

appellant's request for reconsideration was not in posture for review as the underlying issue was modification of a wage-earning capacity determination. The Board set aside the December 28, 2011 decision and remanded the case to OWCP for further proceedings consistent with its order.²

On June 20, 1990 appellant, then a 42-year-old ship fitter apprentice, sustained injury to his low back and hip. OWCP accepted the claim for a lumbar strain and herniated nucleus pulposus at L3-4 and L4-5. It authorized a percutaneous nucleotomy at L4 and L4-5 in March 1991, a repeat exploration and nucleotomy at L4 on November 22, 1991 and an intradiscal thermoplasty procedure at L4-5 on June 5, 2001. Appellant had intermittent periods of disability until he stopped work on November 21, 1991. He was placed on the periodic rolls.

In an October 6, 2008 report, Dr. Joseph W. McCoy, a Board-certified orthopedic surgeon and second opinion examiner, stated that appellant had residuals of his work injury, but was not totally disabled. He listed permanent work restrictions of: sitting, walking and standing two to four hours; reaching and reaching above shoulder up to one hour; operate a motor vehicle up to three hours; pushing and pulling up to 30 pounds up to one hour; lifting up to 20 pounds up to two hours; and no climbing. In a January 26, 2009 supplemental report, Dr. McCoy found appellant capable of performing sedentary duty as defined by the Department of Labor's *Dictionary of Occupational Titles*.

Appellant underwent a vocational rehabilitation program, which included training and job placement services, with the targeted vocation of classification control clerk or account clerk. However, his job placement was unsuccessful.

By decision dated November 4, 2010, OWCP found that appellant's wage-earning capacity was represented by the position of classification control clerk. Dr. McCoy's physical limitations were found to represent appellant's work restrictions and that the selected job conformed with the limitations outlined by Dr. McCoy. Appellant's treating physician, Dr. J.C. Pickett, a Board-certified orthopedic surgeon, concurred with Dr. McCoy's opinion that appellant could perform at sedentary occupations.

By decision dated May 16, 2011, OWCP's hearing representative affirmed the November 4, 2010 wage-earning capacity decision. She found that appellant did not submit reasoned medical evidence to establish that he was unable to perform sedentary work. There was also no evidence to support appellant's contention that Dr. McCoy was biased or harbored resentment towards him.

Appellant requested reconsideration on October 5, 2011. He resubmitted reports from Dr. Pickett dated August 3, 2010 to May 2, 2011. Dr. Pickett indicated a permanent off work status and findings of degenerative disc disease and degenerative joint disease of the low back, with subjective findings of back pain and stiffness. Appellant noted that after Dr. Talcott retired in 2011, Dr. Pickett treated him. However, Dr. Pickett dropped him as a patient and he had a difficult time finding a qualified physician to take over his care.

² Docket No. 12-883 (issued October 25, 2012).

By decision dated December 28, 2011, OWCP denied appellant's reconsideration request. Pursuant to the Board's October 25, 2012 order, it proceeded to adjudicate his request for modification of the wage-earning capacity determination.

In a December 3, 2012 letter, OWCP advised appellant of the criteria necessary for modifying a wage-earning capacity decision. It noted that he alleged he was not medically able to work due to his injury and requested that he provide, medical evidence to establish a material change in the nature and extent of his injury-related condition. Appellant requested an extension. On January 28, 2013 OWCP granted him an additional 30 days to provide evidence.

On February 7, 2013 appellant submitted a February 4, 2013 letter requesting that lenders discharge his student loans and medical evidence from Kaiser Permanente.³

In a September 27, 2011 report, Dr. Gordon Sinclair, a podiatrist, stated that appellant was seen for foot problems. He noted appellant's belief that his back injury has caused a short right leg. In a November 8, 2012 report, Dr. Michele Wilson, a Board-certified internist, noted that appellant was seen for a foot and ear problem. A November 15, 2012 report from Dr. Lance Van Woy, a podiatrist, noted foot pain and that appellant had diabetes mellitus. The reports also contain a history of appellant's immunization record and medical conditions.

