

duty, was struck by another vehicle. He stopped work on April 8, 1998 and returned to modified work on July 9, 1998. OWCP accepted the claim for lumbosacral joint ligament sprain and L3-4 lumbar intervertebral disc displacement without myelopathy. Appellant underwent authorized L3-4 discectomy surgery, which was performed on May 5, 1999, and L4-5 left-sided hemilaminectomy and discectomy, which was performed on December 17, 2008. On June 16, 2009 he accepted the modified position of vehicle operations and maintenance assistant, working eight hours per day, with restrictions of no lifting or carrying more than 40 pounds.

By decision December 23, 2009, OWCP issued an LWEC determination. It found that appellant had no loss of wage-earning capacity in his modified position of vehicle operations and maintenance assistant and that he had been working in that position since June 16, 2009.

Appellant filed claims for wage-loss compensation (Forms CA-7) for the period April 5 to May 2, 2014.

On April 8, 2014 OWCP received disability notes dated April 4, 7, and 24, 2014 from Dr. Robert D. Heroes, a Board-certified physiatrist.

By letter dated May 15, 2014, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him regarding the definition of a recurrence and worsening of a work injury and afforded him 30 days to provide the requested evidence.

By decision dated May 30, 2014, OWCP denied appellant's claim for wage-loss compensation, on and after April 5, 2014, as causally related to his accepted April 8, 1998 employment injury.

A June 5, 2014 OWCP Form CA-110 memorandum of telephone call summarized that appellant had called after he received the decision denying his claim. Appellant noted that his work as a mechanic contributed to his current condition. He was advised to file a new occupational disease claim.²

In a June 25, 2014 report, Dr. Heroes noted a 1998 work injury for which appellant had undergone a 1998 L3-4 laminectomy and a L4-5 surgery and the surgery resulted in a resolution of his back pain. However, the back pain returned again approximately 15 months ago. Dr. Heroes opined that appellant's job as a vehicle mechanic placed stress on his spine without any specific incident as the cause. Based on appellant's increased pain complaints, Dr. Heroes concluded appellant experienced a significant lumbar sprain. A review of a lumbar magnetic resonance imaging (MRI) scan revealed mild and diffuse changes. Dr. Heroes opined that appellant's back pain complaints were directly attributable to his work duties and/or accepted work injury. In support of this conclusion, he noted that lack of any back pain prior to the accepted 1998 work injury and the fact that his job duties required significant physical activity, which aggravated appellant's back pain. Dr. Heroes diagnosed lumbar degenerative disc disease, lumbar sprain/strain, discogenic/segmental pain, and lumbar spondylosis.

² Appellant filed a new claim for occupational disease on June 3, 2014 for "repetitive trauma injury" under OWCP File No. xxxxxx519. OWCP denied that claim by decision dated October 9, 2014.

In a report dated September 24, 2014, Dr. Kathleen Moore, a Board-certified orthopedic surgeon, diagnosed L3-4 and L4-5 annular tear *versus* herniated disc. She indicated that she had treated appellant for radicular pain intermittently since 1998, and that he underwent L3-4 left-sided surgery in April 1999. Based on appellant's leg pain complaints and review of a lumbar MRI scan, Dr. Moore diagnosed left-sided L4-5 disc herniation, which she opined required L4-5 microdiscectomy surgery. Following the surgery, appellant's condition had improved until he returned with complaints of low back and bilateral lower extremity pain from his buttocks to his knees. Dr. Moore also noted treatment provided by Dr. Heroes. A review of a recent MRI scan revealed probable L3-4, L4-5 annular tears and disc bulges. Dr. Moore concluded that appellant's condition was due to his accepted work injury and recommended that he consider training for a new position.

