

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

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**T.B., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL  
SHIPYARD, Charleston, SC, Employer**

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**Docket No. 10-1570  
Issued: June 28, 2011**

*Appearances:*  
*Appellant, pro se*  
*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 May 25, 2010 appellant filed a timely appeal from a December 9, 2009 decision of the Office of Workers' Compensation Programs (OWCP). The Board assigned Docket No. 10-1570.

In a June 25, 1999 decision, OWCP reduced appellant's compensation effective July 18, 1999 based on its determination that he was capable of earning wages of \$294.00 per week in the constructed position of management trainee.<sup>1</sup> Appellant requested modification of OWCP's June 25, 1999 wage-earning capacity determination and, in its December 9, 2009 decision, OWCP found that appellant had not met his burden of proof to modify the June 25, 1999 decision.

In support of his request for modification of OWCP's June 25, 1999 wage-earning capacity determination, appellant submitted new medical evidence to support that he could not perform management trainee duties. In a September 2, 2009 report, Dr. Wilson stated that

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<sup>1</sup> OWCP accepted that on March 30, 1990 appellant, then a 29-year-old painter, sustained a lumbosacral strain and aggravation of preexisting spondylolisthesis at L4 through S1 due to picking up a tool box on two occasions on that date. On April 23, 1997 Dr. William E. Wilson, an attending Board-certified orthopedic surgeon, performed decompression and fusion surgery at L5-S1 which was authorized by OWCP.

appellant's symptoms had been aggravated and that he had spondylolisthesis, degenerative disc disease and lumbar radiculopathy due to his 1990 work injury. He noted that appellant continued to have work-related chronic low back pain and radicular leg pain which had not resolved over an approximately 12-year period in spite of surgery. Dr. Wilson found that, due to the fact that appellant remained symptomatic and had not been able to work during this period, it is unlikely that he would return to significant gainful employment. In a September 30, 2009 report, Dr. Wilson stated that appellant continued to have work-related chronic low back pain and radicular leg pain caused by abnormalities at L4-5 and L5-S1. Appellant had been unable to work over the past 11 to 12 years in spite of surgery and, in fact, was currently more symptomatic. Dr. Wilson attributed these problems to the 1990 work injury and posited that appellant had more than an aggravation of degenerative disc disease in 1990. He found that appellant was disabled from all work.

In an October 13, 2009 report, Dr. Castellone, an attending Board-certified family practitioner, stated that appellant suffered a work injury in 1990 which resulted in degenerative disc disease and a ruptured disc. He asserted that appellant's work-related condition worsened over the years and that he had chronic pain which interfered with his activities of daily living and which caused him to be 100 percent permanently and totally disabled. Due to his work injury, appellant used large doses of powerful narcotic analgesics on a daily basis.<sup>2</sup>

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.<sup>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>4</sup>

In determining whether a claimant is entitled to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>5</sup> 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."<sup>6</sup> These requirements are supported by Board precedent.<sup>7</sup>

In the December 9, 2009 decision, OWCP did not provide adequate findings of fact or clear reasoning explaining to appellant the basis for its denial of his request to modify its June 25, 1999 wage-earning capacity determination. It provided only brief discussions of the

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<sup>2</sup> Appellant also submitted a number of medical reports that had previously been submitted to OWCP.

<sup>3</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8124(a) provides: "The [Office] 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."

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

<sup>7</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

medical evidence submitted by appellant and did not explain why this medical evidence did not meet one of the standards for modifying a wage-earning capacity determination, *i.e.*, showing the existence of a material change in the nature and extent of a claimant's injury-related condition.<sup>8</sup> Another way of showing that a wage-earning capacity determination should be modified is to show that the original determination was erroneous. However, OWCP did not provide any discussion of whether the evidence of record showed that the June 25, 1999 wage-earning capacity determination was erroneous. Given the fact that OWCP provided limited findings of fact and reasoning for its holding, appellant would not understand the precise defect of his claim and would not be apprised of the kind of evidence which would tend to overcome it.

Therefore, the case shall be remanded to OWCP in order to meet its obligation to present adequate findings of fact and reasoning in support of its decision regarding whether appellant met his burden of proof to modify its June 25, 1999 wage-earning capacity determination. After such development it deems necessary, OWCP shall issue an appropriate merit decision on this matter.

**IT IS HEREBY ORDERED THAT** the December 9, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: June 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

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<sup>8</sup> Moreover, OWCP did not discuss the requirements of the management trainee position or adequately explain how appellant's medical condition would have allowed him to perform the specific duties of the position.