

On appeal appellant's representative asserts that the loss of wage-earning capacity determination was improper because it was issued immediately after appellant's return to work on June 7, 2010, was informal, and, therefore, violated section 2.814.7.c of OWCP's procedures.

Appellant's representative further asserts that appellant became totally disabled on April 11, 2011 when she was hit by a car leaving her rehabilitation position. Failing to consider this was in violation of section 2.814.10 of OWCP procedures.

FACTUAL HISTORY

On October 25, 2008 appellant, then a 55-year-old temporary letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her low back that day while moving a tray of mail. She stopped work and did not return. On November 28, 2008 OWCP accepted sprain of back, lumbar region. Appellant received wage-loss compensation and was placed on the periodic compensation rolls.

In November 2008 appellant moved from Florida to New York City. On November 9, 2008 Dr. Robert A. Marini, Board-certified in physical medicine, rehabilitation and pain medicine, began a regimen of pain management. He described physical examination findings and diagnosed lumbosacral back pain with sciatica. A March 10, 2009 lumbar spine magnetic resonance imaging (MRI) scan demonstrated disc bulges at L1-2 through L4-5 and a herniated disc at L5-S1.

In May 2009 OWCP referred appellant to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for a second-opinion evaluation to determine appellant's work capacity. In a May 29, 2009 report, Dr. Soren noted MRI scan findings, described his physical examination, and advised that March 19, 2009 electromyogram and nerve conduction studies (EMG/NCS) showed right L4-5 lumbar radiculopathy. He diagnosed acute lumbosacral sprain, L4-S1 herniated disc, and right L4-5 lumbar radiculopathy. Dr. Soren concluded that, although appellant could not return to letter carrier duties, she could perform full-time light-duty work. Based on his report, OWCP expanded the additional conditions to include herniated disc at L5-S1 and lumbar radiculopathy at L4-5.

Dr. Marini and his associate Dr. Felix A. Almentero, also a Board-certified physiatrist, provided pain management on a regular basis. They noted that appellant was not working.

OWCP found a conflict in medical evidence between the opinions of appellant's treating physicians Drs. Marini and Almentero and OWCP's referral physician Dr. Soren, regarding appellant's employment-related diagnoses and work ability. It referred appellant to Dr. Martin Barschi, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In reports dated September 9 and November 2, 2009, Dr. Barschi opined that appellant had sustained right lumbosacral radiculopathy on October 25, 2008 and a herniated disc. He advised that she was capable of working in a modified-duty capacity.

Appellant was terminated by the employing establishment effective September 26, 2009. OWCP referred her to vocational rehabilitation in January 2010. A vocational rehabilitation specialist conducted an evaluation and identified the positions of receptionist, hospital admitting

clerk, and bookkeeper as within appellant's capabilities and available in the local labor market. Appellant began a job search.

In April 2010 OWCP referred appellant to Dr. Robert J. Orlandi, a Board-certified orthopedist, for a second-opinion evaluation and an updated work capacity evaluation. In a May 3, 2010 report, Dr. Orlandi discussed his review of the record and provided physical examination findings. He diagnosed lumbar strain, resolved, superimposed on degenerative disc disease with an unrelated right L5-S1 disc herniation. Dr. Orlandi advised that appellant could work without restrictions.

By letter dated May 25, 2010, Mclean Heights Medical Professionals informed the vocational rehabilitation specialist that it would like to hire appellant as a receptionist/clerk, to begin June 1, 2010. OWCP entered into an assisted reemployment agreement with the medical group on June 1, 2010. Appellant began work with the medical group on June 7, 2010.

In correspondence dated August 2, 2010, OWCP informed appellant that, based on her actual earnings, it had adjusted her compensation to reflect 85 percent wage-earning capacity.

In a September 2, 2010 decision, OWCP found that appellant's actual full-time earnings as a receptionist with Mclean Heights Medical Professionals, effective June 7, 2010, fairly and reasonably represented her wage-earning capacity. It reduced her compensation effective June 7, 2010 to reflect an 85 percent wage-earning capacity. Appellant's wage-loss compensation was reduced to \$56.37 per week.

