

**United States Department of Labor
Employees' Compensation Appeals Board**

S.B., Appellant

and

**PEACE CORPS, PEACE CORPS VOLUNTEER
SERVICE, Washington, DC, Employer**

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**Docket No. 11-460
Issued: September 28, 2011**

Appearances:
James E. Anderson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On December 14, 2010 appellant filed a timely appeal from a September 7, 2010 decision of the Office of Workers' Compensation Programs (OWCP) that denied her request for reconsideration. The Board docketed the appeal as No. 11-460.¹

By decision dated January 6, 2009, OWCP reduced appellant's compensation, effective January 18, 2009, based on her capacity to earn wages in the constructed position of coordinator, volunteer services. On August 17, 2009 an OWCP hearing representative affirmed the January 6, 2009 decision.

The Board has reviewed the case record and notes that on June 22, 2010 appellant, through her attorney, requested reconsideration and presented arguments that the January 6, 2009 decision was in error because the second opinion report relied upon by OWCP in reducing compensation was three years old and, at the least, a conflict in medical evidence had been created. The record also contains reports dated May 25, 2010 in which appellant's attending

¹ OWCP accepted that appellant, who was born on May 22, 1950 and a Peace Corps volunteer from February 1989 through December 1990, sustained permanent aggravation of her preexisting spondylolisthesis, malaria and a broken tooth while performing volunteer service in the Solomon Islands. Appellant has not worked since April 1991 and she was placed on the periodic compensation rolls.

Board-certified physiatrist, Dr. Margaret Burke, advised that appellant was suffering from chronic back pain. Dr. Burke stated that, while she could not state with medical certainty that appellant's current chronic back pain was a direct result of a lumbar strain that occurred 20 years previously, appellant had not had a recent aggravation and had underlying degenerative disc disease. He maintained that appellant could do sedentary work on a part-time basis. In a nonmerit decision dated September 7, 2010, OWCP denied appellant's request for reconsideration, stating that appellant's arguments were not relevant.²

As noted above, OWCP issued a formal decision on appellant's wage-earning capacity on January 6, 2009, that had been affirmed by an OWCP hearing representative on August 17, 2009, both issued prior to appellant's reconsideration request on June 22, 2010.

It is well established that a claimant may establish that a modification of a wage-earning capacity is warranted if there is a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.³ While appellant submitted a form requesting reconsideration and used the word reconsideration in her written request, her submission should be regarded as a request for modification of the wage-earning capacity determination. The Board has held that, when a wage-earning capacity determination has been issued and she submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁴ While OWCP procedures cover the situation when a claimant has completely stopped working,⁵ the principle is equally applicable to a claim of increased disability which would prevent a claimant from performing the position that was the basis of the wage-earning capacity determination.⁶ The June 6, 2009 wage-earning capacity decision was based on appellant's capacity to earn wages in a full-time sedentary position, and Dr. Burke advised on May 25, 2010 that appellant had developed chronic back pain and could only work part time. Dr. Burke also alluded to a lumbar strain that occurred 20 years previously. The accepted condition is, however, permanent aggravation of preexisting spondylolisthesis.⁷ Furthermore, appellant alleged that the January 6, 2009 decision was erroneous because it was based on a medical report three years old.⁸

² It does not appear that OWCP reviewed Dr. Burke's May 25, 2010 reports in rendering its decision.

³ *P.C.*, 58 ECAB 405 (2007).

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁶ *D.G.*, Docket No. 10-1666 (issued May 12, 2011).

⁷ *Supra* note 1.

⁸ 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. *Stanley B. Plotkin*, 51 ECAB 700 (2000); see Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (June 1996).

The Board finds that OWCP should have adjudicated appellant's reconsideration request as whether she had established that the wage-earning capacity determination should be modified.⁹ The Board will therefore remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.

IT IS HEREBY ORDERED THAT the September 7, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: September 28, 2011
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

⁹ *F.B.*, Docket No. 09-99 (issued July 21, 2010).