United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 17-1288**
	)	**Issued: May 16, 2018**
DEPARTMENT OF THE ARMY, SCHOFIELD BARRACKS COMMISSARY, Wahiawa, HI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 24, 2017 appellant filed a timely appeal from a January 26, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that a June 6, 2016 loss of wage-earning capacity (LWEC) determination should be modified.

[1] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated November 3, 2017, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1288 (issued November 3, 2017).

[2] 5 U.S.C. § 8101 *et seq.*

On appeal appellant asserts that she established a recurrence of disability in 2011 when the employing establishment could no longer accommodate her restrictions due to a shoulder condition, adjudicated by OWCP under File No. xxxxxx196.[3]

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On November 9, 1985 appellant, then a 31-year-old part-time store worker, injured her back lifting a heavy box while in the performance of her duties. An employing establishment supervisor, E.H., indicated that appellant, who worked 32 hours per week, last worked on November 13, 1985. Continuation of pay (COP) was authorized. OWCP accepted low back strain and adjudicated the claim under File No. xxxxxx105. On September 10, 1986 appellant sustained a second work-related low back strain. OWCP adjudicated the 1986 claim under File No. xxxxxx322 and combined the claim with File No. xxxxxx105. Appellant received wage-loss compensation benefits and returned to part-time work as a cashier at the employing establishment on July 17, 1988.

In October 1988 appellant relocated from Hawaii to Georgia. On December 4, 1988 she began working 24 hours a week as a sales store checker (cashier) at the Fort Benning, Georgia Commissary.

An OWCP Nonfatal Summary (NFS) indicated that appellant's initial pay rate for compensation purposes was based on her pay rate of November 13, 1985, the date disability began following the November 9, 1985 employment injury. At the time she worked 32 hours a week. The NFS also indicated that appellant received COP and intermittent compensation through December 17, 1988.

By decision dated January 4, 1989, OWCP reduced appellant's compensation benefits, based on her actual part-time earnings as a sales store checker (cashier).

On April 27, 2006 appellant accepted a full-time sales store checker (cashier) position and began the full-time work on May 14, 2006. OWCP continued to pay appellant compensation benefits based on the January 4, 1989 LWEC determination.[5] On January 16, 2010 appellant accepted a position as a sales store checker working in self check out.

[3] Appellant has a second appeal before the Board, assigned Docket No. 17-1289, in which she is appealing from a December 20, 2016 OWCP decision, issued under File No. xxxxxx196 accepted for right rotator cuff strain. The Board will adjudicate Docket No. 17-1289 separately.

[4] Docket No. 13-0115 (issued April 16, 2013); Docket No. 14-1217 (issued October 6, 2014).

[5] The employing establishment questioned why appellant continued to receive wage-loss compensation after she began full-time work, and on December 6, 2006 maintained that appellant had been overpaid for numerous years. It continued to question appellant's receipt of wage-loss compensation as she was working 40 hours per week.

On May 4, 2011 the employing establishment offered appellant a sales store checker (cashier) position to begin that day. Appellant did not accept the position. She stopped work on May 13, 2011 and filed a claim for compensation (Form CA-7), beginning that day. OWCP paid appellant compensation benefits based on the January 4, 1989 LWEC determination through November 28, 2011.

On November 29, 2011 OWCP modified appellant's LWEC determination to reflect that she had no wage loss and terminated her wage-loss compensation benefits. On July 11, 2012 an OWCP hearing representative affirmed the November 29, 2011 OWCP decision.

Appellant appealed to the Board. By April 16, 2013 decision, the Board affirmed the July 11, 2012 OWCP decision, finding that appellant had not met her burden of proof to modify a January 4, 1989 LWEC determination for the period May 13 to November 29, 2011 and that OWCP met its burden of proof to modify the LWEC determination on November 29, 2011.[6]

An Equal Employment Opportunity Commission (EEOC) bench decision dated July 24, 2013 found that, under the Rehabilitation Act of 1973 as amended, appellant met her burden of proof to show that she was discriminated against by the employing establishment when it failed to accommodate her disability and terminated her from employment in May 2011.[7]