Dr. Marini and Dr. Almentero provided continued pain management. On August 26, 2010 Dr. Marini noted that appellant had returned to work.

In an April 19, 2011 statement, the employing establishment noted that appellant had been hit by a motor vehicle. An April 18, 2011 report from Markiel Sionov, a physician assistant, advised that appellant had been seen that day and was totally disabled for three weeks due to a left ankle fracture.

Appellant telephoned OWCP on July 22, 2011 relating that she had been hurt on the job on April 11, 2011. She was advised that, as she had a new employer, she should proceed under that employing establishment's policies.

In an August 2, 2011 report, Dr. Marini noted that appellant had not worked since April 11, 2011 when she was hit as a pedestrian by a motor vehicle. Examination findings included decreased lumbar range of motion, normal straight-leg testing, and 5/5 strength in the legs. Dr. Marini diagnosed lumbosacral root lesions, displacement of lumbar intervertebral disc without myelopathy, and myalgia and unspecified myositis. He and Dr. Almentero submitted monthly reports thereafter. They described similar findings and reiterated diagnoses. Additional diagnoses included lumbar radicular syndrome, chronic lumbar radiculopathy, and bilateral myofascial pain. On July 30, 2013 Dr. Almentero advised that appellant was totally disabled and

could not lift more than 10 pounds, could walk short distances and one flight of stairs, and was independent with self-care. Drs. Marini and Almentero continued pain management.³

On May 8, 2015 appellant, through her representative, requested modification of the September 10, 2010 loss of wage-earning capacity determination. He maintained that the decision was erroneous because it was made immediately upon her return to work on June 7, 2010 and was an informal determination, both of which were inconsistent with OWCP procedures. Appellant's representative indicated that appellant was claiming compensation for total disability as of April 11, 2011 when she was hit by a car as she was walking to her vehicle after leaving her rehabilitation job and that she was found totally disabled by the Social Security Administration (SSA). He attached a New York State Department of Motor Vehicles police accident report dated April 11, 2011 which indicated that appellant was struck in a crosswalk in Yonkers, New York. SSA correspondence dated April 24, 2013 indicated that she would receive SSA disability beginning in October 2011. In an April 21, 2015 letter, the Practice Manager at Mclean Heights Medical Professionals advised that appellant's employment was terminated after her accident on April 11, 2011. The representative also attached copies of OWCP procedures.

Dr. Almentero and Dr. Marini continued pain management. In June 1 to September 16, 2015 reports, the physicians noted appellant's complaints of low back pain, described their treatment history and her examination findings, including diffuse tenderness of paraspinal muscle and decreased trunk mobility with a negative straight leg raising. In each report they reiterated appellant's diagnoses and advised that she was totally disabled. Dr. Almentero and Dr. Marini also noted that she could lift no more than 10 pounds, could walk short distances and one flight of stairs, and was independent in self-care. In a September 16, 2015 attending physician's report (Form CA-20), Dr. Marini noted a history that appellant had injured her back while working as a mail carrier. He diagnosed lumbar radiculopathy and noted by checking a box indicating that the condition was employment related and that she was unable to work. Dr. Marini also submitted a work capacity evaluation (Form 5c) that day, in which he also diagnosed chronic lumbar radicular syndrome, reiterated that appellant was totally disabled, and provided restrictions of no reaching above shoulder, twisting, bending, stooping, or operating a motor vehicle at work. He indicated that she could sit no more than two hours daily, and walk, stand, and reach for one hour.

OWCP informed appellant and her representative, by letters dated December 30, 2015, of the evidence needed to establish modification of the September 2, 2010 loss of wage-earning capacity determination.

