



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> In an October 25, 2010 order, the Board dismissed appellant's appeal finding no final adverse OWCP decision over which the Board could exercise jurisdiction.<sup>3</sup> In an order dated November 26, 2012, the Board noted that OWCP had issued a wage-earning capacity decision on June 2, 2011 and thereafter issued a nonmerit decision denying his request for reconsideration. The Board remanded the case for OWCP to adjudicate whether the wage-earning capacity determination should be modified.<sup>4</sup> The facts of the case as set forth in the previous Board orders are incorporated herein by reference.

In January 2010, OWCP referred appellant to Dr. Francisco J. Quiñones, Board-certified in internal medicine and pulmonary disease, for a second-opinion evaluation. In a February 10, 2010 report, Dr. Quiñones reviewed the medical record, noting that appellant had a cerebrovascular accident in 2004. He described findings on physical examination and reported that pre and postbronchodilator spirometry demonstrated an FEV<sub>1</sub> of 102 percent of expected, with a normal FEV<sub>1</sub>/FVC and normal flow volume loops. Dr. Quiñones diagnosed vasomotor rhinitis, perhaps allergic; moderate obesity; and hypertension. The examination findings indicated normal pulmonary function with no sign of pulmonary impairment. With regard to appellant's work-related readiness, Dr. Quiñones advised against appellant's previous occupation because of a strong history of sensitivity to something in the laboratory environment likely related to the rodents with which he worked. It was reasonable to assume that such recurrent exposure to this environment would again produce symptoms. Dr. Quiñones noted that, on repeated examination by multiple practitioners, there had been no objective evidence of asthma and, if it was present, it was mild, intermittent and very well controlled with current medication. He advised that the diagnosis of allergic rhinitis remained work related that appellant lived a very normal life and was up and about in his office with no difficulty. Dr. Quiñones saw no reason why appellant could not pursue a different occupation. Appellant was capable of performing sedentary or light-duty work in an environment where he was not exposed to strong or noxious smells or to rodents or their bedding.

In September 2010, appellant was referred to Joe Day, a rehabilitation counselor, for vocational rehabilitation services. Mr. Day conducted vocational and transferable skills analyses. He identified the positions of desk clerk and security guard, finding that they were within appellant's work restrictions and qualifications and reasonably available in the local labor market.

Appellant maintained that specific accommodations would have to be made by prospective employers due to his medical conditions. He submitted a June 23, 2010 report from

---

<sup>2</sup> On January 31, 1995 appellant, a 52-year-old animal laboratory technician, filed an occupational disease claim alleging that employment factors caused a bronchial condition. On August 26, 1997 OWCP accepted allergic rhinitis and the claim was later expanded to include aggravation of extrinsic asthma. Appellant stopped work on December 20, 1995 and was placed on the periodic compensation rolls. In 1997 he moved from Washington, DC to Virginia and then relocated to Alabama. In 2011 appellant moved back to Virginia.

<sup>3</sup> Docket No. 10-685 (issued October 25, 2010).

<sup>4</sup> Docket No. 12-1350 (issued November 26, 2012).

Dr. John McAtee, Board-certified in internal medicine and pulmonary disease, who noted that days earlier appellant had been admitted to South Baldwin Regional Medical Center for complete heart block. Appellant had been assessed and a pacemaker recommended but he had insisted on discharge and returned for further evaluation. Dr. McAtee described physical examination findings and diagnosed middle age, cardiac arrhythmia, reactive airway disease and hyper-attention to small details of the clinical process. In a June 23, 2010 hospital consultation, Dr. James Stinebaugh, Board-certified in internal medicine and cardiovascular disease, diagnosed arrhythmia, recent nuclear stress testing with no ischemia, hypertension, reactive airway disease, history of cerebrovascular accident, upper respiration fraction and renal insufficiency. He recommended evaluation with a cardiac electrophysiologic specialist. In a June 24, 2010 hospital consultation, Dr. James Storey, Board-certified in internal medicine, cardiovascular disease and cardiac electrophysiology, described a one-week history of chest pain and transient heart block. He diagnosed asymptomatic transient third degree heart block, a current long first degree block, history of stroke, hypertension, normal ejection fraction and mild renal insufficiency. Dr. Storey recommended a permanent pacemaker.