By decision dated November 21, 2013, OWCP denied modification of the LWEC determination, finding that appellant did not establish a material worsening of the accepted lumbar strain. It noted that the pay rate issue had previously been addressed and that when she stopped work in May 2011, it was not due to the accepted condition. Appellant appealed to the Board. By an October 6, 2014 decision, the Board set aside the November 21, 2013 OWCP decision, finding that, although appellant had not established a material change in the injury-related condition, the record required further development to determine if she had been compensated at the correct pay rate.[8]

During the pendency of appellant's appeal before the Board, in a September 17, 2014 treatment note, Dr. Thomas Bernard, Jr., an attending Board-certified orthopedic surgeon, noted last seeing appellant in November 2013 for a November 9, 1985 employment injury. He described complaints of continued back pain and listed a number of orthopedic problems, including the onset of low back pain and lumbosacral spondylosis without myelopathy on August 6, 2008 and the onset of a lumbar sprain on December 9, 2009.[9] After examination, Dr. Bernard diagnosed lumbosacral spondylosis without myelopathy and recommended magnetic resonance imaging (MRI) scan of the lumbar spine. A September 25, 2014 lumbar MRI scan demonstrated no evidence of compression of neural structures and mild degenerative changes. Following an October 20, 2014 OWCP inquiry as to whether the November 9, 1985 lumbar sprain had resolved, Dr. Bernard replied that it had not, based on his physical examinations and

[6] Docket No. 13-0115 (issued April 16, 2013).

[7] Damages awarded were not described in the copy of the bench decision found in the case record.

[8] Docket No. 14-1217 (issued October 6, 2014).

[9] Dr. Bernard also noted that appellant had right shoulder surgery on November 11, 2008 and February 5, 2010.

appellant's history. He added that it did not aggravate, exacerbate, precipitate, or accelerate a preexisting condition. On a work capacity evaluation (OWCP Form 5c) dated October 22, 2014, Dr. Bernard advised that she could not perform her usual job, noting that appellant had retired from her commissary work. He recommended a functional capacity evaluation.

Following the Board's October 6, 2014 decision, in a letter dated November 7, 2014, OWCP requested that the employing establishment provide pay rate information beginning on the date of injury, November 9, 1985, and also on September 1, 1986, the date of the second lumbar injury. On November 19, 2014 the employing establishment responded that it had requested appellant's pay records, and was researching the wage salary grade.

A January 13, 2015 OWCP memorandum noted that appellant officially moved from Hawaii to Fort Benning, Georgia, on October 2, 1988. It noted that a WG 4 Step 5 store worker earned $7.36 an hour at Fort Benning on appellant's date of injury. OWCP discussed appellant's pay rate at Fort Benning, noting that effective May 14, 2006 she increased her work hours to 40 hours a week as a sales store checker (cashier) earning $29,873.00 annually, that on January 16, 2010 she accepted a full-time modified position working self-checkout, and that the position was made permanent on May 4, 2011, at a rate of $32,412.00 a year. It noted that on November 29, 2011 her LWEC determination was modified to zero as she no longer had a loss. OWCP noted that, per its procedures, the "current pay rate for the job and step when injured" should reflect the pay in the new locale if reemployed at a lower locality pay rate. It concluded that the January 4, 1989 decision should be modified as it was based on an incorrect pay rate.

In correspondence dated January 27, 2015, the employing establishment indicated that, per appellant's SF-50 forms (Notice of Personnel Action), on November 9, 1985 her grade was WG 4 Step 4, and she was working a regular 20-hour workweek, at the rate of $10.28 per hour. On September 1, 1986 appellant continued to work a regular 20-hour weekly schedule as a WG 4 Step 4, at an hourly rate of $10.63. The employing establishment indicated that Sunday premium pay was not available at that time for part-time employees, and it could not be determined if she earned night differential. On December 5, 1988 appellant began working as a sales store checker, grade 3, step 9, working 24 hours a week, for an annual salary of $9,147.60.

OWCP, in March 12, 2015 correspondence, noted that, upon review of the record following the Board's October 5, 2014 decision, it had determined that the pay rates used in the November 21, 2013 decision were incorrect. It asked that the employing establishment provide pay rate information for the pay rate of a store worker, WG 4 Step 4, working the second shift at Fort Benning as of December 4, 1989. The employing establishment indicated that, as of December 4, 1989, a WG 4 Step 4 store worker earned $7.94 per hour on the first shift and $8.49 on the second shift.

