

FACTUAL HISTORY

On August 7, 1985 appellant, then a 48-year-old special agent, injured his lower back when the car he was driving was struck by another vehicle. OWCP accepted the claim for low back strain and herniated nucleus pulposus at L4-5. It paid temporary total disability and placed appellant on the periodic rolls.

In a report dated November 26, 2001, Dr. Anthony C. Pitts, a specialist in physical and rehabilitative medicine, stated that appellant was not totally disabled. He noted that appellant had been diagnosed with a herniated disc and had not been working. Dr. Pitts advised that appellant should be permanently restricted from activities requiring frequent bending, lifting, squatting and stooping but opined that he could perform sedentary work, as long as he was allowed to stand as needed and avoid protracted immobilization. He stated that appellant had degenerative disc disease which was evolutionary with age. In a work capacity evaluation dated June 17, 2002, Dr. Pitts found that appellant could work an eight-hour day with restrictions of no twisting; sitting for no more than four to six hours a day; walking, standing, pushing, pulling and lifting for no more than one to two hours a day; and squatting and kneeling for no more than five minutes a day. He instructed appellant to take 15- to 20-minute breaks every two to three hours.

On October 22, 2002 a vocational rehabilitation counselor selected a position as credit authorizer, listed in the Department of Labor's *Dictionary of Occupational Titles*, which she determined reasonably reflected appellant's ability to earn wages.

By decision dated July 16, 2003, OWCP reduced appellant's compensation to reflect his wage-earning capacity in the position of credit authorizer.

By letter dated October 17, 2006, appellant requested reconsideration of OWCP's July 16, 2003 decision. He stated that Dr. Pitt's medical opinion was flawed because he ordered appellant to undergo a magnetic resonance imaging (MRI) scan and nerve conduction studies, but failed to cite the results of these tests in conjunction with his medical evaluation. Appellant also objected to Dr. Pitt's assertion that he was drug dependent. He further alleged that his compensation checks were not based on the correct formula.

By decision dated November 20, 2006, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error.

In a May 9, 2008 decision,² the Board set aside the November 20, 2006 decision. The Board found that OWCP erred by treating appellant's October 17, 2006 correspondence as a request for reconsideration of the July 16, 2003 wage-earning capacity determination under 5 U.S.C. § 8128(a). The Board found that, although appellant had used the term "reconsideration" in his October 17, 2006 letter, he asserted that OWCP erred in the July 16, 2003 wage-earning capacity determination. Appellant contended that he was totally disabled for work on or before that date; that his loss of wage-earning capacity (LWEC) compensation was not calculated using the correct formula; and that his condition had worsened since the LWEC determination was made.

² Docket No. 07-929 (issued May 9, 2008).

The Board found that his October 17, 2006 letter constituted a request for modification of the July 16, 2003 wage-earning capacity determination. The Board determined that appellant was entitled to a merit review on that issue. The Board set aside the November 20, 2006 decision and remanded the case for adjudication of his request for modification of the wage-earning capacity determination. The facts of the case as set forth in the Board's May 9, 2008 decision are incorporated by reference.

By decision dated May 30, 2008, OWCP denied modification of the July 16, 2003 wage-earning capacity determination. By decision dated June 5, 2009, it denied modification of the May 30, 2008 decision.

In a December 23, 2010 report, Dr. Ronald Borlaza, Board-certified in internal medicine, indicated that appellant continued to have chronic low back pain and residual symptoms from his lumbar radiculopathy and degenerative disc disease. He stated that on examination appellant demonstrated moderate lumbar back tenderness with 80 percent muscle strength and decreased sensation on his legs bilaterally. Dr. Borlaza advised that appellant's most recent lumbar MRI scan, on May 17, 2006, showed degenerative changes with mild-to-moderate facet hypertrophic changes and mild disc bulges at L2-S1 and L2 vertebral body contusion or edema. He stated that appellant's condition was due to residual symptoms from his lumbar radiculopathy that did not resolve despite his surgery. Dr. Borlaza also advised that appellant had additional back pain from the degenerative changes seen on the MRI scan. He opined that appellant could not do any meaningful full-time and part-time work and that his condition would not improve. Dr. Borlaza advised that he would remain totally and permanently disabled due to this condition.

On April 18, 2011 appellant requested reconsideration and noted that he was seeking modification of the LWEC determination. He asked OWCP to provide him with certified copies of all medical records from Drs. Pius, Pins and Pitts. Appellant also requested that OWCP provide him with justification for the pay rate for all compensation it paid him since his 1985 work injury was accepted. In addition, he stated that he was submitting his most recent medical report; *i.e.*, Dr. Borlaza's December 23, 2010 report, which indicated that his condition had worsened since OWCP's July 16, 2003 wage-earning capacity determination.

By decision dated September 7, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding that it was untimely filed and that appellant had not established clear evidence of error.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP may seek to modify a formal LWEC determination. 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.³ The burden of

³ *Katherine T Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

proof is on the party attempting to show modification.⁴ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁵

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP erred in considering appellant's April 18, 2011 letter as a request for reconsideration of the July 16, 2003 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the request untimely and that he did not submit relevant evidence or legal argument establishing clear evidence of error. Appellant requested "reconsideration" but noted that he sought modification of the LWEC determination. He submitted Dr. Borlaza's December 23, 2010 report in support of his contention that OWCP erred in its July 16, 2003 wage-earning capacity determination and that his condition has worsened since the LWEC determination was made. Appellant's April 18, 2011 letter is a request for modification of OWCP's July 16, 2003 wage-earning capacity determination.⁶ OWCP improperly characterized his April 18, 2011 letter as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a).

The Board finds that appellant has requested modification of the July 16, 2003 wage-earning capacity determination. Appellant is entitled to a merit review on that issue.⁷ On remand, OWCP shall adjudicate his request for modification of the wage-earning capacity determination and issue an appropriate decision.

CONCLUSION

The Board finds that appellant requested modification of the July 16, 2003 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.

⁴ *Darletha Coleman*, 55 ECAB 143 (2003).

⁵ *Gary L. Moreland*, 54 ECAB 638 (2003). *See also Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004) (in *Peoples and Taylor*, the Board determined that the claimants' requests for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside OWCP's decisions denying appellants' reconsideration requests as untimely and remanded the cases for OWCP to address the merits of their requests for modification of an LWEC decision).

⁶ *See Gary L. Moreland*, *supra* note 5.

⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2011 is set aside and the case remanded for further action consistent with this decision.

Issued: August 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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