

**United States Department of Labor  
Employees' Compensation Appeals Board**

S.S., Appellant	)	
	)	
and	)	<b>Docket No. 18-0397</b>
	)	<b>Issued: January 15, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Gretna, LA, 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  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 18, 2017 appellant filed a timely appeal from an August 14, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish that her July 27, 2012 loss of wage-earning capacity (LWEC) determination should be modified.

**FACTUAL HISTORY**

On September 16, 2008 appellant, then a 24-year-old temporary employee letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 13, 2008 she sustained head, neck, chest, and back injuries as the result of a motor vehicle accident while in the performance of duty. She stopped work that day. OWCP accepted the claim for neck, back, and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

thoracic sprains. It subsequently expanded acceptance of the claim to include lumbar sprain, aggravation of spina bifida without hydrocephalus, and thoracic or lumbosacral neuritis or radiculitis. OWCP paid appellant wage-loss compensation benefits on the supplemental rolls as of September 13, 2008 and on the periodic rolls as of January 18, 2009.

By decision dated July 27, 2012, OWCP found the position of manager trainee with Hertz Rental, a position appellant had worked since May 11, 2012, fairly and reasonably represented her wage-earning capacity. It reduced her compensation based on her actual wages of \$420.00 per week, finding that she had 53 percent wage-earning capacity.

The record contains medical reports prepared during the period July 9, 2015 to March 11, 2016 from Dr. Eric I. Royster, a treating Board-certified anesthesiologist and pain medicine physician, in which he related appellant's diagnoses as lumbosacral and cervical spondylosis without myelopathy, low back arthritis, chronic pain syndrome, isolated cervical dystonia, and cervical and lumbar intervertebral disc degeneration.

In a June 23, 2016 report, Dr. Ademola Opanuga, an examining physician specializing in family medicine, diagnosed chronic pain syndrome and cervical and lumbar radiculopathy.

On September 7, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Raju M. Vanapalli, a Board-certified orthopedic surgeon. Dr. Vanapalli was asked to address whether appellant had residuals of her accepted injury and whether she could perform the duties of the position described in an attached statement of accepted facts (SOAF).

While a SOAF was not scanned into the record with the September 7, 2016 referral letter, the record reflects that a SOAF was last prepared on April 24, 2013. The April 24, 2013 SOAF noted that appellant's claim had been accepted for neck, back, lumbar, and thoracic sprains, aggravation of spina bifida without hydrocephalus, and thoracic or lumbosacral neuritis or radiculitis. The SOAF listed the job duties and work requirements for a city carrier, appellant's date-of-injury position. It noted that appellant stopped work on September 13, 2008 and returned to work on May 12, 2012 working eight hours per day "in the private sector."

In a November 5, 2016 report, Dr. Vanapalli noted that "[t]he information contained in this report was obtained by interview, an examination of the claimant, review of the [SOAF] as well as available medical records and information provided at the time of intake." He discussed appellant's medical history and accepted conditions, which he listed as neck, back, lumbar, and thoracic sprains, aggravation of spina bifida without hydrocephalus, and thoracic or lumbosacral neuritis or radiculitis. Dr. Vanapalli provided examination findings and diagnosed chronic pain syndrome, lumbar and cervical degenerative intervertebral disc, and cervical and lumbosacral spondylosis without myelopathy. Physical examination findings included normal gait, no lumbar muscle spasm, lumbar nerve stimulator scars were supple, no lower extremity wasting, no cervical muscle spasm, and diffuse cervical tenderness. Dr. Vanapalli opined that appellant had no residuals from the accepted conditions and that her chronic pain was unrelated. In support of this conclusion, he noted that, while she had symptoms of pain and complaints of weakness, he found no supporting objective evidence. Dr. Vanapalli reviewed a magnetic resonance imaging scan (MRI) which showed degenerative spondylosis, but no radiculitis or myelopathy. As to the sprains, he explained that soft tissue spinal injuries without objective findings usually resolved in three to six months. Since the job description included in the SOAF involved heavy to very heavy

physical demands, Dr. Vanapalli concluded that appellant was disabled from performing the duties of the described position.

In a letter dated December 22, 2016, appellant related that her condition had worsened. She explained that she had stopped working in June 2015, based on Dr. Royster's recommendation that she consider full disability. Appellant noted that she had relocated to the State of Georgia and that she had submitted reports from her physician relating that she was disabled from work.

In a letter dated March 7, 2017, OWCP requested clarification from Dr. Vanapalli regarding appellant's inability to perform her date-of-injury job based on his opinion that she no longer had residuals from the accepted work injury. Dr. Vanapalli was further asked to opine as to whether additional medical treatments should be authorized.

