

ISSUE

The issue is whether appellant has met her burden of proof to modify an August 1, 2011 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

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

On December 18, 2006 appellant, then a 50-year-old practical nurse, filed an occupational disease claim (Form CA-2) alleging that on December 14, 2006 she first realized that her neck and back pain were due to duties relative to patient care while in the performance of duty.⁴ She filed a second Form CA-2 on that same date alleging that she first realized that her bilateral carpal tunnel syndrome and right shoulder pinched nerve were caused or aggravated by her employment duties.⁵ OWCP accepted appellant's claims for right neck sprain; right shoulder, upper arm, and rotator cuff sprain; right shoulder calcifying tendinitis; right shoulder impingement syndrome; and right median neuropathy. Appellant received intermittent wage-loss compensation on the supplemental rolls commencing December 16, 2006. Subsequently, OWCP accepted a recurrence of disability commencing May 18, 2010.

On March 2, 2011 the employing establishment offered appellant an accommodated licensed practical nurse position. The job offer noted the work schedule, salary, and referred to an attachment for the job description and physical requirements. The attachment accompanying the job offer was a performance plan and a list of the performance elements/standards for the position. Appellant accepted the job offer on March 9, 2011.

By decision dated August 1, 2011, OWCP issued an LWEC determination in which it found that appellant's actual earnings in her accommodated licensed practical nurse position met or exceeded the current wages of the job she held when injured and therefore her wage-loss compensation payments were terminated.

On October 24, 2011 appellant filed a Form CA-2 alleging that on October 6, 2011 she first realized that her cervical sprain with right-sided radiculopathy, right medial neuropathy, and right rotator cuff tear had been aggravated by her duties in the accommodated position she had performed since March 9, 2011.⁶

³ Docket No. 16-0098 (issued May 26, 2016), *Order Remanding Case*, Docket No. 14-0084 (issued July 10, 2014).

⁴ This claim was assigned OWCP File No. xxxxxx093.

⁵ This claim was assigned OWCP File No. xxxxxx067. On April 15, 2010 OWCP combined OWCP File Nos. 0000067 and xxxxxx093, with xxxxxx067 as the master file number.

⁶ This claim was assigned OWCP File No. xxxxxx523. On October 24, 2011 OWCP combined OWCP File Nos. xxxxxx093, xxxxxx523, and xxxxxx067, with OWCP File No. xxxxxx093 as the master file number.

In a statement dated November 6, 2011, appellant related that on June 8, 2011 she was removed from the accommodated position and assigned to a job requiring observing patients who were a threat to themselves or at risk to themselves. On September 28, 2011 she was reassigned to a position sorting mail.

In an October 6, 2011 report, Dr. Scott M. Fried, a Board-certified osteopathic orthopedic surgeon, noted that appellant reported increased symptoms and that she was having difficulty with her current physical job duties which required prolonged neck and head flexion. He was also concerned that the activity of pushing and pulling a cart aggravated her injuries. Dr. Fried reported that appellant could perform brief and limited computer work in an ergonomic environment. He also opined that she should avoid repetitive activities and prolonged positioning. Dr. Fried determined that appellant was unable to work due her flare-up of her symptoms and difficulty with her current job activities. He recommended functional capacity testing to determine her current limitations and capabilities.

A functional capacity evaluation (FCE) report dated October 28, 2011 detailed appellant's work capability. The report noted that she became symptomatic on her right side when performing repetitive and heavy lifting tasks. Restrictions included: occasional light fine manipulation and firm grasping; no repetitive work; avoid frequent firm grasping, fine manipulation, and repetitive tasks; and under 10 pounds of lifting or carrying. Under physical demands, the report found that appellant was capable of up to six hours of sitting; occasional static position; rotational movements; flexing movements; bending/stooping, squatting, crawling, climbing stairs, reaching above left shoulder level, kneeling, and balance; no repetitive fine manipulation; occasional fine manipulation; no climbing a ladder or reaching above the right shoulder; and frequent extension movements. Lifting and carrying restrictions of up to 10 to 24 pounds were also provided for the left and right hand. The report concluded that appellant was capable of performing sedentary work requiring up to 10 pounds of carrying and/or lifting items and occasional walking/standing.

In an April 22, 2013 report, Dr. Fried provided physical examination findings and detailed appellant's injury and treatment history from October 28, 2009, the date he first treated her. He reported that she returned to work on March 9, 2011 and on June 20, 2011 she noted an aggravation of her symptoms. Physical examination findings were markedly positive and it was noted that any increase in activities caused a flare-up in appellant's symptoms. On October 6, 2011 appellant reported a significant flare up of her symptoms involving her arm, right neck, and plexus. At the time of the flare-up she was in a new modified job which required a frequent writing, prolonged sitting, and pulling a cart with a laptop, which Dr. Fried opined aggravated her symptoms.

