



## ISSUE

The issue is whether appellant has met her burden of proof to modify a February 14, 2012 loss of wage-earning capacity (LWEC) determination.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference.

On April 8, 2009 appellant, then a 52-year-old administrative support assistant, filed an occupational disease claim (Form CA-2) alleging that due to factors of her federal employment she sustained bilateral carpal tunnel syndrome, left-sided neck pain, and pain and paresthesias in both upper extremities while in the performance of duty on or before April 5, 2009. OWCP assigned the claim OWCP File No. xxxxxx908 and accepted the conditions of bilateral carpal tunnel syndrome and a cervical strain as work related. It subsequently expanded its acceptance of the claim to include the additional conditions of a temporary aggravation of C5-6 disc herniation, a temporary aggravation of a bulging intervertebral disc at C6-7, and displacement of a cervical disc without myelopathy.<sup>4</sup>

On June 18, 2010 appellant underwent authorized median nerve decompression of the right wrist. She returned to full-time limited-duty work on June 28, 2010. Appellant remained under medical treatment for her accepted conditions.<sup>5</sup>

In an October 18, 2011 duty status report (Form CA-17), Dr. William L. Rutledge, a family practitioner, permanently restricted appellant to two hours a day of simple grasping, two hours a day of fine manipulation, and one hour a day of reaching above shoulder level.

On December 5, 2011 appellant accepted a modified-duty position as an administrative support assistant, within the restrictions provided by Dr. Rutledge.<sup>6</sup>

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<sup>3</sup> *Order Dismissing Appeal*, Docket No. 18-0144 ( issued April 13, 2018); *Order Remanding Case*, Docket No. 161573 (issued September 5, 2017); and Docket No. 15-0947 (issued August 5, 2015).

<sup>4</sup> Appellant has two prior claims that were also accepted for upper extremity conditions. In OWCP File No. xxxxxx747, OWCP accepted her occupational disease claim with a September 25, 2000 date of injury for sprain of the left radial collateral ligament affecting the elbow and forearm, left hand joint derangement, right radial styloid tenosynovitis, and right wrist and carpus enesopathy. In OWCP File No. xxxxxx271, OWCP accepted appellant's occupational disease claim with a date of injury of January 15, 2002, for de Quervain's tenosynovitis of the right upper extremity

<sup>5</sup> On November 4, 2010 appellant filed an occupational disease claim (Form CA-2) alleging that she sustained stenosing tenosynovitis of the right long finger on or before August 26, 2010. OWCP assigned the claim OWCP File No. xxxxxx474 and accepted the conditions of trigger finger deformity of the right long finger as work related. Appellant remained on modified duty.

<sup>6</sup> Dr. Rutledge subsequently confirmed in a January 17, 2012 duty status report (Form CA-17) that she was able to perform the modified position without additional restrictions.

By decision dated February 14, 2012, OWCP issued a formal LWEC determination finding that appellant's modified administrative support assistant position, which was effective December 5, 2011, fairly and reasonably represented her wage-earning capacity. It also found that she was not entitled to wage-loss compensation benefits as her actual earnings of \$920.08 a week met or exceeded the \$895.21 current weekly wages of her date-of-injury position.<sup>7</sup>

On August 26, 2013 appellant stopped work and did not return.<sup>8</sup> On September 9, 2013 she filed a claim for compensation (Form CA-7) for the period August 26 to September 22, 2013 due to a flare-up of her accepted conditions. In support of her claim, appellant submitted August 26 and September 25, 2013 Form CA-17 reports from Dr. Rutledge holding her off work due to increased cervical spine symptoms.

In a development letter dated October 9, 2013, OWCP notified appellant that her claim for wage-loss compensation commencing August 26, 2013 would be developed as a request for a modification of the February 14, 2012 LWEC determination. It described the type of medical evidence needed to establish that the accepted conditions had worsened such that she was disabled from her modified position for the claimed period. In a separate development letter of even date, OWCP requested that the employing establishment provide relevant information and documentation of appellant's modified job offer and an explanation of whether she had been performing the duties of the modified job or whether those duties had changed. It afforded both parties 30 days to respond.

In response, appellant submitted reports by Dr. Rutledge dated from December 23, 2013 to February 26, 2015 noting her complaints of increased cervical spine pain and bilateral upper extremity symptoms on August 26, 2013. Dr. Rutledge diagnosed an acute exacerbation of cervicalgia, cervical disc disease, bilateral carpal tunnel syndrome, right long trigger finger, and de Quervain's syndrome of the right hand caused by her "working outside of restrictions for many months." He continued to hold appellant off work.<sup>9</sup>

In an August 25, 2015 letter, S.P., appellant's supervisor, asserted that she instructed appellant to take appellant's prescribed breaks even if the unit was short staffed. She noted that appellant had not utilized the ergonomic telephone headset and keyboard provided for her.