By decision dated March 16, 2015, OWCP vacated the January 4, 1989 LWEC determination. It noted that the January 4, 1989 decision, was calculated using incorrect pay rates and should be recalculated. OWCP noted that the employing establishment provided pay rate information indicating that on the date appellant began working at Fort Benning, December 4, 1988, a WG 4 Step 5 earned $7.36 an hour at the Fort Benning commissary in Georgia and $11.37 per hour at the Schofield Barracks commissary in Hawaii. It continued that appellant's pay rate for compensation purposes was calculated based on earning $12.22 per hour

at the second shift at the Hawaii locality, or $391.04 per week based on a 32-hour workweek which, yielded a wage-earning capacity of $131.67 per week. OWCP noted that it thereafter paid appellant FECA benefits based on the January 4, 1989 LWEC determination, using the locality pay rate in Hawaii when, under OWCP procedures, it should have used the Georgia locality pay rate. It concluded that a new LWEC determination should be issued.

In a second March 16, 2015 decision, OWCP reduced appellant's compensation benefits, based on her actual part-time earnings as a sales store checker (cashier) at the Fort Benning commissary. It found a new compensation rate of $767.00 each four weeks, as of the date she was last paid on November 29, 2011.[10]

Dr. Bernard continued to submit treatment notes in which he reiterated his findings and conclusions.

In an October 27, 2015 decision, an OWCP hearing representative vacated the March 16, 2015 LWEC determination. She indicated that OWCP used the date of injury, November 9, 1985, although the evidence indicated that appellant stopped work at a later date. The hearing representative noted that clarification was needed about the date disability began, which should be used in determining the pay rate for compensation purposes. She noted that OWCP utilized appellant's rate of pay on December 4, 1989 rather than December 4, 1988, when appellant began working at the Fort Benning commissary. The hearing representative instructed OWCP to obtain additional information from the employing establishment regarding whether appellant was a regular employee, whether she worked a fixed shift, and whether her weekly hours varied. She found that, based on this remand, the overpayment of compensation was not in posture for decision. On remand, after determination of the proper pay rate for compensation purposes, OWCP was to address any overpayment and issue a new preliminary overpayment determination.

In correspondence dated November 4, 2015, OWCP requested that the employing establishment furnish pay rate information regarding appellant, as noted in its October 27, 2015 decision.

On November 17, 2015 the employing establishment indicated that it could not confirm the date appellant stopped work after the November 9, 1985 employment injury or determine whether she worked a fixed or rotating shift and how many hours she worked at the time. It noted that, on the date of injury, appellant was a permanent WG 4 Step 4 part-time employee working no less than 20 hours per week.[11]

[10] On May 6, 2015 OWCP issued a preliminary determination that an overpayment of compensation in the amount of $142,629.24 had been created. It explained that the overpayment occurred because appellant was compensated at an incorrect pay rate and found her at fault. On June 4, 2015 appellant requested a prerecoupment hearing with OWCP's Branch of Hearings and Review.

[11] The employing establishment noted that appellant's appointment was changed from intermittent to regular part-time effective June 23, 1985 and attached a copy of appellant's Notification of Personnel Action (Form SF-50), effective that day, and a listing of appellant's Form SF50's with effective dates from June 23, 1985 to April 30, 2006.

On December 14, 2015 appellant's Congressional representative made an inquiry with OWCP on appellant's behalf. He forwarded a letter to him from appellant in which she disagreed with employing establishment and OWCP actions. Documentation attached included part of the EEOC decision, and an October 21, 2014 letter from the employing establishment to appellant which indicated that, in accordance with the EEOC decision, appellant was granted an $8,000.00 settlement and back pay for one month beginning May 12, 2011.

