

FACTUAL HISTORY

This case has previously been before the Board. By order dated July 6, 2005, the Board remanded the case to OWCP because appellant had timely requested a preresoupment hearing from a preliminary overpayment finding.² In a July 26, 2007 decision, the Board found that OWCP properly determined that an overpayment in compensation was created but that the case was not in posture for decision regarding the amount of the overpayment or whether he was entitled to waiver.³ The law and facts of the previous Board decisions and orders are incorporated by reference.

In November 2004, OWCP referred appellant to Dr. Bernard Z. Albina, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a December 1, 2004 report, Dr. Albina advised that appellant had findings compatible with postlumbar laminectomy syndrome and that he could return to modified duties. In a February 23, 2005 report, following a functional capacity evaluation, he found that appellant could perform sedentary work with lifting restricted to 10 pounds.

OWCP determined that a conflict in medical opinion arose between Dr. Albina and Dr. Steven P. Kloeris, an attending physician Board-certified in family medicine, who advised that appellant was totally disabled. In August 2005, it referred appellant to Dr. Larry L. Likover, a Board-certified orthopedic surgeon, for an impartial evaluation. In a September 1, 2005 report, Dr. Likover provided physical findings on examination and found appellant's subjective complaints were not supported by the objective evidence. He stated that appellant could return to work in a light-duty capacity with no lifting over 10 pounds.

In March 2006, appellant was referred for vocational rehabilitation.⁴ Linda Farris, a rehabilitation counselor, reported that he had an associate's degree and basic computer skills. On June 13, 2006 she identified the positions of gate guard and customer service clerk, finding that they were within the sedentary strength category, within appellant's work restrictions and qualifications and reasonably available in the local labor market. Vocational rehabilitation services were closed in September 2006.

Appellant began treatment with Dr. Ranjit Patel, a Board-certified neurologist and pain management specialist in August 2006. Dr. Patel submitted monthly reports describing

² Docket No. 05-628 (issued July 6, 2005). On September 15, 2000 appellant, then a 46-year-old aircraft mechanic, injured his back while changing an aircraft tire. The claim was accepted for lumbar sprain and displacement of lumbar intervertebral disc without myelopathy. Appellant was placed on the periodic compensation rolls. On December 15, 2000 he had a laminectomy procedure at L3-4. A May 14, 2001 functional capacity evaluation indicated that appellant could perform work at a medium demand level. Appellant underwent pain management therapy in the fall of 2001.

³ Docket No. 07-656 (issued July 26, 2007).

⁴ Appellant was initially referred for vocational rehabilitation in 2001 and underwent work hardening. By report dated July 25, 2002, Daphaney Johnson, a vocational rehabilitation counselor, stated that vocational rehabilitation services were no longer warranted because appellant had elected to retire. There is no evidence of record to indicate that appellant chose to retire.

appellant's symptoms. He diagnosed lumbar radiculopathy, described appellant's medication regimen and advised that he could not work.

By letter dated December 21, 2006, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a customer service clerk.⁵ Appellant disagreed with the proposed reduction and submitted additional reports from Dr. Patel who reiterated that appellant was totally disabled.⁶

In November 2007, OWCP referred appellant to Dr. James F. Hood, a Board-certified orthopedist, for a second opinion evaluation. In a December 12, 2007 report, Dr. Hood noted appellant's complaint of back pain. He provided physical examination findings and advised that appellant continued to have residuals of the employment injury, but that, following review of a December 12, 2007 functional capacity evaluation, appellant could perform eight hours of sedentary, light or medium work daily, with frequent lifting restricted to 20 pounds.

Dr. Patel submitted reports describing appellant's medical condition and advising that he could not work. On December 18, 2007 OWCP forwarded a copy of Dr. Hood's report to Dr. Patel for review. Dr. Patel submitted reports dated January 11, 2008, but did not respond to OWCP's inquiry. On a form report he commented that appellant was retired.

