United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 12-1278**
	)	**Issued: November 29, 2012**
GOVERNMENT PRINTING OFFICE, PUBLIC DOCUMENTS DEPARTMENT, Washington, DC, Employer	)	

Appearances:
Thomas Van Tiem, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

On May 24, 2012 appellant filed a timely appeal from a January 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] The appeal was docketed as No. 12-1278.

In its January 20, 2012 decision, OWCP found that appellant did not meet his burden of proof to modify its December 7, 1979 wage-earning capacity determination. In a March 12, 2010 decision, it previously found that appellant did not meet his burden of proof to modify the December 7, 1979 wage-earning capacity determination. OWCP determined that appellant had not shown that there was a material change in the nature and extent of his injury-related

[1] OWCP accepted that on October 24, 1973 appellant, a bookstore planner, sustained a lumbosacral strain and a herniated disc at L5-S1 due to lifting books. He received compensation from OWCP for periods of disability and was terminated from the employing establishment in July 1975. OWCP issued a decision on December 7, 1979 which adjusted appellant's compensation based on its determination that he could earn wages in the constructed position of order clerk. In his December 2009 request for modification of OWCP's December 7, 1979 wage-earning capacity determination, appellant claimed that OWCP's original December 7, 1979 determination was in fact erroneous because it had not been shown that he was physically able to perform the order clerk position or that it was reasonably available in his commuting area.

condition, that he had been retrained or otherwise vocationally rehabilitated or that the original determination was in fact erroneous.

In an April 14, 2011 order remanding case,[2] the Board set aside OWCP's March 12, 2010 decision as the case record submitted by OWCP was incomplete. The Board noted that the record did not contain OWCP's December 7, 1979 wage-earning capacity decision or documents from an OWCP-approved vocational rehabilitation counselor or an OWCP wage-earning capacity specialist from around the time of OWCP's December 7, 1979 decision. The Board indicated that the record lacked any document showing that a vocational rehabilitation counselor or a wage-earning capacity specialist determined that appellant was vocationally and medically capable of performing the order clerk position or that it was reasonably available in the general labor market in his commuting area. The Board remanded the case to attempt to obtain these documents. On remand, OWCP attempted to obtain additional documents pertaining to appellant's request for modification of the December 7, 1979 wage-earning capacity decision. Additional documents were added to the record, including the December 7, 1979 decision and other documents from that period.

In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulation to make findings of fact.[3] OWCP procedure further specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."[4] These requirements are supported by Board precedent.[5]

The Board finds that OWCP failed to provide adequate facts, findings and reasoning in connection with its January 20, 2012 decision finding that appellant did not meet his burden of proof to modify its December 7, 1979 wage-earning capacity determination. In its January 20, 2012 decision, OWCP did not provide any discussion of the documents that were added to the case record after the remand to OWCP dictated by the Board's April 14, 2011 order remanding case. Moreover, it did not provide any discussion of appellant's claim that OWCP's December 7, 1979 wage-earning capacity determination should be modified because the original determination was erroneous. OWCP did not address appellant's argument that the record did not show that the order clerk position (serving as the basis for the wage-earning capacity determination) had been approved by a vocational rehabilitation counselor or wage-earning capacity specialist or that the position was reasonably available in his commuting area. Moreover, appellant had argued that he was not medically capable of working as an order clerk in 1979 and discussed medical evidence which he believed supported this argument. However, OWCP did not provide any discussion of this aspect of appellant's argument in support of his

[2] Docket No. 10-1323 (issued April 14, 2011).

[3] 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

[5] *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

request for modification. Appellant had also argued that, after December 1979, he had a material worsening of his injury-related condition which warranted modification of OWCP's December 7, 1979 decision and he discussed numerous medical reports which he believed supported his argument. In its January 20, 2012 decision, OWCP did discuss this argument but it only did so in a cursory manner.[6]

Therefore, the case shall be remanded to OWCP for it to produce a decision with adequate facts, findings and reasoning regarding the question of whether appellant met his burden of proof to modify its December 7, 1979 wage-earning capacity determination. After such development as it deems necessary, OWCP shall issue such an appropriate merit decision.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2012 is set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: November 29, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[6] OWCP only discussed August 16, 1990, March 31, 1994 and December 2, 2011 reports of Dr. Charles Jackson, an attending Board-certified orthopedic surgeon.