In a March 17, 2017 supplemental report, Dr. Vanapalli opined that appellant's degenerative spondylosis prevented her from performing her date-of-injury job. He explained that spinal sprains typically resolve within three to six months. Dr. Vanapalli based his opinion regarding appellant's inability to perform the job of city carrier on her degenerative spondylosis. He indicated that if a functional capacity evaluation was performed and indicated differently, he would amend his opinion.

On April 25, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) claiming total disability from July 2015 to July 2016.

In an August 5, 2016 letter, Dr. Kamal Kabakibou, a treating Board-certified anesthesiologist, noted that he first treated appellant on July 27, 2016 for chronic pain management. He opined that her condition had worsened to the point that she could not return to work in a sedentary position. In progress notes dated April 5, 2017, Dr. Kabakibou provided examination findings and diagnosed cervical radiculopathy and lumbar traumatic rupture intervertebral disc.

By development letter dated May 1, 2017, OWCP informed appellant that since a formal LWEC determination had been issued in her case, her claim for wage-loss compensation effective July 1, 2015 was being treated as a request for modification of her LWEC. It informed her of the three criteria necessary for modifying a formal LWEC determination. OWCP advised appellant that her physician must provide an opinion which establishes a worsening of her accepted condition and provide a well-rationalized medical opinion regarding the relationship between such changes and her increased disability. It informed her that medical evidence she submitted either did not address disability or lacked medical rationale. OWCP afforded appellant 30 days to provide the necessary documentation to support her claim. No additional evidence was received.

By decision dated August 14, 2017, OWCP denied modification of its July 27, 2012 LWEC determination "(and any resulting claim for compensation for the period July 1, 2015 through June 30, 2017) is hereby denied."<sup>2</sup> It found the evidence of record failed to establish any of the

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<sup>2</sup> Appellant filed a Form CA-7 dated April 26, 2017 claiming wage-loss compensation from July 1, 2016 to the present. By decision dated August 9, 2017, OWCP accepted appellant's claim for a recurrence of disability beginning July 1, 2016. On August 25, 2017 it paid her additional compensation in the amount of \$18,516.22 covering the period July 1, 2016 to July 22, 2017. Beginning July 23, 2017 OWCP paid appellant for total disability on the periodic rolls.

three criteria for modifying an LWEC determination and, as such, “there is no entitlement to additional compensation.”

### **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.<sup>3</sup> 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.<sup>4</sup>

OWCP has by regulation defined when modification of a LWEC determination should occur.<sup>5</sup>

“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.<sup>6</sup> 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.<sup>7</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>8</sup>

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<sup>3</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

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

<sup>5</sup> 20 C.F.R. § 10.511.

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

<sup>7</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

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

## ANALYSIS

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

OWCP accepted appellant's claim for neck, back, and thoracic sprains, lumbar sprain, aggravation of spina bifida without hydrocephalus, and thoracic or lumbar neuritis or radiculitis. In its July 27, 2012 decision, OWCP found the position of manager trainee with Hertz Rental, fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation based on her actual wages. Appellant alleged that her accepted medical conditions had worsened such that she could no longer perform the duties of the position of manager trainee with Hertz Rental, which was the basis for her LWEC determination.

When OWCP referred the case to Dr. Vanapalli for a second opinion, it should have inquired as to whether appellant's employment-related conditions had worsened, such that she was disabled from performing the duties of the position upon which her LWEC determination was based.<sup>9</sup> OWCP instead asked whether appellant could perform the duties of her date-of-injury position and provided Dr. Vanapalli with a SOAF that detailed the duties of her date-of-injury position of a mail carrier, as opposed to the duties of her private sector position as a manager trainee with Hertz Rental upon which the LWEC determination was based.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.<sup>10</sup> Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>11</sup> Herein, appellant alleged and submitted medical evidence in support of her claim that her condition worsened following the issuance of an LWEC determination. OWCP began to develop the evidence by seeking an opinion from an OWCP referral physician regarding her disability. It failed, however, to seek clarification as to whether appellant's accepted employment-related conditions had materially worsened thereby disabling her from performing the duties of her LWEC position with Hertz Rental.

On remand, OWCP shall create a new SOAF which properly describes appellant's Hertz Rental position, which was the basis of her LWEC determination. It shall thereafter refer the medical evidence of record, and appellant if necessary, back to Dr. Vanapalli for a supplemental opinion as to whether she had a change in her employment-related medical conditions that rendered her disabled from her LWEC position as of July 1, 2015. After this and such other development of the evidence as it deems necessary, OWCP shall issue a *de novo* decision.

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<sup>9</sup> *J.J.*, Docket No. 17-1008 (issued December 1, 2017); *see also N.B.*, Docket No. 15-1749 (issued January 15, 2016).

<sup>10</sup> *D.G.*, Docket No. 15-0702 (issued August 27, 2015); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>11</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

**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 August 14, 2017 is set aside and the case is remanded for further development in accordance with this decision.

Issued: January 15, 2019  
Washington, DC

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

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

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