OWCP determined that a conflict in medical opinion arose between Dr. Patel and Dr. Hood regarding appellant's work capacity and limitations. It referred him to Dr. Grant R. McKeever, Board-certified in orthopedic surgery, for an impartial evaluation. A functional capacity evaluation completed on March 5, 2008 demonstrated that appellant's most limiting factor was pain in the low back. The study demonstrated that appellant could safely work up to an eight-hour day in light duty with restrictions to prolonged sitting, standing, bending and stooping.

In a March 5, 2008 report, Dr. McKeever noted the history of injury and his review of the medical record. He provided physical examination findings, noting that appellant moved around the room and get on and off the examining table without apparent difficulty, was able to heel and toe walk, did not limp and did not appear to be in severe pain. Dr. McKeever noted no spasm on examination of the low back, no tenderness over the paravertebral muscle masses or over the sciatic notches or sacroiliac areas. Sensation in the lower extremities was intact. Dr. McKeever diagnosed herniated nucleus pulposus at L3-4, postoperative status laminectomy, degenerative disc disease of the lumbar spine with small herniations at L5-S1 and postoperative adhesions at L3-4. Based on the March 5, 2008 functional capacity evaluation, appellant could work eight

⁵ The Department of Labor's *Dictionary of Occupational Titles (DOT)* states that the position is sedentary. The description states: Interviews applicants and records interview information into computer for water, gas, electric, telephone or cable television system service. Talks with customers by phone or in person and receives orders for installation, turn-on, discontinuance, or change in service. Fills out contract forms, determines charges for service requested, collects deposits, prepares change of address records and issues discontinuance orders, using computer. May solicit sale of new or additional services. May adjust complaints concerning billing or service rendered, referring complaints of service failures, such as low voltage or low pressure, to designated departments for investigation.

⁶ In April 2007, appellant's Norco (hydrocodone) medication was changed to Oxycontin (oxycodone).

hours a day in a light category; could lift up to 10 pounds frequently and 20 pounds occasionally; should restrict prolonged sitting, standing, bending and stooping; and would benefit from frequent postural breaks. Dr. McKeever noted that appellant had been on oxycodone for too long and the medication should be tapered off and advised that a gradual work hardening program would improve his functional capacity. In an attached work capacity evaluation, he advised that appellant could work eight hours daily with sitting and standing limited to four hours each and bending and stooping to two hours with 15-minute breaks every two hours. Dr. McKeever recommended a work hardening program.

Dr. Patel continued to submit reports reiterating his findings and conclusions. On February 19, 2009 appellant was again referred to Ms. Farris for vocational rehabilitation services. On April 16, 2009 Ms. Farris updated the job survey information for the customer service clerk position.

By letter dated April 20, 2009, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a customer service clerk.

Appellant disagreed with the proposed reduction. In an April 30, 2009 report, Dr. Patel stated that he had been taking care of appellant for several years for his back pain, lumbar radiculopathy, lumbar root disease, postlaminectomy syndrome and failed back syndrome. He advised that appellant had physical deficits of weakness, numbness and gait difficulty. Dr. Patel stated that, due to appellant's severe, chronic pain, he was on high doses of narcotic medication, noting that he took 40 milligrams (mg) of Oxycontin three times a day and 800 mg of Skelaxin three times a day. He concluded that, due to multiple medical problems, pain and medication, appellant was permanently, totally disabled. In a May 6, 2009 treatment note, Dr. Patel described appellant's pain complaints, provided physical examination findings and described his medication.

By decision dated June 2, 2009, OWCP found that the weight of the medical evidence rested with the opinion of Dr. McKeever, the impartial specialist. It reduced appellant's compensation benefits, effective June 6, 2009, based on his capacity to earn wages as a customer service clerk.

In June 5, 2009 to February 25, 2010 treatment notes, Dr. Patel described appellant's physical findings and treatment. OWCP reissued the June 2, 2009 decision on December 15, 2009 because appellant had not been provided with appeal rights. Appellant was paid retroactive compensation for the period June 7 through December 19, 2009 at the total disability rate.