Dr. Heroes, in an October 31, 2014 report, noted that appellant had experienced back pain since a 1998 work-related automobile accident. He observed that appellant's job as a vehicle mechanic was physically demanding and placed stress on his spine. Dr. Heroes concluded that there was no specific incident causing appellant's recent pain or significant lumbar strain. He reviewed a March 2014 MRI scan and found mild diffuse lumbar degenerative changes. Dr. Heroes attributed appellant's back pain complaints to his ongoing work duties and/or accepted 1998 work injury. He observed that prior to the 1998 work injury, appellant had no back pain. Dr. Heroes opined that the significant physical activity required by appellant's job duties exacerbated his pain and limited his ability to perform the duties of his position. He diagnosed lumbar degenerative disc disease, lumbar sprain/strain, discogenic/segmental pain, and lumbar spondylosis and provided work restrictions. Appellant's work restrictions included no lifting more than 45 pounds and no bending, stooping, or prolonged sitting.

In a January 12, 2015 report, Dr. Paul Fleissner, an examining Board-certified family practitioner, noted that appellant had worked for the employing establishment for 29 and 1/2 years and that he had recently filed for medical retirement. Appellant related a history of multiple work injuries and surgeries performed and that the employing establishment was unable to accommodate his work restrictions. Dr. Fleissner diagnosed chronic lumbar back pain and history of lumbar discectomies. He recommended a functional capacity evaluation to determine appellant's work restrictions.

Dr. Fleissner, in a progress report dated February 18, 2015 reviewed a February 15, 2015 MRI scan which showed multiple levels of degenerative disc disease at a L1-4. He also noted that at L4-5 appellant had a disc bulge and central annular tear. Dr. Fleissner reported that appellant continued to have complaints of lumbar back pain with no radicular symptoms. Physical examination findings and diagnoses were unchanged.

On March 3, 2015 appellant requested reconsideration and submitted additional medical evidence.

On April 6, 2015 OWCP received a November 25, 2014 job offer for a city letter carrier position that the employing establishment had made to appellant. It also received a December 23, 2014 reassignment letter, in which the employing establishment informed appellant that it determined he was unable to perform the essential functions of his current

position with or without accommodations. The offered city carrier position was located at the Newberg Post Office Annex in Oregon.

The record contains evidence that appellant was approved by the Office of Personnel Management (OPM) for a retirement annuity effective April 6, 2015.

In a report dated May 19, 2015, Dr. Vinita Parikh, Board-certified in pain medicine, reviewed appellant's February 11, 2015 MRI scan and compared it to his December 31, 2007 scan. She noted that appellant had a new subtle superior plate depression at L3 compared to the prior examination, and at L4-5 appellant had circumferential disc bulge and central annular tearing, with regressed broad based left central disc protrusion.

By decision dated June 25, 2015, OWCP affirmed as modified the May 30, 2014 decision. It found that the May 30, 2014 decision erred in denying appellant's claim for wage-loss compensation for the period April 5 to May 9, 2014 without considering whether modification of the December 23, 2009 LWEC had been established. However, OWCP also concluded that the claim remained denied because there was insufficient evidence to modify the LWEC determination of December 23, 2009.

Appellant requested reconsideration on February 4, 2016. In support of this request, OWCP received a January 12, 2016 report from Dr. Moore, who related that appellant had been under her care for his lumbar spine injury since 1998. Dr. Moore further related that appellant had been taken off work April 4, 2014 because of a flare up of his back pain. She explained that she had reexamined appellant's 2007 MRI scan, compared to his 2014 MRI scan to determine whether there was any pathological worsening of his lumbar spine. Dr. Moore related that appellant had some perineural scarring at L4-5 on both scans, and that the scarring had increased slightly in the 2014 scan, especially on the left side. Also, appellant had some notable facet disease at L4-5 bilaterally and at L4-5, which had progressed.

By decision dated April 26, 2016, OWCP denied modification. It found the evidence appellant submitted was insufficient to warrant modification of the December 23, 2009 LWEC determination.

OWCP continued to receive progress reports from Dr. Fleissner. On December 5, 2016 Dr. Fleissner related that appellant had undergone a new lumbar spine MRI scan on November 21, 2016 which showed evidence of disc protrusion at L2-3, disc desiccation and a central disc protrusion at L4-5. He opined that it was possible the disc protrusion along the facet hypertrophy caused moderately severe effacement of the lateral recess. Evidence of the prior L3-4 hemilaminectomy was noted. In a form request dated January 22, 2017 and received on February 1, 2017, appellant requested reconsideration.

