United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
	)	
and	)	**Docket No. 11-770**
	)	**Issued: September 28, 2011**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Paicines, CA, Employer	)	

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 February 8, 2011 appellant timely appealed the October 21, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The appeal was assigned Docket No. 11-770.

This case was previously before the Board.[1] Appellant, a 64-year-old former maintenance worker, has an accepted claim for lumbago and permanent aggravation of spondylolisthesis, which arose on or about April 25, 1980. In a decision dated March 24, 2009, the Board remanded appellant's case to OWCP to address whether he established a basis for modifying the September 13, 2000 loss of wage-earning capacity (LWEC) determination.[2] The Board's March 24, 2009 decision is incorporated herein by reference.

By decision dated January 14, 2010, OWCP denied modification of its September 13, 2000 LWEC determination. It found that appellant had not satisfied any of the three criteria for

[1] Docket No. 08-1238 (issued March 24, 2009).

[2] OWCP had reduced appellant's wage-loss compensation based on his ability to earn wages in the constructed position of assembler II (office machines).

modifying a LWEC determination.[3] On June 25, 2010 appellant sought further review of the LWEC determination. He argued there was a "material change in the nature and extent" of his April 25, 1980 employment injury. Appellant also argued that there was sufficient evidence to warrant modification of the prior decision and restoration of "full compensation." OWCP treated appellant's June 25, 2010 LWEC modification request as a request for reconsideration under 20 C.F.R. § 10.606, and found that he had not established a basis for reconsideration of the January 14, 2010 decision.[4] Consequently, it did not address the merits of the claim.

The criteria for modifying a LWEC determination are separate and distinct from the requirements for reconsideration under 20 C.F.R. §§ 10.606 and 10.608. Unlike reconsideration, there is no threshold requirement for merit review with respect to modification of a LWEC determination.[5] The Board finds that OWCP applied the incorrect standard of review in this particular instance. Accordingly, the case is remanded for a proper determination of whether appellant established a basis for modifying the September 13, 2000 LWEC determination.

The Board further notes that OWCP appears to have ignored prior guidance concerning the propriety of its September 13, 2000 LWEC determination. Footnote one (1) of the Board's March 24, 2009 decision discussed the type of medical evidence required to support a LWEC determination. Specifically, the Board advised that a LWEC determination should be based on a reasonably current medical evaluation, which includes a detailed description of appellant's condition. On remand, OWCP should explain how Dr. Michael D. Butcher's undated (circa 1991) work capacity evaluation (Form OWCP-5c) ostensibly satisfied the above-noted criteria.

[3] 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 erroneous. *Tamra McCauley*, 51 ECAB 375, 377 (2000). The burden of proof is on the party seeking modification of the wage-earning capacity determination. *Id.*

[4] Appellant submitted, *inter alia*, a March 26, 2010 report from his treating physician, Dr. Morteza Farr, who diagnosed lumbar spinal stenosis and spondylosis. Dr. Farr indicated that appellant was totally disabled ("TTD") as of March 26, 2010. He authored a similar report on August 13, 2010. OWCP authorized Dr. Farr's designation as appellant's treating physician in March 2010. Despite the fact that Dr. Farr did not begin treating appellant until after the January 14, 2010 merit decision, OWCP characterized Dr. Farr's findings as "cumulative and repetitive." OWCP also apparently overlooked Dr. Farr's disability assessment.

[5] *Id.*

IT IS HEREBY ORDERED THAT the October 21, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action 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