OWCP continued to request that the employing establishment provide pay rate information. On December 21, 2015 the employing establishment indicated that pay records were kept for six years and three months, but noted that it would continue searching. In February 11, 2016 correspondence, it indicated that it had contacted the National Records Center in St. Louis, Missouri, the Defense Finance and Accounting Office in Pensacola, Florida, and the agency's internal finance and accounting department, and none had pay records. The employing establishment advised that, as appellant's SF-50 indicated that she was to work no less than 20 hours per week, and that a Form CA-1 indicated that she worked 32 hours, it conceded that she worked a 32-hour shift. It concluded that at the time of injury appellant was a WG 4 Step 4 making $10.28 per hour.

On March 1, 2016 OWCP requested that appellant confirm the date she first stopped work following the November 9, 1985 employment injury. It noted that the employing establishment could not confirm the date and only had documentation from 2006 forward. OWCP requested that appellant provide information regarding her employment on November 9, 1985 and to provide any pay records she had. Appellant telephoned OWCP on May 13, 2016. She indicated that she had no further evidence to provide and requested a decision.

Following a request by OWCP, on May 19, 2016 the employing establishment indicated that, effective December 4, 1988, a WG 4 Step 4, second shift store worker at Fort Benning, Georgia, earned $7.91 an hour.

By decision dated June 6, 2016, OWCP determined appellant's LWEC for the period December 4, 1988 to November 19, 2011. It noted that, after the employment injury, she did not stop work until November 13, 1985 and considered this the date disability began. At that time appellant was working 32 hours per week at the Schofield Barracks commissary in Hawaii. OWCP determined that appellant's hourly wage on that date was $10.28 and, utilizing OWCP pay rate procedures, determined that her weekly pay rate was $330.07. It noted that appellant relocated from Hawaii to Georgia in October 1988 and began work in the second shift at the Fort Benning, Georgia, Commissary on December 4, 1988, at $7.91 an hour. OWCP computed the pay rate there in accordance with its procedures, finding a weekly pay rate of $253.97 and determined that this fairly and reasonably represented her wage-earning capacity. It noted that, under OWCP procedures, when an injured employee is reemployed in a new locale with a lower percentage of locality pay than the locality pay of the job held on the date of injury, the employee may be paid less than previously even if reemployed at the same grade and step, noting that the difference in locality pay reflected the difference in the cost of living which, in appellant's case, Fort Benning had a lower locality pay than Hawaii.[12] It applied the *Shadrick*

[12] OWCP cited the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4.e(1) (June 2013).

formula and determined that appellant had a 31 percent LWEC. It set her net compensation for the period December 4, 1988 to November 19, 2011 at $609.00 every four weeks. OWCP attached worksheets showing how the pay rate was calculated.[13]

In a June 8, 2016 treatment note, Dr. Bernard noted that he had last seen appellant in September 2015. He reported that she had recently flown to Virginia to visit family and had a setback with back pain and that she also complained of chronic left leg pain. Sensory and motor examinations were normal, and sciatic stretch signs were negative. Dr. Bernard diagnosed lumbosacral spondylosis without myelopathy.

In correspondence dated June 29, 2016, appellant requested a review of the written record. She contended that the June 6, 2016 decision contained numerous pay rate errors and alleged that numerous important documents had been misplaced. Appellant also submitted a Form SF-50 effective November 24, 1985; earnings and leave statements dated December 31, 1988 through March 25, 1989; and evidence previously of record.[14]

By decision dated January 26, 2017, an OWCP hearing representative denied modification of the June 6, 2016 LWEC determination. The hearing representative noted that appellant did not indicate that she was unable to perform the duties of the sales clerk checker position. The hearing representative found that the record supported that OWCP properly calculated appellant's pay rate for compensation purposes and concluded that appellant did not meet her burden of proof to modify the June 6, 2016 LWEC determination.[15]

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

[13] OWCP noted that the effective date of the pay rate on which compensation was based was November 13, 1985, which it prorated to a 32-hour workweek and, after applying the 2087 method, concluded that her weekly pay rate was $330.07. It then noted that in October 1988 appellant moved from Hawaii to Georgia, and the current pay rate for the job and step when injured at the new location (Fort Benning), effective December 4, 1988, was $7.91 per hour. OWCP then applied the 2087 method and concluded that appellant's weekly pay rate for the date-of-injury job and step was $253.97, based on a 24-hour workweek, with actual earnings of $175.91 per week.