According to Dr. Fried appellant's condition continued to be markedly positive and she continued to have symptom flare ups with any increased activity. He reviewed her statement, noted that she requested voice-activated software as an accommodation several times, and noted the different jobs and duties assigned to her. Dr. Fried reported that on September 20, 2011 appellant's duties included filing paid invoices and processing mail which involved bending and "prolonged postured of the head and neck." He also opined that her repetitive computer activity aggravated her condition. Dr. Fried reported that appellant has accepted employment injuries of right median neuropathy, carpal tunnel, cervical radiculopathy, and right rotator cuff strain and sprain, which were aggravated by her computer work, the lack of voice-activated software to limit writing and keying activities, and nonergonomic seating. He also opined that the work duties she

was performing in her modified position were outside the restrictions noted in the October 2011 FCE.

In an April 25, 2013 addendum, Dr. Fried opined that as of October 6, 2011 appellant was totally disabled from work due to the work injuries outlined in his prior April 22, 2013 report. He further noted that the October 2011 FCE testing supported that her disability was due to her employment injuries and she was unable to perform her modified job duties.

By decision dated October 24, 2014, following the combining of the claim files, OWCP had found that the evidence from the combined claim files was insufficient to establish a new occupational disease or that appellant's employment duties had aggravated her accepted conditions. Appellant, through counsel, requested an oral hearing on March 27, 2015. By decision dated May 22, 2015, a hearing representative affirmed the denial of her claim finding that the medical reports of Dr. Fried were insufficient to establish that the accepted conditions had been aggravated by the job duties she performed during the period March 9 to October 6, 2011. Appellant appealed to the Board.

By decision dated May 26, 2016, the Board remanded the case to OWCP for a determination of whether appellant had established total disability due to an aggravation of her accepted conditions such that the August 1, 2011 LWEC should be modified.

Following remand, by decision dated September 27, 2017, OWCP denied modification of the August 1, 2011 LWEC determination.

On October 6, 2017 appellant, through counsel, requested an oral hearing before a representative of the OWCP Branch of Hearings and Review. A hearing was held on March 13, 2018.

By decision dated May 3, 2018, OWCP's hearing representative affirmed OWCP's September 27, 2017 decision finding that the evidence of record did not substantiate a modification of the August 1, 2011 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.⁷

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.⁸ The position must conform to the established physical limitations of the injured employee; the employing establishment must

⁷ See *L.T.*, Docket No. 18-0797 (issued March 4, 2019); *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁸ 20 C.F.R. § 10.510.

have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.⁹ If these circumstances are present, a determination may be made that the position constitutes “regular” federal employment. In the absence of a “light-duty position” as described in this paragraph, OWCP will assume that the employee was instead engaged in noncompetitive, makeshift or odd lot employment which does not represent the employee’s wage-earning capacity, *i.e.*, work of the type provided to injured employees who cannot otherwise be employed by the Federal Government or in any well-known branch of the general labor market.

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.¹⁰ OWCP has by regulations defined when modification of a LWEC determination should occur.¹¹

“...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.”

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP’s May 22, 2015 decision because the Board considered that evidence in its May 26, 2016 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹²

On March 9, 2011 appellant accepted a March 2, 2011 modified job offer from the employing establishment for a position as an accommodated licensed practical nurse. The job offer noted the work schedule, salary, and listed the performance elements/standards in an attachment. No physical restrictions were provided. In an August 1, 2011 LWEC determination, OWCP found that the position fairly and reasonably represented appellant’s wage-earning capacity as she had been performing the position since March 9, 2011 and had demonstrated the ability to perform the duties of the modified job of accommodated licensed practical nurse for 60 days or more.

An LWEC determination can be modified if it was issued in error.¹³ The Board finds that the current record does not establish that the March 2, 2011 job offer from the employing

⁹ *Id.*

¹⁰ *See C.C.*, Docket No. 18-1127 (issued January 29, 2019); *Sue A. Sedwick*, 45 ECAB 211 (1993).

¹¹ 20 C.F.R. § 10.511.

¹² *T.J.*, Docket No. 18-1477 (issued April 4, 2019).

¹³ *Supra* note 11.

establishment complied with OWCP's regulations regarding light-duty job offers. The physical requirements of the position were not described in the job offer or accompanying documents. Therefore, it is unclear from the record what the physical requirements of licensed practical nurse position were and whether the physical requirements of the position were within appellant's medical restrictions. On remand OWCP should obtain relevant evidence including a written description of the job duties and physical restrictions of the modified position appellant performed as of March 9, 2011.¹⁴

The Board finds that the record of evidence is incomplete and thus the case will accordingly be remanded to OWCP to properly resolve the issues presented. After such further development as is deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 29, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *A.J.*, Docket No. 10-0619 (issued June 29, 2010); 20 C.F.R. § 10.510.