In correspondence dated January 27, 2011, Mr. Day indicated that during a 90-day period beginning November 1, 2011, 12 job openings were available. Appellant did not pursue employment. OWCP secured updated pay rate information from the employing establishment.

By letter dated March 25, 2011, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a desk clerk.<sup>5</sup> It advised him that, if he disagreed with the proposed reduction, he could submit additional evidence or argument within 30 days.

Appellant disagreed with the proposed reduction in compensation, asserting that the medical evidence established that he did not qualify for any position because he could not function outside a controlled environment. He submitted medical evidence and correspondence previously of record. In 2011 appellant relocated from Alabama to Virginia.

In a June 2, 2011 decision, OWCP reduced appellant's compensation benefits, based on his capacity to earn wages as a desk clerk. It applied the *Shadrick* decision,<sup>6</sup> finding a new wage-earning capacity of 23 percent and reduced his compensation as of June 5, 2011. OWCP found that the physical requirements did not exceed the limitations recommended by Dr. Quiñones and noted that there was no medical evidence of record to support that appellant could not perform the duties of the desk clerk position.

On June 21, 2011 appellant requested reconsideration, asserting that he had a stroke on April 28, 2011 and he could not return to work. He submitted medical reports previously of record. In an August 23, 2008 report, Dr. Leonard J. Caputo, a Board-certified allergist, advised

---

<sup>5</sup> The *Dictionary of Occupational Titles* job description for desk clerk is as follows: Greets, registers and assigns rooms to guests; issues room key; date-stamps, sorts and racks incoming mail and messages; transmits and receives messages, using telephone or telephone switchboard; answers inquiries pertaining to hotel/motel service; registration of guests and shopping dining, entertainment and travel services; keeps records of room availability and guests' accounts, manually or using computer; computes bill, collects payment and makes change for guests; makes and confirms reservations. It required a light strength level.

<sup>6</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

that he treated appellant for symptoms of asthma, rhinitis and chemical sensitivity. He last evaluated appellant in June 2008. Dr. Caputo advised that appellant's significant symptoms caused repeated difficulties, especially in winter and that he had to relocate to a warmer climate. Appellant was sensitive to multiple chemicals and should avoid chemical exposure. In a report and discharge summary, Dr. McAtee described appellant's hospitalization at South Baldwin Regional Medical Center from June 15 to 19, 2010. He diagnosed middle age, chronic obstructive pulmonary disease with reactive airway disease, sinusitis, variable cardiac dysrhythmia and hypertension. On June 15, 2010 Dr. Brian Dearing, Board-certified in internal medicine and cardiovascular disease, evaluated appellant. He diagnosed complete heart block, asymptomatic; hypertension; history of asthma; history of cerebral vascular accident; and abnormal lipids. Appellant withdrew his reconsideration request on July 22, 2011.<sup>7</sup>

On October 28, 2011 and February 10, 2012 appellant requested reconsideration and presented arguments that the June 2, 2011 wage-earning capacity decision was in error because his additional medical conditions were not considered. He submitted medical evidence and copies of correspondence previously of record. In a June 17, 2011 report, Dr. Nazaneen Grant, a Board-certified otolaryngologist, noted a history of difficulty breathing and diagnosed vocal cord dysfunction. He provided stroboscopic examination findings and recommended respiratory retraining therapy and an allergy work up. In treatment notes dated June 23, 2011 to January 13, 2012, Dr. Matthew Jaeger, Board-certified in family medicine, noted appellant's medical history and provided examination findings. He diagnosed increased lipids; history of cerebrovascular accident; asthma, exacerbated by fumes, old weather and local allergens; and hypertension.