In a February 12, 2016 letter, the Practice Manager at Mclean Heights Medical Professionals indicated that appellant had worked at Mclean Heights Medical Professionals from June 7, 2010 through April 11, 2011 when she was forced to take time off following an accident. She stated that, because appellant's physicians were not able to provide an estimated return to work date, she was terminated on October 28, 2011.

³ An October 1, 2012 EMG/NCS study demonstrated right L4-5 lumbar nerve root dysfunction. December 11, 2012 and July 3, 2014 MRI scans of the lumbar spine demonstrated similar findings to the March 10, 2009 study.

In monthly reports dated January 12 through July 28, 2016, Drs. Marini and Almentero described their pain management treatments. On a form report dated February 9, 2016, Dr. Marini advised that appellant was not even capable of sedentary work.

By decision dated September 21, 2016, OWCP denied modification of the September 2, 2010 loss of wage-earning capacity determination. It found that appellant had submitted insufficient evidence to establish that the September 2, 2010 rating was in error or to establish a material change in the accepted conditions, noting that an intervening injury caused her work stoppage.

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. Compensation payments are based on the loss of wage-earning capacity determination and it remains undisturbed until properly modified.⁴

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.⁵ OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.⁶ 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.⁷

The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to modify the September 2, 2010 loss of wage-earning capacity determination. In the September 2, 2010 decision, OWCP found that her actual earnings in private employment as a receptionist, effective June 7, 2010, fairly and reasonably represented her wage-earning capacity and reduced her compensation to \$56.37 per week. In May 2015 appellant, through her representative, requested total disability compensation beginning April 11, 2011 after she was hit by a car after leaving her private employment.

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

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

⁷ *Id.* at § 2.1501.3(a).

⁸ *Jennifer Atkerson*, 55 ECAB 317 (2004).

As a formal loss of wage-earning capacity determination was in effect at the time of the claimed total disability, appellant must show a basis for modification of that decision to be entitled to wage-loss compensation. She did not allege that she was retrained or otherwise vocationally rehabilitated.

Furthermore, the evidence does not establish a material change in her employment-related condition. The accepted conditions in this case are sprain of back, lumbar region, lumbar herniated disc at L5-S1, and lumbar radiculopathy, caused by an October 25, 2008 employment injury. Appellant is now claiming total disability beginning April 11, 2011, the date she was struck by a car on the street outside her private employment. The Board finds that the medical evidence submitted is insufficient to establish that her worsening low-back condition after that date were due to the October 25, 2008 employment injury, especially in light of the intervening injury on April 11, 2011.⁹

The question is whether appellant's injury and disability on or after April 11, 2011 was the direct and natural progression of her accepted conditions or whether it was instead triggered by an intervening factor, the April 11, 2011 accident, arising independently of her federal employment.¹⁰ The record contains no medical evidence describing the injuries appellant sustained on April 11, 2011. The brief report rendered by a physician assistant on April 18, 2011 does not constitute probative medical evidence as a physician assistant is not a physician as defined by FECA.¹¹ The project manager at appellant's private employment indicated that as of October 28, 2011 appellant could not return to work due to its effects. Dr. Marini, who had been treating appellant since shortly after the October 28, 2008 employment injury did not submit reports between March 24 and August 2, 2011. In the latter report, he merely mentioned that appellant had not worked since April 11, 2011 when she was hit as a pedestrian.

Moreover, neither Dr. Marini nor Dr. Almentero provided a reasoned explanation as to how appellant's accepted conditions worsened such that she was unable to perform the duties of the job in which her loss of wage-earning capacity determination was based. On July 30, 2013 Dr. Almentero additionally diagnosed myofascial pain and, for the first time, advised that she was totally disabled. Myofascial pain has not been accepted as employment related and, although Dr. Marini indicated on February 9, 2016 that appellant was not even capable of sedentary work, in none of their reports did either physician exhibit knowledge of the modified job duties she was performing in her modified receptionist position, any injuries she sustained on April 11, 2011, or explain how the October 28, 2010 employment injury caused her current condition.

