

Following the Board's March 4, 2011 remand, OWCP issued its May 19, 2011 decision. It advised that it denied appellant's request for reconsideration after a merit review. The decision noted the requirements for modifying a wage-earning capacity determination but further noted the standard for reopening a claim for merit review following a reconsideration request. The decision also found that the evidence provided by appellant did not establish "clear evidence of error," a standard used to consider an untimely reconsideration request.³ OWCP's decision concluded by declining to modify its July 2, 2002 wage-earning capacity decision as the additional evidence and argument provided by appellant was "repetitive, duplicative, irrelevant and insufficient," a standard typically used in considering whether to grant a merit review from a timely reconsideration request.⁴ As noted, the Board's March 4, 2011 decision specifically found that appellant's June 16, 2009 request should not be treated as a reconsideration request but should be adjudicated as a request for modification of a wage-earning capacity determination.

Section 8124(a) of FECA provides: OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.⁵ Its regulations at section 10.126 of Title 20 of the Code of Federal Regulations provide: The decision of the Director of OWCP shall contain findings of fact and a statement of reasons.⁶ Moreover, OWCP's procedure manual provides: The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.⁷

The Board, having duly considered the matter, finds that OWCP's May 19, 2011 decision fails to properly explain the findings with respect to the issue presented. Although the decision indicates that it is a merit decision and finds the evidence insufficient to overcome OWCP's wage-earning capacity decision, it is unclear whether the proper standard of review was utilized. Modification of a 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, in fact, erroneous.⁸ OWCP appears to have analyzed appellant's request both as a timely and untimely request for reconsideration under 5 U.S.C. § 8128(a). There is no clear discussion, for example, as to whether the evidence and argument provided by appellant showed a material change in the nature and extent in the employment-related condition or whether the original wage-earning capacity determination was erroneous. Thus, OWCP, in its May 19, 2011 decision, did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*,

³ See, e.g., *Darletha Coleman*, 55 ECAB 143 (2003).

⁴ See, e.g., *James W. Scott*, 55 ECAB 606 (2004).

⁵ 5 U.S.C. § 8124(a); see *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

⁶ 20 C.F.R. § 10.126. See also *O.R.*, 59 ECAB 432 (2008); *Teresa A. Ripley*, 56 ECAB 528 (2005); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(e) (March 1997).

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

whether he met his burden of proof to show modification of the loss of wage-earning capacity determination.

The case must be returned to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding appellant's request for modification of a wage-earning capacity determination. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2011 is set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: June 27, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board