In a May 14, 2012 decision, OWCP denied appellant's request for reconsideration without conducting a merit review, which was followed by the Board's November 26, 2012 remand order.<sup>8</sup>

Appellant submitted no additional medical evidence.

By decision dated March 12, 2013, OWCP denied modification of the June 2, 2011 wage-earning capacity determination.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>9</sup> OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for

---

<sup>7</sup> Appellant withdrew the request, noting that, because he had relocated to Virginia, his case was to be transferred. His case was transferred on July 29, 2011.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

modifying a formal loss of wage-earning capacity.”<sup>10</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>11</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>12</sup>

In addition, Chapter 2.814.11 of OWCP’s procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant’s medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP’s procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>13</sup> It is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.<sup>14</sup>

### ANALYSIS

Applicable case law and OWCP’s procedures require that once a formal wage-earning capacity decision is in place, 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>15</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>16</sup>

On appeal, appellant asserts that the June 2, 2011 wage-earning capacity was erroneous because he was medically incapable of performing the duties of the selected position. The Board finds that he did not submit sufficient evidence to show error in OWCP’s June 2, 2011 wage-earning capacity determination. OWCP found that the weight of the medical evidence rested with the opinion of Dr. Quiñones, an OWCP referral pulmonologist. In his February 10, 2010 report, Dr. Quiñones noted his review of the medical record, described physical examination and spirometry test findings and advised that his examination findings indicated normal pulmonary

---

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (October 2009).

<sup>11</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>12</sup> *Id.*

<sup>13</sup> *See* Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.814.11 (October 2009).

<sup>14</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>15</sup> *Stanley B. Plotkin*, *supra* note 11.

<sup>16</sup> *Id.*

function with no sign of pulmonary impairment. He diagnosed vasomotor rhinitis, perhaps allergic; moderate obesity; and hypertension. With regard to work ability, Dr. Quiñones stated that appellant should not return to his previous occupation because of sensitivity in the laboratory environment and opined that appellant was capable of performing sedentary or light-duty work in an environment where he is not exposed to strong or noxious smells or to rodents or their bedding.

The contemporaneous medical evidence submitted by appellant prior to the June 2, 2011 wage-earning capacity determination consisted of reports from his hospitalizations at South Baldwin Regional Medical Center. This included reports of consultations with Drs. McAtee, Stinebaugh and Storey. While these physicians described appellant's cardiovascular condition, none rendered an opinion on any physical restrictions or work abilities and none advised that he was totally disabled. The desk clerk position requires a light strength level.<sup>17</sup> As the record does not support that the selected position was outside the restrictions provided by Dr. Quiñones, there is no evidence that OWCP committed error by its June 2, 2011 decision.<sup>18</sup>

As to the medical evidence submitted by appellant with his requests for modification, Dr. Caputo's report predated the June 2, 2011 wage-earning capacity determination by three years and is therefore of diminished probative value regarding appellant's condition in 2011. Dr. McAtee, Dr. Grant, Dr. Jaeger and Dr. Dearing did not discuss appellant's physical restrictions or work abilities.

There is no evidence of record that appellant was retrained or otherwise vocationally rehabilitated. The medical evidence submitted by him is insufficient to show that there was a material change in the nature and extent of the injury-related condition such that the June 2, 2011 decision should be modified. OWCP therefore properly denied modification of the January 21, 2009 wage-earning capacity determination.<sup>19</sup>

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 did not meet his burden of proof to modify the June 2, 2011 wage-earning capacity decision.<sup>20</sup>

---

<sup>17</sup> *Supra* note 5.

<sup>18</sup> *See Darletha Coleman*, 55 ECAB 143 (2003).

<sup>19</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>20</sup> The Board notes that appellant submitted evidence subsequent to the March 12, 2013 decision to OWCP and with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, *supra* note 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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