

OWCP accepted appellant's claim for a herniated disc at L5-L1 on January 9, 2004. Appellant was placed on the periodic rolls on February 16, 2005.

OWCP referred appellant for a second opinion evaluation. In a report dated April 29, 2010, Dr. Larry M. Parker, a Board-certified orthopedic surgeon, reviewed the history of injury and set forth findings on physical examination. Appellant had a slightly positive straight leg raising on the right, with slight diminution of the Achilles reflex on the right side. Dr. Parker reviewed the May 17, 2008 magnetic resonance imaging (MRI) scan and concluded that appellant had a recurrence of disc herniation with objective findings to support continuation of the lumbar radiculitis in the right lower extremity with an L5 radicular pattern in the right lower extremity. He found that appellant could work a sedentary or light position. Dr. Parker completed a work capacity evaluation on May 11, 2010. Appellant could work eight hours a day with restrictions. She could walk and stand for 4 to 8 hours a day with 5- to 10-minute breaks every hour. Dr. Parker opined that appellant could lift up to 20 pounds.

OWCP referred appellant for vocational rehabilitation services on May 13, 2010. The vocational rehabilitation counselor conducted a labor market survey based on appellant's lack of transferable skills and considered entry level positions within her light-duty physical requirements of lifting up to 20 pounds and the need to change positions for 5 to 10 minutes each hour. She identified the positions of general office clerk, cashier and outside delivery. The vocational rehabilitation counselor provided labor market survey information to find that the position of cashier II was reasonably available within appellant's commuting area. There were 11,380 cashier positions available. The vocational rehabilitation counselor provided appellant with 20 job openings as a cashier which did not require any specific education or vocational preparation.

In a letter dated August 17, 2010, OWCP informed appellant that the positions of cashier, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 211.462.10, was within her physical restrictions. It stated that appellant would receive 90 days of placement assistance to find employment.

The vocational rehabilitation counselor determined that the position of cashier II, DOT No. 211.462.10, was within appellant's work restrictions and vocational ability. It was defined as a light position requiring lifting, carrying, pushing and pulling up to 20 pounds occasionally, and up to 10 pounds frequently. The position required walking and standing frequently as well as pushing or pulling. On November 8, 2010 the rehabilitation specialist stated that the position of cashier II was reasonably available to appellant with an expected entry level wage of \$7.25 per hour. The position description required up to 30 days of specific vocational preparation or level 2 and the general educational requirements were reasoning level 3, mathematics level 2 and language level 2.

On November 16, 2010 OWCP proposed to reduce appellant's monetary benefits based on her capacity to earn wages as a cashier II.

Counsel disagreed on November 24, 2010, contending that the job description was not in keeping with her work restrictions.

By decision dated December 20, 2010, OWCP determined that the position of cashier II represented appellant's wage-earning capacity. It reduced her monetary benefits effective that date.

Appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

By decision dated July 29, 2011, a hearing representative affirmed the December 20, 2010 decision. She found that the cashier II position properly reflected appellant's wage-earning capacity and was within her physical abilities.

Appellant requested reconsideration and offered a legal argument based on the Board's decision in *M.V.*²

OWCP declined to reopen appellant's claim in an October 12, 2011 decision.

Counsel appealed to the Board. In an October 2, 2012 decision, the Board found that the position of cashier II represented appellant's wage-earning capacity.³ The Board further found that appellant had not submitted sufficient evidence to warrant modification of the loss of wage-earning capacity determination. The Board distinguished the facts in *M.V.* from those in appellant's case.

OWCP referred appellant for a second opinion examination on May 2, 2012 to Dr. David A. West, a Board-certified orthopedic surgeon. It requested that Dr. West address whether appellant's accepted work-related condition had resolved and whether she could perform the duties of her date-of-injury position as a mail clerk. OWCP provided Dr. West with appellant's date-of-injury position description which noted that she was required to stand up to eight hours a day and generally stand from three to five hours a day with walking from four to eight hours a day.

In a report dated May 17, 2012, Dr. West examined appellant and found that she walked in an upright position with no assistive device. He found negative straight leg raising and good strength of the quadriceps, hamstrings, dorsiflexors and plantar flexors. Dr. West stated that appellant had deep tendon reflexes at two of four at her Achilles and patella. He reported that appellant was able to heel and toe walk with difficulty. Dr. West noted that appellant had a radicular pattern in the right lower extremity and that her MRI scan demonstrated a recurrent disc herniation. He found that appellant could not return to her date-of-injury position due to the job requirements that she stand or walk for four to eight hours a day. Dr. West stated that appellant could not kneel, bend, squat or climb.

