

FACTUAL HISTORY

This case has previously been before the Board. By decisions dated August 7, 2003 and January 15, 2010, the Board found that appellant had not established that his wage-earning capacity should be modified. By order dated July 12, 2011, the Board remanded the case to OWCP for use of the proper standard of review to be followed by an appropriate merit decision to preserve his appeal rights.² The law and facts of the previous Board decisions and orders are incorporated herein by reference.

In a September 20, 2011 decision, OWCP found that the medical evidence of record failed to support a material worsening of the employment-related condition to support modification of a March 27, 2001 wage-earning capacity determination.

On July 19, 2012 appellant requested reconsideration. He submitted additional medical evidence including reports from Dr. Hugh G. Maddox, a Board-certified anesthesiologist, dated September 13, 2011 to July 3, 2012 and a July 18, 2012 report from Dr. Russell L. Ingram, a Board-certified family physician. Dr. Maddox provided physical examination findings, noting that appellant had trouble standing erect and was in severe pain. On February 15, 2012 he performed an epidural injection at L5. Dr. Ingram advised that appellant had lumbar degenerative disc disease with herniation that caused right leg radiculopathy and advised that his condition had worsened.

By decision dated August 15, 2012, OWCP found that the evidence submitted with appellant's reconsideration request did not establish a material worsening of his employment-related condition and denied modification of the March 27, 2001 wage-earning capacity decision.³

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.⁴ 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 modifying a formal loss of wage-earning capacity."⁵ Once the wage-earning capacity of an

² Docket No. 11-152 (issued July 12, 2011).

³ The Board notes that OWCP characterized the August 15, 2012 decision as a nonmerit denial of appellant's request for reconsideration. A careful review of the decision, however, indicates that OWCP evaluated the evidence and found that it did not demonstrate that appellant's medical condition had materially changed.

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (October 2009).

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

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 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.⁸ OWCP is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁹

ANALYSIS

The Board finds that appellant did not meet his burden to modify the March 27, 2001 wage-earning capacity determination. In its August 15, 2012 decision, OWCP denied modification of the March 27, 2001 wage-earning capacity determination which had found a modified recycling specialist position fairly and reasonably represented his wage-earning capacity. As noted above, 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.¹⁰

Appellant did not assert that the March 27, 2001 wage-earning capacity determination was erroneous.¹¹ There is no evidence of record that appellant was retrained or otherwise vocationally rehabilitated.¹² On appeal, appellant indicated that his medical condition was worsening. The accepted conditions in this case are lumbar strain and displacement of intervertebral disc.

⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁷ *Id.*

⁸ *See* Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (October 2009).

⁹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁰ *Supra* note 8.

¹¹ *Supra* note 8.

¹² *Id.*

The medical evidence submitted by appellant includes a July 18, 2012 report in which Dr. Ingram advised that appellant was worse, but did not relate his condition to the December 6, 1999 employment injury. In reports dated September 13, 2011 to July 3, 2012, Dr. Maddox provided physical examination findings, noting that appellant had trouble standing erect and was in severe pain. He diagnosed severe degenerative disc disease of the lumbar spine, particularly at L4-5 and L5-S1 and facet joint arthropathy of the lumbar spine. On February 15, 2012 Dr. Maddox performed an epidural injection at L5 and advised that appellant could not work. On July 3, 2012 he indicated that appellant's situation had not changed since he was evaluated by Dr. Ingram in October 2007.

Taken as a whole, the reports of Dr. Maddox are insufficient to meet appellant's burden. Neither degenerative disc disease nor facet arthropathy have been accepted as employment related. While Dr. Maddox advised that appellant could not work, he did not provide a reasoned explanation regarding whether appellant's accepted lumbar strain and displaced lumbar disc had materially worsened such that he was unable to perform the duties of his modified position.¹³

Appellant has the burden of proof to show that a modification of his 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. As the medical evidence is insufficient to establish that the March 27, 2001 wage-earning capacity decision should be modified,¹⁴ OWCP properly denied modification of the March 27, 2001 wage-earning capacity determination.¹⁵

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 establish that his March 27, 2001 wage-earning capacity decision should be modified.

¹³ *Id.*

¹⁴ See *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁵ *T.M.*, Docket No. 08-975 (issued February 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board