On January 12, 2010 appellant requested a hearing and submitted copies of evidence previously of record. In an April 1, 2008 report, Dr. Tyson B. Dekorse, an osteopath, provided physical examination findings and diagnosed hypertension, hepatitis C, chronic low back pain, status postlaminectomy and depression symptoms. Dr. Ileana Jarrin, an internist, also provided examination findings on April 1, 2008. In reports dated October 14 and November 20, 2009, Darrell D. Turner, Ph.D., a clinical psychologist, diagnosed depression. On November 24, 2009 Dr. Dekorse diagnosed depression and hypertension.

At the April 15, 2010 hearing, appellant described his medical condition, stating that he was physically restricted, went to the physician monthly and took oxycodone to relieve pain. Dr. Patel provided treatment notes dated March 25 to May 25, 2010. In a May 18, 2010 letter, he described appellant's complaints of severe low back pain radiating to the right lower extremity and his medication regimen. Dr. Patel advised that appellant was considerably limited in the use of the back and was restricted from repetitive bending with sitting restricted to 50 percent of the time; and no climbing, kneeling or squatting; no lifting over five pounds; and no pushing or pulling over one to two pounds of force. He concluded that he felt appellant was unable to work due to increasing low back pain and that his prognosis was guarded.

By decision dated June 11, 2010, OWCP's hearing representative affirmed the December 15, 2009 decision.

On June 14, 2010 appellant requested reconsideration. He submitted duplicates of evidence previously of record. In form treatment notes dated May 18 and June 24, 2010, Dr. Patel listed appellant's complaints and provided findings on physical examination. He diagnosed chronic pain, degenerative joint disease, degenerative disc disease, low back pain, lumbar radiculopathy and lumbar radiculitis.

In a July 8, 2010 decision, OWCP denied modification of the wage-earning capacity determination.

Appellant again requested reconsideration on July 23 and 30, 2010. He submitted evidence previously of record and a July 21, 2010 report in which Dr. Turner noted that appellant had been under his care since October 2009 for a diagnosis of depression. In form treatment notes dated July 22 and August 11, 2010, Dr. Patel reiterated his findings and conclusions.

By decision dated August 20, 2010, OWCP denied modification of the December 15, 2009 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁷ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁸

Section 8115 of FECA and OWCP regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his

⁷ *James M. Frasher*, 53 ECAB 794 (2002).

⁸ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁹

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹⁰ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹¹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position listed in the Department of Labor's *DOT* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹² Finally, application of the principles set forth in *Albert C. Shadrick*,¹³ as codified in section 10.403 of OWCP's regulations,¹⁴ will result in the percentage of the employee's loss of wage-earning capacity.¹⁵

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁶

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁷ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

⁹ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, id.*

¹⁰ *William H. Woods*, 51 ECAB 619 (2000).

¹¹ *Jackson, supra* note 8.

¹² *Frasher, supra* note 7.

¹³ 5 ECAB 376 (1953).

¹⁴ 20 C.F.R. § 10.403.

¹⁵ *Frasher, supra* note 7.

¹⁶ *Jackson, supra* note 8.

¹⁷ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁸

ANALYSIS -- ISSUE 1

The medical evidence from Dr. McKeever established that appellant was no longer totally disabled. OWCP previously referred appellant for vocational rehabilitation in 2001 and 2006, when a job search was unsuccessful. Appellant was again referred to vocational rehabilitation in February 2009. The vocational rehabilitation counselor, Ms. Farris, identified two positions, gate guard and customer service clerk that fit appellant's work capabilities and limitations. On April 14, 2009 she updated the job survey information for the customer service clerk position.

The Board finds that OWCP met its burden of proof to reduce appellant's wage-earning capacity based on his ability to earn wages as a customer service clerk. In a March 5, 2008 referee opinion, Dr. McKeever advised that, based on the March 5, 2008 functional capacity evaluation and his physical examination, appellant could perform light duties for eight hours a day with sitting and standing limited to four hours each and bending and stooping to two hours with frequent lifting of 10 pounds. While appellant disagreed with the proposed reduction in wage-loss compensation and submitted reports from Dr. Patel dated April 30, 2009 to February 25, 2010, Dr. McKeever essentially reiterated his opinion that appellant could not work. The physical restrictions he provided on May 18, 2010 comport with a sedentary position.