On October 9, 2012 counsel requested reconsideration and again cited to *M.V.* He also cited to Dr. West's report.

² Docket No. 10-1642 (issued June 15, 2011) (finding that as the vocational rehabilitation counselor trained appellant as an entry-level budget analyst the record should have demonstrated how many of the positions available were entry level and therefore suitable to the claimant's vocational training).

³ Docket No. 12-228 (issued October 2, 2012).

By decision dated January 27, 2014, OWCP denied modification of appellant's loss of wage-earning capacity determination. It found that she did not submit medical evidence to establish a material change in the nature and extent of her injury-related condition. OWCP noted that Dr. West did not address appellant's ability to perform the selected position. It further noted that the Board had ruled on the reasonability of the cashier II position and found that *M.V.* was not applicable to the facts of her case.

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.⁴ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁵ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁶

Modification of a standing wage-earning capacity determination is not warranted unless 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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

Appellant requested modification of her loss of wage-earning capacity determination, noting Dr. West's second opinion report. OWCP requested a second opinion report from Dr. West. The purpose of the second opinion report was to address whether appellant had any continuing medical residuals due to her accepted employment injuries; and whether she could perform her date-of-injury position.

OWCP based the November 16, 2010 wage-earning capacity determination on Dr. Parker's April 29, 2010 report. Dr. Parker found that appellant had a recurrent herniated disc as well as radiculitis in the right lower extremity and diminution of the Achilles reflex. He completed a work capacity evaluation on May 11, 2010 and advised that appellant could work eight hours a day with restrictions. Dr. Parker found that she could walk and stand for four to eight hours a day. He opined that appellant could lift up to 20 pounds.

⁴ 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

⁵ *K.R.*, *supra* note 2; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁶ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁷ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁸ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

The original loss of wage-earning capacity determination is not in question as the Board found that OWCP met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of cashier II. The Board further addressed the relevance of *M.V.*,⁹ finding that the facts of that case were not applicable to the facts at hand in appellant's claim. Appellant is the party attempting to modify the 2010 loss of wage-earning capacity determination. She has the burden of proof to establish a material change in the nature and extent of her injury-related condition. The only evidence that appellant cited in support of her request for modification of the loss of wage-earning capacity is the May 17, 2012 report from Dr. West. In the referral for a second opinion, OWCP did not request that Dr. West address whether appellant sustained a material change in the nature and extent of her injury-related condition. As such, he did not address this issue. In response to the questions posed by OWCP, Dr. West found that appellant continued to have medical residuals due to her accepted condition and could not return to her date-of-injury position. He noted that appellant continued to exhibit a radicular pattern in the right lower extremity and a recurrent disc herniation. Dr. West opined that appellant could not return to her date-of-injury position due to the job requirements that she stand or walk for four to eight hours a day. He stated that appellant could not kneel, bend, squat or climb. Dr. West did not find that she was unable to perform the duties of the cashier II position, upon which the wage-earning capacity decision was based.

The Board finds that there is no evidence of a change in the nature and extent of appellant's injury-related condition warranting modification of her loss of wage-earning capacity determination. Dr. Parker made similar findings to Dr. West in his April 29, 2010 report, including a recurrent herniated disc, reduced Achilles reflex and radiculitis in the right lower extremity. He provided work restrictions finding that appellant could not perform her date-of-injury position and could only walk or sit for four to eight hours a day with breaks to change position every hour. Dr. West agreed that appellant could not return to her date-of-injury position due to the need to stand or walk for eight hours a day. He did not diagnose any additional condition beyond that found by Dr. Parker. Dr. West did not find that there was a change in the nature and extent of appellant's injury-related condition or provide probative medical rationale supporting modification of her loss of wage-earning capacity determination. His report is not sufficient to establish that appellant sustained a material change of her accepted back condition. It is appellant's burden to provide medical evidence to support modification of the loss of wage-earning capacity determination. The Board finds that she has not met her burden of proof.

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

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish a change in the nature and extent of her injury-related condition thus warranting modification of her loss of wage-earning capacity determination.

⁹ *Supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board