On January 11, 2016 OWCP referred appellant, along with the medical record and a statement of accepted facts, to Dr. Thomas Rooney, a Board-certified orthopedic surgeon, for a second opinion examination. In a January 26, 2016 report, Dr. Rooney noted obtaining x-rays of

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<sup>7</sup> Effective February 28, 2012, OWCP administratively combined OWCP File Nos. xxxxxx747, xxxxxx908, and xxxxxx474 with OWCP File No. xxxxxx747 designated as the master file.

<sup>8</sup> On September 25, 2013 appellant filed an occupational disease claim (Form CA-2) alleging that repetitive upper extremity motions in the performance of duty on or before August 26, 2013 caused an aggravation of the cervical spine conditions accepted under OWCP File No. xxxxxx908 and right long trigger finger accepted under OWCP File No. xxxxxx474. OWCP assigned the claim OWCP File No. xxxxxx794. By decisions dated June 11 and October 28, 2014 and March 5, 2015, OWCP denied the claim. Appellant appealed the March 5, 2015 OWCP decision to the Board. By decision dated August 5, 2015, the Board set aside the March 5, 2015 decision, and remanded the case for further development of the medical record.

<sup>9</sup> Appellant was removed from federal service on June 29, 2014.

the cervical spine which demonstrated an anterior discectomy with incomplete fusion at C5-6. He diagnosed cervical disc disease with radiculopathy and a history of bilateral carpal tunnel syndrome. Dr. Rooney opined that there were no objective findings to support an objective worsening of the accepted conditions on August 26, 2013.

By decision dated February 25, 2016, OWCP denied modification of the LWEC determination as the medical evidence of record was insufficient to establish a worsening of the accepted conditions on and after August 26, 2013. It accorded Dr. Rooney's opinion the weight of the medical evidence. OWCP further found that Dr. Rutledge's reports were of diminished probative value as appellant had not established that she was made to work outside of her medical restrictions.

OWCP subsequently received a February 18, 2016 report, in which Dr. Rutledge indicated that working outside of appellant's medical restrictions had worsened her cervical spine and upper extremity conditions and caused a new condition at C5-6. Dr. Rutledge found her totally disabled from work.

On April 27, 2016 appellant requested reconsideration and submitted additional evidence. In an April 24, 2012 statement, appellant's coworker, S.M., asserted that appellant could not take her required breaks as there was no one else available to check in patients while she was away from her workstation.

OWCP also received a February 16, 2016 report wherein Dr. Kevin J. Collins, a Board-certified physiatrist, opined that repetitive upper extremity motions at work aggravated appellant's cervical disc disease, bilateral carpal tunnel syndrome, de Quervain's syndrome, and trigger finger. In a February 25, 2016 report, Dr. Bernard Crowell, an orthopedist, diagnosed status post cervical fusion C5-6 secondary to central disc herniation, mild-to-moderate adjacent level disc protrusion with disc disease at C3-4 and C4-5, recent degenerative changes at C6 to C8, and a history of bilateral carpal tunnel syndrome. Dr. Rutledge opined in an April 5, 2016 report that working outside of appellant's restrictions worsened her accepted conditions and caused C5-6 stenosis. He noted that a February 12, 2016 magnetic resonance imaging scan revealed new degenerative changes from C3 through C6.

By decision dated July 21, 2016, OWCP denied modification of the February 25, 2016 decision.<sup>10</sup>

OWCP subsequently received a June 14, 2016 report by Dr. Rutledge diagnosing cervicgia, aggravation of cervical disc disease, a herniated cervical disc, previous cervical

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<sup>10</sup> Appellant appealed to the Board. By order dated September 5, 2017, the Board set aside OWCP's July 21, 2016 decision and remanded the case for OWCP to develop File No. xxxxxx908 as a request for modification of the February 14, 2012 LWEC determination.

surgery, left upper extremity radicular symptoms, bilateral carpal tunnel syndrome, de Quervain's syndrome, and stenosing tenosynovitis of the right long finger.<sup>11</sup>

In an October 12, 2017 development letter, OWCP again notified appellant of the requirements for modifying the February 14, 2012 LWEC determination. It advised her to submit medical evidence establishing a material change or worsening of her accepted conditions. OWCP afforded appellant 30 days to submit such evidence. No additional evidence was received.

By decision dated November 13, 2017, OWCP denied modification of the February 14, 2012 LWEC determination. It found that appellant had not submitted evidence to substantiate that she met the criteria for modifying a formal 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, represents a claimant's ability to earn wages.<sup>12</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>13</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>14</sup> OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.<sup>15</sup> The relevant part provides that a formal LWEC 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.<sup>16</sup> However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of an LWEC decision, such as where an employee has a demonstrated need for surgery.<sup>17</sup>

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<sup>11</sup> A February 2, 2016 bilateral upper extremity electromyogram and nerve conduction velocity study demonstrating severe bilateral C6-7 radiculopathy and no evidence of carpal tunnel syndrome. Appellant also provided physical therapy treatment notes dated from April 6 to June 2, 2016.

<sup>12</sup> 5 U.S.C. § 8115(a); *O.H.*, Docket No. 17-0255 (issued January 23, 2018).

<sup>13</sup> *O.H.*, *id.*; *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>14</sup> *B.G.*, Docket No. 17-0477 (issued September 20, 2017); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013). See *J.M.*, Docket No. 18-0196 (issued July 12, 2018).

