

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).