



## ISSUES

The issues are: (1) whether OWCP properly denied modification of a 1999 wage-earning capacity determination; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that the loss of wage-earning capacity determination was erroneous. He also contended that the Board's finding that OWCP's determination of pay rate required clarification established that the original determination was erroneous.

## FACTUAL HISTORY

This case has previously been before the Board. The Board issued a decision and order on May 15, 2003 affirming OWCP decisions of October 29, 2001 and January 28, 2002.<sup>3</sup> The Board found that OWCP properly reduced appellant's wage-loss benefits effective August 15, 1999,<sup>4</sup> based on its determination that the selected position of cashier II represented his wage-earning capacity. The Board also found that appellant failed to meet his burden of proof to establish a recurrence of disability on or after August 28, 2000 causally related to his accepted March 15, 1982 employment injury.<sup>5</sup> In a December 12, 2004 decision, the Board affirmed OWCP's April 12, 2004 decision finding that modification of the loss of wage-earning capacity was not warranted.<sup>6</sup> The Board found that further development was required as to the wage rate used to determine appellant's wage-earning capacity. In a decision dated October 24, 2006, the Board affirmed an April 5, 2005 OWCP decision regarding his pay rate.<sup>7</sup> The Board found that OWCP properly denied appellant's request for merit review and affirmed OWCP's June 2 and September 15, 2005 nonmerit decisions. On July 30, 2007 the Board issued an order granting the Director's petition for reconsideration for correction and denying appellant's petition for reconsideration.<sup>8</sup> The Board modified footnote 7 to delete inaccurate language. In a May 4, 2010 decision, the Board found that OWCP applied an erroneous legal standard to appellant's request for modification of his July 16, 1999 loss of wage-earning capacity determination.<sup>9</sup> The Board set aside OWCP's nonmerit decisions dated March 8, April 17 and August 6, 2008 and March 11, 2009 and remanded the case to adjudicate the claim under the correct legal standard. In a July 19, 2011 decision, the Board affirmed an August 2, 2010 OWCP decision which found

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<sup>3</sup> Docket No. 02-2265 (issued May 15, 2003).

<sup>4</sup> OWCP issued its initial decision reducing the rate of appellant's compensation benefits based on his wage-earning capacity as a cashier II, effective August 15, 1999 on July 16, 1999.

<sup>5</sup> On March 15, 1982 appellant, then a molder, injured his right hand in the performance of duty. OWCP accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery.

<sup>6</sup> Docket No. 04-1438 (issued December 14, 2004).

<sup>7</sup> Docket No. 06-40 (issued October 24, 2006).

<sup>8</sup> *Id.*, order granting Director's petition for recon. for correction and denying appellant's petition for recon. Docket No. 06-40 (issued July 30, 2007).

<sup>9</sup> Docket Nos. 09-1046 & 09-1294 (issued May 4, 2010).

that modification of the loss of wage-earning capacity determination was not warranted.<sup>10</sup> On October 26, 2011 the Board denied appellant's request for reconsideration. Appellant contended that the constructed position was unsuitable for him. The Board rejected his argument as it found that all of his arguments had been addressed in the July 19, 2011 decision. The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.<sup>11</sup>

On November 27, 2011 appellant requested that OWCP modify the July 16, 1999 loss of wage-earning capacity determination. He contended that OWCP incorrectly identified physical requirements for the position of cashier II as it required heavy lifting which he was unable to perform.

By decision dated December 22, 2011, OWCP denied modification of the July 16, 1999 wage-earning capacity decision.

On December 28, 2011 appellant requested modification of the July 16, 1999 loss of wage-earning capacity determination. He again contended that the physical requirements of the selected position were outside his work restrictions. Appellant argued that the physical requirements were actually very heavy and not light or sedentary as found by OWCP.

By decision dated February 2, 2012, OWCP denied modification of the July 16, 1999 loss of wage-earning capacity determination.

On July 12, 2012 appellant requested modification of the July 16, 1999 loss of wage-earning capacity determination. He argued both OWCP and the Board relied upon an incorrect designation of the physical requirements of the cashier II position as sedentary. Appellant contended that the cashier II position was outside of his work restrictions and thus OWCP erred when it reduced his wages based on this position.