<sup>16</sup> *Id.* at Chapter 2.1501.3(a).

<sup>17</sup> *Id.* at Chapter 2.1501.10(b); *Katherine T. Kreger*, *supra* note 13.

The burden of proof is on the party attempting to show a modification of the LWEC determination.<sup>18</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>19</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to modify the February 14, 2012 LWEC determination.

In reaching its determination of appellant's LWEC, OWCP properly found that she had received actual earnings as a modified administrative support assistant for more than 60 days in that she had been working in the position since December 5, 2011 when OWCP issued its February 14, 2012 LWEC decision.<sup>20</sup> It also properly found that her actual wages fairly and reasonably represented her wage-earning capacity. The record does not establish that the modified administrative support assistant position constituted part time, sporadic, seasonal, or temporary work.<sup>21</sup> Moreover, the record does not reveal that the position was a make-shift position designed for appellant's particular needs.<sup>22</sup> Appellant stopped work because she claimed an exacerbation of accepted cervical spine and bilateral upper extremity conditions. Therefore, the Board finds that she has not met her burden of proof to establish that the original determination was erroneous.

Thus, appellant must establish a material change in the nature and extent of the injury-related conditions by establishing that the current medical evidence demonstrates a worsening of the accepted medical conditions with no intervening injury resulting in new or increased work-related disability.<sup>23</sup> She asserts that she cannot perform the modified-duty position due to a worsening of the accepted conditions on and after August 26, 2013.

In support of her request to modify the February 14, 2012 LWEC determination, appellant submitted numerous reports from Dr. Rutledge.

Dr. Rutledge placed appellant in total disability status in reports from August 26, 2013 to June 14, 2016 due to increased cervical spine and bilateral upper extremity symptoms. He diagnosed an acute exacerbation of cervicgia, cervical disc disease, bilateral carpal tunnel syndrome, right long trigger finger, and de Quervain's syndrome of the right hand, and new spinal stenosis at C5-6. Dr. Rutledge attributed these conditions to repetitive upper extremity motion at work, and to appellant being forced to exceed her work limitations. His opinion does not support

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<sup>18</sup> *D.R.*, Docket No. 18-1197 (issued April 30, 2020); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *C.S.*, Docket No. 18-1610 (issued April 25, 2019); *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>19</sup> *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>20</sup> *J.A.*, Docket No. 18-1586 (issued April 9, 2019).

<sup>21</sup> *Supra* note 15 at Chapter 2.815.5 (June 2013).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at Chapter 2.1501.3(a)(2) (June 2013).

modification of the LWEC determination as he failed to provide a rationalized opinion explaining why she could not work on a full-time basis as a modified administrative support assistant, the position on which the determination had been based, due to the accepted employment conditions of left radial collateral ligament sprain, right de Quervain's tenosynovitis, right long trigger finger, bilateral carpal tunnel syndrome, cervical spine strain, and temporary aggravation of C5-6 and C6-7 disc herniations.<sup>24</sup> Dr. Collins opined in a February 16, 2016 report that repetitive upper extremity motions at work aggravated cervical disc disease, bilateral carpal tunnel syndrome, de Quervain's syndrome, and trigger finger. However, he failed to provide medical rationale explaining why or how there had been a worsening of the accepted conditions as of August 26, 2013 which disabled appellant from performing her modified-duty position.<sup>25</sup> Thus, Dr. Collins' opinion is insufficient to require modification of the LWEC determination as he failed to provide a clear opinion, supported by medical rationale, which explained how her inability to perform her employment duties as a modified administrative support assistant was causally related to an accepted condition.

In a February 25, 2016 report, Dr. Crowell diagnosed cervical spine conditions and a history of bilateral carpal tunnel syndrome. This report is insufficient to require modification of the LWEC determination as he did not address whether appellant was disabled from her modified position commencing August 26, 2013.<sup>26</sup>

The Board thus finds that appellant has not met her burden of proof to establish a material change in the nature and extent of her occupationally-related conditions, that the original determination was in fact erroneous, or that she was vocationally rehabilitated. Therefore, appellant has not met her burden of proof to establish that the February 14, 2012 LWEC determination should be modified.

On appeal, appellant contends that Dr. Rutledge's opinion established a worsening of the accepted conditions warranting modification of the LWEC determination. She also alleges that Dr. Rooney's opinion was of diminished probative value as it was not based on a complete and accurate history. As explained above, appellant has not established a basis to require modification of OWCP's LWEC determination.

Appellant may request modification of the February 14, 2012 LWEC determination, supported by new evidence or argument, at any time before OWCP.<sup>27</sup>

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<sup>24</sup> See *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *D.R.*, Docket No. 16-0528 (issued August 24, 2016) (a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining the relationship between a given employment activity and a diagnosed medical condition).

<sup>25</sup> *Id.*

<sup>26</sup> See *V.A.*, Docket No. 19-1123 (issued October 29, 2019); see *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

<sup>27</sup> *Supra* note 20.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to modify the February 14, 2012 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2020  
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board