenerative disc disease with cervical radiculitis and left trochanteric tendinitis and bursitis, which was aggravated by increased activity and her low back derangement, lumbar sprain, herniated lumbar disc, and post-traumatic lumbar degenerative disc disease. Dr. Ratzan opined that appellant's condition had materially worsened

¹⁰ *Order Remanding Case*, Docket No. 14-1287 (issued March 25, 2015).

based on his examination, review of prior medical records, and recommended that a cervical MRI scan be performed. In an addendum noted on the report, he noted that her degenerative disc disease had worsened and that there had been a progression of her post-traumatic changes based on review of the July 25, 2016 cervical spine MRI scan.

In a letter dated August 11, 2016 appellant, through counsel, requested modification of the November 22, 2006 determination. He argued that both the objective evidence and Dr. Ratzan's May 5, 2016 report established a worsening of her condition. Counsel further argued that the selected position of telephone sales representative was not vocationally suitable, and, thus, the determination was issued in error.

By decision dated November 14, 2016, OWCP denied modification of the November 22, 2006 determination. It found, contrary to counsel's arguments, that the evidence of record, established that appellant had sufficient typing and computer skills for the constructed position of telephone sales representative. OWCP noted that the July 28, 2006 job offer showed that the job was suitable based on her college degree, work experience, testing, and ability to type. It further found that Dr. Ratzan failed to provide a rationalized opinion to explain how the additional diagnosed conditions of lumbar and cervical degenerative disc disease, cervical radiculitis, and left trochanteric and bursitis were caused or aggravated by the accepted conditions.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP may seek to modify a formal wage-earning capacity determination. 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.¹² There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹³

ANALYSIS

OWCP accepted that appellant sustained cervical and lumbosacral sprains and herniated disc at L3-4 and L4-5 as a result of her accepted April 13, 1992 employment injury. In a November 22, 2006 wage-earning capacity determination, appellant's compensation was

¹¹ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

¹² *Id.*

¹³ *Gary L. Moreland*, 54 ECAB 638 (2003). See also *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004) (in *Peoples* and *Taylor*, the Board determined that the claimants requests for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside OWCP's decisions denying appellants reconsideration requests as untimely and failing to establish clear evidence of error and remanded the cases for OWCP to address the merits of their requests for modification of a wage-earning capacity decision).

adjusted to reflect its determination that she was capable of earning wages in the constructed position of telephone sales representative for 40 hours per week. By decision dated November 14, 2016, OWCP denied her request for modification of the November 22, 2006 wage-earning capacity determination.

In support of appellant's contention that she had sustained a material change in her condition, counsel submitted an October 17, 2013 progress note and reports dated February 10, 2014 and May 5, 2016 from Dr. Ratzan. Dr. Ratzan advised in progress notes dated October 17, 2013 and reports dated February 10, 2014 and May 5, 2016 that she was totally disabled from performing any work including part-time sedentary work based on her restrictions. He diagnosed lumbosacral and cervical sprains, herniated lumbar disc, post-traumatic degenerative disc disease, cervical radiculitis, and left hip trochanteric tendinitis and bursitis in his October 17, 2013 and February 10, 2014 report. Diagnoses from the May 5, 2016 report included cervical degenerative disc disease with cervical radiculitis, left low trochanteric tendinitis and bursitis, lumbar sprain, low back derangement, lumbar herniated disc, and post-traumatic lumbar degenerative disc disease. Dr. Ratzan, in an addendum to the May 5, 2016 report, determined that the degenerative disc disease had worsened based on review of a July 25, 2016 cervical spine MRI scan.

The Board notes that the only conditions accepted by OWCP are cervical and lumbosacral sprains and herniated disc at L3-4 and L4-5. Dr. Ratzan did not provide sufficient explanation as to how the accepted conditions prevented appellant from performing the telephone sales representative duties, in light of his additional diagnoses that included post-traumatic degenerative disc disease, cervical radiculitis, and left hip trochanteric tendinitis and bursitis, cervical degenerative disc disease with cervical radiculitis, and post-traumatic lumbar degenerative disc disease which have not been accepted by OWCP as work related.¹⁴ No reasoned explanation was given by Dr. Ratzan detailing how appellant's accepted condition worsened such that she was unable to perform the duties-of-the job in which her wage-earning capacity determination was based. Furthermore, Dr. Ratzan attributed her symptoms to conditions which have not been accepted by OWCP as employment related. The Board has held that appellant has the burden of proof to establish any additional conditions to be employment related.¹⁵ The Board finds that appellant has not submitted 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 November 22, 2006 wage-earning capacity determination should be modified.¹⁶

¹⁴ 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).

¹⁵ See *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁶ See *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

On appeal counsel contends that the November 22, 2006 wage-earning capacity determination was erroneous and that the medical evidence establishes that appellant's condition has materially worsened. He again argues that the constructed position was not vocationally suitable as she had been a respiratory therapist and had no vocational training for a telephone sales representative position. Contrary to counsel's arguments, the November 22, 2006 determination properly determined that the selected position was vocationally suitable based upon the opinion of the rehabilitation counselor. As OWCP found in the November 22, 2006 decision, vocational testing revealed that appellant had basic computer skills, good customer service skills, and a Bachelor's degree. The Board finds that OWCP properly relied upon the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the position of telephone sales representative.¹⁷

Counsel contended that Dr. Levine's opinion was not entitled to special weight as an impartial medical examiner. Contrary to his contentions, the Board previously found Dr. Levine's October 31, 2007 report that appellant's cervical sprain had resolved was thorough and represented the weight of the evidence.¹⁸

The Board found the medical evidence failed to establish that appellant's accepted work conditions had materially worsened. Dr. Ratzan attributed her inability to perform the constructed position to new conditions and failed to explain how the new conditions were due to the accepted employment conditions or injury or how her accepted conditions had worsened. Appellant therefore did not meet her burden of proof to establish that the November 22, 2006 wage-earning capacity determination should be modified.¹⁹

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

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish modification of the November 22, 2006 determination.

¹⁷ See *J.B.*, Docket No. 16-1906 (issued April 25, 2017).

¹⁸ The subject matter reviewed in the Board's prior decision is *res judicata* and is not subject to further consideration. See *L.K.*, Docket No. 14-1722 (issued September 29, 2015).

¹⁹ See *K.C.*, Docket No. 13-0757 (issued September 11, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2016 is affirmed.

Issued: October 17, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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