[14] This included a January 28, 1986 report of termination of disability and/or payment (Form CA-3), a July 16, 1986 telephone memorandum between OWCP and the employing establishment, a computer printout of wage-loss compensation for the period January 31 to February 28, 1987, a December 20, 1988 wage-earning capacity memorandum, correspondence between the employing establishment and OWCP dated December 31, 1988 regarding appellant's reemployment at Fort Benning, Georgia and her pay rate, and a February 17, 1989 telephone memorandum between OWCP and the employing establishment regarding appellant's FECA compensation.

[15] On June 29, 2016 OWCP issued a preliminary determination that an overpayment of compensation in the amount of $181,983.75 had been created because appellant was paid at an incorrect rate from December 4, 1988 to November 19, 2011. It found her without fault and forwarded an overpayment action request and overpayment recovery questionnaire (Form OWCP-20). In correspondence dated July 27, 2016 and received by OWCP on August 4, 2016, appellant maintained that an overpayment did not occur and requested a review of the written record. She resubmitted the evidence she forwarded with her request for a written record regarding the June 6, 2016 loss of wage-earning capacity decision. A final overpayment decision had not been issued at the time OWCP rendered its January 26, 2017 decision, on appeal in the instant case.

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[16]

Under section 8115(a) of FECA,[17] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[18] The formula for determining loss of wage-earning capacity, developed in the case of *Albert C. Shadrick*[19] has been codified at section 10.403(c)-(e) of OWCP's regulations.[20] Under the *Shadrick* formula, OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings (or constructed earnings) by the current or updated pay rate for the position held at the time of injury.[21] The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins, or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.[22] The regulations further provide that the employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate.[23]

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.[24] OWCP's procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.[25] 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.[26]

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[16] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[17] 5 U.S.C. § 8115(a).

[18] *E.W.*, Docket No. 14-0584 (issued July 29, 2014).

[19] 5 ECAB 376 (1953).

[20] 20 C.F.R. § 10.403(c)-(e).

[21] *Id*. at § 10.403(c)-(d).

[22] *Id*. at § 10.403(e).

[23] *Id*. at § 10.403(d).

[24] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

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

[26] *Id*. at Chapter 2.1501.3(a).

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[27]

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time (unless the claimant was a part-time worker at the time of injury), or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.[28] Additionally, a makeshift or odd-lot position designed to meet an injured employee's particular needs will not be considered representative of one's wage-earning capacity.[29]

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent the employee's wage-earning capacity after she has successfully performed the required duties for at least 60 days.[30]

OWCP procedures provide methodology for computing weekly pay on an annual, daily, and hourly basis.[31] Regarding hourly pay, the procedure manual provides, "For regular [f]ederal employees, the amount shown is multiplied by 2087 (by administrative determination, the number of hours in a full work year based on a 40-hour workweek). This figure is then divided by 52."[32]

OWCP procedures further provide that when an injured employee is reemployed in a new locale with a lower percent of locality than the job held on the date of injury, or without the cost-of-living allowance, the employee may be paid less than previously even if reemployed at the same grade and step. The current pay rate for the job and step when injured should reflect the pay in the new locale, not the original one.[33] The procedures further explain that the employee is not losing net pay if reemployed at a lower locality pay rate since the cost of living is less in the new location, as represented by the difference in locality pay.[34]

ANALYSIS

The issue in this case is whether appellant has met her burden of proof to establish that a June 6, 2016 LWEC determination should be modified. On appeal she generally contends that

[27] *Jennifer Atkerson*, 55 ECAB 317 (2004).

[28] Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.1501.3(a).

[29] *A.J.*, Docket No. 10-1619 (issued June 29, 2010).

[30] Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.815.5.d (June 2013).

[31] *Id*. at Chapter 2.900.10 (March 2011).

[32] *Id*. at Chapter 2.900.10.c(2).

[33] *Id*. at Chapter 2.815.4.e(1).

[34] *Id*.

the LWEC determination was in error and that she established a recurrence of total disability in 2011.

The Board finds that appellant has not met her burden of proof to modify the June 6, 2016 LWEC determination.