Thus, the Board finds that appellant has failed to submit sufficient medical evidence to establish a material change in the nature and extent of her injury-related conditions and,

⁹ See *S.M.*, 58 ECAB 166 (2006).

¹⁰ *Id.*

¹¹ *E.K.*, Docket No. 09-1827 (issued April 21, 2010) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

therefore, she has failed to meet her burden of proof to modify the September 10, 2010 loss of wage-earning capacity determination.¹²

The Board notes that OWCP procedures for determining wage earning capacity (referenced by appellant's representative) were superseded in June 2013 by Chapter 2.815, *Determining Wage-Earning Capacity Based on Actual Earnings*.¹³ These procedures provide that, upon notice that an injured employee has returned to work, if the employee has been receiving compensation on the periodic rolls, without a formal loss of wage-earning capacity determination, OWCP should delete the payment record as soon as possible to avoid an overpayment.¹⁴ If the injured employee is entitled to compensation for partial wage loss after the return to work, OWCP should use the *Shadrick* formula and, if the earnings are fixed, periodic compensation could be authorized.¹⁵ Section 2.815.4 provides that where residuals of the accepted injury prohibit the employee from returning to the work held at the time of injury or from earning equivalent wages, but do not render her totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for loss of wage-earning capacity, based on the employee's actual wages if they fairly and reasonably represent the employee's wage-earning capacity.¹⁶ If the employee returned to work outside federal employment, and is reemployed through vocational rehabilitation, OWCP may generally presume that the earnings fairly and reasonable represent wage-earning capacity.¹⁷ When OWCP has determined that the injured employee's actual earnings fairly and reasonably represent the wage-earning capacity, it should proceed with the issuance of a formal loss of wage-earning capacity decision once the employee has worked in the position for 60 days with no further work stoppage due to the accepted conditions.¹⁸

The facts of this case indicate that, following a determination that appellant was medically able to return to modified duty, she was referred to vocational rehabilitation. During the vocational rehabilitation process she obtained a position as receptionist with Mclean Heights Medical Professionals and began work there on June 7, 2010.

As required under section 2.815.3 of its procedures, OWCP informed appellant that it was reducing her compensation based on her return to work earnings.¹⁹ On September 2, 2010 almost three months after her return to work on June 7, 2010, it issued a formal loss of wage-earning capacity determination, finding that her work as a receptionist fairly and reasonably

¹² See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

¹³ *Supra* note 6 *Determining Wage-Earning Capacity Based on Actual Earnings* at Chapter 2.815 (June 2013).

¹⁴ *Id.* at Chapter 2.815.3.

¹⁵ *Id.* at Chapter 2.815.3b. The *Shadrick* formula is found in section 2.815.4b of OWCP procedures. See also *Albert C. Shadrick*, 5 ECAB 376 (1943).

¹⁶ *Id.* at Chapter 2.815.4a.

¹⁷ *Id.* at Chapter 2.815.5d.

¹⁸ *Id.* at Chapter 2.815.5e(1) and Chapter 2.815.6a.

¹⁹ *Supra* note 10.

represented her wage-earning capacity and reduced her compensation to \$56.37 per week effective the date of her employment, June 7, 2010. Appellant continued to work at her private employment at McLean Heights Medical Professionals until April 11, 2011 when she was struck by a car in a crosswalk while walking to her car after work.

As the record supports that OWCP followed proper procedures, the Board finds that the September 2, 2010 loss of wage-earning capacity determination was proper.²⁰

As to the representative's reliance on the SSA disability determinations/decisions by other administrative agencies, as to whether an employee is disabled, are not binding on OWCP or the Board with respect to whether the individual is disabled under FECA.²¹

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

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that a September 2, 2010 loss of wage-earning capacity determination should be modified.

²⁰ See *A.D.*, Docket No. 14-0253 (issued June 6, 2015).

²¹ *Daniel F. O'Donnell, Jr.*, Docket No. 04-1545 (issued January 12, 2005).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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