By decision dated June 30, 2017, OWCP denied modification of its December 23, 2009 LWEC determination.

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, represent a claimant's ability to earn

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ 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.⁴

OWCP has by regulation defined when modification of an LWEC determination should occur.⁵

“If OWCP issues a formal loss of wage-earning capacity determination, including a finding of no loss of wage-earning capacity, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP. Modification of such a determination is only warranted where the party seeking the modification establishes either that 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 erroneous. However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision, such as where an employee has a demonstrated need for surgery.”

Further definition as to when modification of a formal LWEC determination should occur if the claimant’s medical condition has materially changed is provided in OWCP’s procedures.⁶ These procedures provide for modification of a LWEC determination when “Current medical evidence demonstrates either (a) a worsening of the accepted medical condition with no intervening injury resulting in new or increased work-related disability, or (b) that the work-related condition has improved and disability has decreased.”

The burden of proof is on the party attempting to show modification.⁷ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁸

ANALYSIS

OWCP accepted that appellant sustained lumbosacral joint ligament sprain and L3-4 lumbar intervertebral disc displacement without myelopathy on April 8, 1998 when his motor vehicle was struck by another vehicle. Appellant underwent authorized L3-4 discectomy surgery, which was performed on May 5, 1999, and L4-5 left-sided hemilaminectomy and

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ *Sue A. Sedwick*, 45 ECAB 211 (1993); *see also J.H.*, Docket No. 16-0314 (issued May 12, 2016).

⁵ 20 C.F.R. § 10.511.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁷ *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

discectomy, which was performed on December 17, 2008. In its December 23, 2009 LWEC determination, OWCP found that the position of modified vehicle maintenance mechanic fairly and reasonably represented appellant's wage-earning capacity and that appellant had zero percent loss of wage-earning capacity.

Appellant again stopped work on April 5, 2014 due to an alleged worsening of his employment-related lumbar condition. He did not return. Because appellant has requested a modification of the LWEC decision, he has the burden of proof to show that modification of the LWEC determination is warranted.⁹

The Board finds that the case is not in posture for decision. While the question to be determined is whether appellant has established that his accepted conditions have materially worsened, such that the LWEC determination should be modified, OWCP has not made proper findings regarding which conditions are accepted as causally related to the accepted injury.

In this regard the Board notes that OWCP authorized appellant's L4-5 left-sided hemilaminectomy and discectomy, which was performed on December 17, 2008. However, OWCP has never made findings as to whether appellant has an accepted L4-5 disc condition.

In his reports of record, Dr. Heroes reiterated his opinion that appellant was unable to perform the duties of his modified position. On June 25, 2014 he reviewed a lumbar spine MRI scan which revealed mild and diffuse changes. The record also contains reports from Dr. Moore, opining that appellant was unable to perform the duties of his modified position. On September 24, 2014 Dr. Moore recommended that appellant find a new position and attributed his current condition to his accepted work injury. She reviewed a lumbar spine MRI scan which revealed probable L3-4, L4-5 annular tears and disc bulge pathology. Dr. Fleissner reviewed a February 15, 2015 MRI scan which showed degenerative changes at L1-4, and disc bulging at L4-5 with annular tear. Also Dr. Parikh reviewed appellant's February 2015 MRI scan and compared it to his December 2007 scan. He found that appellant had a new subtle superior plate depression at L3 compared to the prior examination, and at L4-5 had circumferential disc bulge and central annular tearing.

The Board finds that the reports from appellant's physicians support that appellant's employment-related condition had worsened. However, the MRI scans refer to significant changes at L4-5. As it is unclear whether OWCP has accepted an L4-5 condition due to the accepted April 8, 1998 employment injury, this case must be remanded to OWCP for further development.

On remand OWCP shall prepare a statement of accepted facts and thereafter refer appellant for a second opinion examination to determine whether appellant's accepted conditions worsened such that he could no longer perform the duties of his modified position after April 5, 2014. Following this and other such further development of the case record as it deems necessary, it shall issue a *de novo* decision.

⁹ *Id.*

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2017 is set aside and the case is remanded for further proceedings consistent with the above opinion.

Issued: March 9, 2018
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