The Board finds that Dr. McKeever provided a comprehensive, well-rationalized opinion in which he clearly advised that appellant could return to light-duty work. Dr. McKeever's opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence in regard to whether appellant had the capacity to earn wages in the sedentary customer service clerk position.¹⁹ The Board has held that reports from a physician, who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.²⁰ For this season, the additional reports of Dr. Patel are insufficient to overcome the weight accorded Dr. McKeever as the impartial medical specialist

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of customer service clerk represented his wage-earning capacity.²¹ The evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of his commuting area. OWCP therefore properly determined

¹⁸ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁹ *Frasher*, *supra* note 7.

²⁰ *I.J.*, 59 ECAB 408 (2008).

²¹ *Frasher*, *supra* note 7.

that the position of customer service clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,²² properly reduced his compensation on December 15, 2009.²³

LEGAL PRECEDENT -- ISSUE 2

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 wage-earning capacity determination and it remains undisturbed until properly modified.²⁴ OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."²⁵ Once the wage-earning capacity of an injured employee is determined, a modification of such 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, in fact, erroneous.²⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁷

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. 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 changed; or (3) the claimant has been vocationally rehabilitated. OWCP's procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If it is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.²⁸ OWCP is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.²⁹

²² *Supra* note 13.

²³ *James Smith*, 53 ECAB 188 (2001).

²⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

²⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

²⁷ *Id.*

²⁸ *See* Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.814.11 (June 1996).

²⁹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ANALYSIS -- ISSUE 2

Applicable case law and OWCP's procedures require that once a formal wage-earning capacity decision is in place, a modification of such 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, in fact, erroneous.³⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³¹

The Board finds that appellant did not submit sufficient evidence to show that OWCP's December 15, 2009 wage-earning capacity determination was erroneous.³² Appellant did not assert and there is no evidence of record that the decision was in error or that he was retrained or otherwise vocationally rehabilitated and the medical evidence submitted is insufficient to show that there was a material change in the nature and extent of the injury-related condition.

Appellant requested reconsideration on July 14, 23 and 30, 2010. He submitted additional treatment notes from Dr. Patel dated May 18 to August 11, 2010 in which Dr. Patel reiterated his findings and conclusions. Dr. Patel did not indicate that there had been a material change in the nature and extent of appellant's injury-related condition such that he could not perform the customer service clerk duties.

Dr. Turner diagnosed depression in reports dated October 14 and November 20, 2009 and July 21, 2010. Dr. Dekorse provided physical examination findings and diagnosed hypertension, hepatitis C, chronic low back pain, status postlaminectomy and depression in reports dated April 1, 2008 and November 24, 2009 and Dr. Jarrin also provided examination findings on April 1, 2008. Neither Dr. Turner or either Dr. Dekorse or Dr. Jarrin discussed appellant's physical limitations or his ability to perform the duties of the constructed customer service clerk position. Hence, their reports are of little probative value on the issue of whether appellant's condition had changed such that he could no longer perform the duties of the selected position.³³

The Board finds that, as the medical evidence did not establish a worsening of appellant's injury-related condition, it is insufficient to establish that the December 15, 2009 wage-earning capacity decision should be modified.³⁴ OWCP therefore properly denied modification of the December 15, 2009 wage-earning capacity determination.³⁵

³⁰ *Stanley B. Plotkin*, *supra* note 26.

³¹ *Id.*

³² *Katherine T. Kreger*, *supra* note 24; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 25.

³³ *See Darletha Coleman*, 55 ECAB 143 (2003).

³⁴ *Id.*

³⁵ *T.M.*, Docket No. 08-975, (issued February 6, 2009). The Board notes that appellant submitted evidence with his appeal. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

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, by its December 15, 2009 decision, as affirmed by the hearing representative on June 11, 2010, OWCP properly reduced appellant's compensation benefits based on his capacity to earn wages in the constructed position of customer service clerk. The Board further finds that OWCP properly denied modification of the December 15, 2009 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 20, July 8 and June 11, 2010 are affirmed.

Issued: August 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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