By decision dated July 23, 2012, OWCP denied appellant's request for a merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>12</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>13</sup> OWCP's procedures provide that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the

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<sup>10</sup> Docket No. 10-2099 (issued July 19, 2011).

<sup>11</sup> The Board notes that appellant filed an appeal of a May 15, 2003 decision on July 29, 2003 and the Board docketed the appeal as No. 03-1923 and No. 03-2022. On October 6, 2003 the Board granted appellant's request to dismiss his appeal in Docket No. 03-1923. The Board also issued an order dismissing Docket No. 03-2022 as a duplicate appeal of Docket No. 03-1923.

<sup>12</sup> *D.M.*, 59 ECAB 164 (2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>13</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

claimant requests resumption of compensation for total wage loss.<sup>14</sup> In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>15</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>16</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>17</sup>

### ANALYSIS -- ISSUE 1

Appellant contends on appeal that the original loss of wage-earning capacity determination was erroneous. The Board finds that he did not submit sufficient evidence to show that OWCP's original determination with regard to his wage-earning capacity should be modified. In a July 16, 1999 decision, OWCP determined that appellant had the wage-earning capacity to perform the position of cashier II and reduced his wage-loss benefits accordingly. This determination was reviewed by the Board in a prior appeal and affirmed. The Board had also affirmed the determination that there had been a conflict in the medical evidence in a prior appeal.

Appellant has the burden of proof to show that a modification of his loss of wage-earning capacity is warranted but has not submitted sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions. OWCP therefore properly denied modification of the July 16, 1999 loss of wage-earning capacity determination.<sup>18</sup>

In his request for reconsideration, appellant reiterated the same argument previously raised before OWCP and in prior Board appeals. As noted above, the Board on May 15, 2003 affirmed OWCP's determination that the position of cashier II was medically suitable and the duties of the position were not repetitive. The Board also affirmed there was a conflict in the medical opinion evidence and that OWCP properly referred appellant for an impartial medical examination to resolve the conflict. Appellant did not submit sufficient evidence to show he was retrained or otherwise vocationally rehabilitated; nor did he allege that there had been a material change in the nature and extent of his injury-related condition. As such, the only remaining basis for modification is for him to demonstrate that the original determination was erroneous, which he has not done.

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<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

<sup>15</sup> Federal (FECA) Procedure Manual, *id.* See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>16</sup> See *D.M.*, *supra* note 11; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>17</sup> *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

<sup>18</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Elbert Hicks*, 55 ECAB 151 (2003).

On appeal, appellant submitted arguments addressing the Dictionary of Occupational Titles. He contends that the loss of wage-earning capacity determination was erroneous as the physical requirement for the position were not sedentary. Appellant also contends that the Board's finding that OWCP's determination of pay rate required clarification established that the original determination was erroneous. The Board has addressed both of these issues in previous decisions. In a decision dated October 24, 2006, the Board on the third appeal affirmed an April 5, 2005 OWCP decision regarding appellant's pay rate and that modification of the July 16, 1999 loss of wage-earning capacity was not established. The Board in its prior appeal on July 19, 2011 rejected appellant's arguments regarding the physical requirements and the constructed position being unsuitable.

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>19</sup> OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>20</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>21</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's July 12, 2012 requests for reconsideration neither showed that OWCP erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered. He reiterated his contention that the job was not sedentary as found by OWCP. These contentions were addressed and rejected by the Board in an October 24, 2006 decision. Appellant has presented no evidence supporting his contention. Thus, he has not advanced a relevant legal argument not previously considered. The Board finds, therefore, that appellant has failed to satisfy either of the first two requirements under section 10.606(b)(3).

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<sup>19</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>20</sup> 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>21</sup> 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>22</sup> 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

Appellant also failed to satisfy the third requirement listed in section 10.606(b). He did not submit any relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3) and thus properly denied his request for reconsideration.

**CONCLUSION**

The Board finds that appellant has not established that a modification of the loss of wage-earning capacity is warranted. The Board further finds that it properly denied reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 23 and February 2, 2012 are affirmed.

Issued: January 17, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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