

FACTUAL HISTORY

On the prior appeal,² the Board found that OWCP properly denied modification of its August 21, 2009 LWEC determination. The relevant facts are set forth below.

Appellant, a 54-year-old mail processing clerk, sustained an occupational disease as a result of repetitive movement while casing mail. OWCP accepted his claim for right rotator cuff sprain. In another claim,³ it accepted left shoulder tendinitis. On August 15, 2008 appellant accepted a modified assignment reworking mail at a nixie table for eight hours per day. About a year later, in an August 21, 2009 decision, OWCP determined that his actual earnings in this modified assignment fairly and reasonably represented his wage-earning capacity.

OWCP denied modification of its LWEC determination on February 5, June 22 and July 23, 2010. On February 16, 2011 an OWCP hearing representative affirmed, finding, among other things, that the original LWEC determination was not, in fact, erroneous. The Board affirmed on March 23, 2012, finding that appellant had failed to establish one of the criteria for modifying the determination.

On November 6, 2012 appellant, through his representative, requested reconsideration before OWCP. “This request for reconsideration is regarding LWEC and is based on the decision of *M.V. and Department of Homeland Security, Transportation Security Administration, et al.* Docket No. 10-1642, June 15, 2011.” He argued that, based on this information, the decision should be vacated and the previous decision should be overturned.

In a decision dated September 30, 2013, OWCP denied modification of its LWEC determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.⁴ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

Once the loss of wage-earning capacity 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,

² Docket No. 11-1791 (issued March 23, 2012). The facts of this case as set forth in the Board’s prior decision are hereby incorporated by reference.

³ OWCP File No. xxxxxx453 (subsidiary file).

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.⁶

ANALYSIS

Appellant requested modification of OWCP's August 21, 2009 LWEC determination based on the case of *M.V.*,⁷ which the Board decided in 2011. In *M.V.*, a transportation security screener injured his back lifting army field packs. He completed a vocational rehabilitation training program to provide him the skills to obtain an entry-level job as a budget analyst. Based on state labor market statistics, the vocational rehabilitation specialist found that budget analyst positions were reasonably available to the claimant in his commuting area. OWCP reduced the claimant's wage-loss compensation accordingly.

The Board reversed the LWEC determination on the grounds that the state labor market statistics did not show how many of available positions for a budget analyst were entry level positions and therefore suitable to the claimant's vocational training. The Board found that OWCP did not meet its burden to justify the reduction of the claimant's wage-loss compensation.

Appellant offered no argument to explain how the Board's holding in *M.V.* warranted modification of the August 21, 2009 LWEC determination. He did not argue a material change in the nature and extent of his injury-related condition and retraining or vocationally rehabilitation does not apply. Appellant did not establish one of the criteria for modification; the case of *M.V.* must establish, on its face, that the August 21, 2009 LWEC determination was, in fact, erroneous.

In *M.V.*, OWCP reduced the claimant's wage-loss compensation based on a constructed position, or a position the claimant did not actually hold. In doing so, it had the burden of establishing that such positions were reasonably available to the claimant within his commuting area. OWCP did not meet that burden, as the record did not establish how many of the available positions were suitable to his vocational training.

Appellant's case is distinguishable. OWCP reduced his wage-loss compensation based on his actual earnings in a position he held. Appellant had successfully performed the duties of this position for some period of time, demonstrating that the position was, in fact, suitable. As the Board noted on the prior appeal, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his or her wage-earning capacity. OWCP found that appellant's demonstrated capacity to earn wages in this position fairly and reasonably represented his or her wage-earning capacity, and that he or she was therefore no longer entitled to compensation for total disability.

As the circumstances of this case are readily distinguishable from the case of *M.V.*, the Board finds that appellant has not met his burden to establish that OWCP's August 21, 2009 LWEC determination was, in fact, erroneous. As his November 6, 2012 request failed to

⁶ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁷ Docket No. 10-1642 (issued June 15, 2011).

establish one of the criteria for modifying the LWEC determination, the Board will affirm OWCP's September 30, 2013 decision denying modification.

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 appellant has not met his burden to establish that OWCP's August 21, 2009 LWEC determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board