The record supports that on the date appellant's initial disability began, November 13, 1985, she was a WG 4 Step 4 commissary worker at Schofield Barracks in Hawaii, and she was working 32 hours per week, earning $10.28 per hour. In October 1988 she relocated to Georgia and began work at the Fort Benning commissary. On December 4, 1988, the date disability began, appellant was a WG 4 Step 4, second shift store worker at Fort Benning, working 24 hours per week at $7.91 an hour.

In its June 6, 2016 LWEC determination and accompanying documentation, OWCP clearly explained its calculations used in finding appellant's pay rate for compensation purposes.

As explained, OWCP's procedures provide that when an injured employee is reemployed in a new locale, the current pay rate for the job and step when injured should reflect the pay in the new locale, even if the locality pay is less than at the previous location. The procedures explain that the employee is not losing net pay if reemployed at a lower locality pay rate because, as reflected in "locality pay," the cost of living is less in the new location.[35] Thus, it was proper for OWCP to calculate appellant's pay rate for compensation purposes beginning on December 4, 1988 based on her earnings in Fort Benning, Georgia, where she worked at that time.[36]

In calculating appellant's pay rate, OWCP relied on its procedures which provide a formula for calculating a regular federal employee's pay rate for compensation purposes which is based on a 40-hour workweek or 80-hour pay period. As noted, OWCP procedures provide that an employee's hourly pay rate is multiplied by 2087 annual work hours, then divided by 52 weeks, to result in a 40-hour pay period.[37] To calculate appellant's weekly pay rate for compensation purposes, OWCP multiplied her hourly rate of $7.91 by 2087 hours, adjusted it based on a 24-hour workweek, finding $13,206.54, which was divided by 52. This yielded a weekly pay rate of $253.97. The Board finds that this calculation was mathematically correct and in accordance with OWCP procedures for calculating a federal employee's compensation.

The Board also finds that appellant has not established a material change in the accepted low back strains. In its October 6, 2014 decision, the Board found that, as the medical evidence from appellant did not adequately explain that she had a material worsening of her injury-related low back strains, it was insufficient to establish that she was unable to perform her work duties beginning May 13, 2011 when she stopped work.[38] The Board reviewed Dr. Bernard's reports

[35] Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.815.4.e(1).

[36] *Id.; see A.B.*, Docket No. 15-0229 (issued September 20, 2016).

[37] Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.900.10.c(2).

[38] *Supra* note 8.

up to October 14, 2013, and found his opinion and the diagnostic studies of little probative value on the issue of whether appellant's accepted 1985 and 1986 low back strains materially changed such that the LWEC determination should be modified.[39]

During the pendency of that appeal before the Board, Dr. Bernard submitted a treatment note dated September 17, 2014. In that report he described appellant's continued complaint back pain and listed a number of orthopedic problems, including the onset of low back pain and lumbosacral spondylosis without myelopathy on August 6, 2008 and the onset of a lumbar sprain on December 9, 2009. Subsequently-acquired conditions are not considered in determining wage-earning capacity.[40] While Dr. Bernard advised on October 20, 2014 that appellant's lumbar strains had not resolved, he did not provide a rationalized explanation as to why a lumbar strain continued 19 years after the employment injury. In treatment notes submitted in 2015, he did not provide any explanation of how the diagnosed low back conditions were caused by the accepted lumbar strains. In his last report on June 8, 2016, Dr. Bernard merely noted that appellant had a set back with back pain while visiting family. Sensory and motor examinations were normal, and sciatic stretch signs were negative. Dr. Bernard diagnosed lumbosacral spondylosis without myelopathy. A September 25, 2014 MRI scan merely reported mild degenerative changes.

The Board finds Dr. Bernard's opinion and the MRI scan of diminished probative value on the issue of whether appellant's accepted 1985 and 1986 low back strains materially changed such that the LWEC determination should be modified.

As the record supports that OWCP followed proper procedures, the Board finds the June 6, 2016 LWEC determination was proper.[41] There is, therefore, no basis to support that it should be modified.

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

CONCLUSION

The Board finds that OWCP properly denied modification of the June 6, 2016 LWEC determination.

[39] *Id*.

[40] *See John D. Jackson*, 55 ECAB 465 (2004).

[41] *See A.D.*, Docket No. 14-0253 (issued June 6, 2015).

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 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