Appellant also submitted financial records acknowledging his request to be discharged from loan obligations because of permanent medical disability.

By decision dated February 13, 2013, OWCP denied modification of the November 4, 2010 wage-earning capacity decision. It found that the evidence did not establish error in the original wage-earning capacity determination or a material change in appellant's accepted back condition.

On March 12, 2013 appellant requested an oral hearing, which was held on June 19, 2013. He argued that the wage-earning capacity determination was not appropriate because he expected to be trained for a different position and his training was inadequate. Appellant argued that his medical condition had changed as he lost an inch in height and had to wear special shoes with a heel lift on one side to adjust his height. He stated that he has not had a treating physician since Dr. Talcott retired in 2011. Appellant submitted medical evidence previously of record.⁴

³ The letter lists documents from lenders ACS dated June 3 and July 6, 2011 and NelNet dated September 27, 2011 and January 8, 2013 which are not of record.

⁴ This included a January 6, 2011 magnetic resonance imaging (MRI) scan of the lumbosacral spine; Dr. Pickett's reports of August 3 and November 2, 2010, and February 8 and May 2, 2011 placing appellant in permanent full disability status due to degenerative disc disease and degenerative joint disease of lumbosacral spine; Dr. Sinclair's September 27, 2011 report regarding foot and ear problem; Dr. Woy's November 15, 2012 report regarding appellant's foot pain; a Dr. Linda May Choe's April 1, 2013 report regarding low back pain; and February 9, 2011 and January 8, 2013 discharge application total and permanent disability forms for loan discharge signed off by Dr. Wilson.

By decision dated August 13, 2013, OWCP's hearing representative affirmed the February 13, 2013 decision. He found that the evidence submitted did not establish a material change in the nature or extent of appellant's accepted back condition.

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.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁹

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationalize explaining the opinion.¹⁰

ANALYSIS

OWCP accepted that appellant sustained an employment-related lumbar strain and herniated nucleus pulposus at L3-4 and L4-5. It authorized surgery for a percutaneous nucleotomy at L4 and L4-5 in March 1991, a repeat exploration and nucleotomy at L4 on November 22, 1991 and an intradiscal thermoplasty procedure at L4-5 on June 5, 2001. Appellant had intermittent periods of disability until he stopped work on November 21, 1991. By decision dated November 4, 2010, OWCP determined that he had the wage-earning capacity

⁵ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2006); *Sharon C. Clement, id.*

⁸ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁹ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *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 claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification of the decision. The Board set aside OWCP's decision denying the claimant's reconsideration request as untimely and remanded both cases for OWCP to adjudicate the issue of modification of an LWEC determination.

¹⁰ *Tamra McCauley*, *supra* note 8.

as a classification control clerk, which resulted in a reduction of his monetary compensation benefits effective November 21, 2010. Appellant requested modification of the November 4, 2010 wage-earning capacity decision, contending that his accepted employment-related medical condition had materially changed.

Appellant did not submit any evidence to show that OWCP's original wage-earning capacity decision was erroneous or that he had otherwise been retrained or vocationally rehabilitated. Rather he argued a material change in his employment-related condition. The issue is whether the medical evidence establishes a material change in the nature and extent of his injury-related back condition.

Appellant did not provide any reasoned medical evidence addressing why he would be unable to perform the selected sedentary job as a classification control clerk on which the original LWEC determination was based. In May 2010, Dr. Pickett advised OWCP that he believed appellant was capable of sedentary employment. Although he subsequently provided form reports noting a permanent off-duty status, he did not submit a narrative report supported by objective findings, to explain his change of opinion. Dr. Pickett did not explain how appellant's accepted lumbar condition had materially changed such that he was totally disabled.

Appellant's requests to lenders for discharge of his student loans have no relevance to the medical issue in this case. The reports of his physicians to the lenders for discharge of the loans due to his back condition fail to explain why he was unable to perform the sedentary job on which the original LWEC determination was based. Dr. Wilson signed off on the discharge application total and permanent disability forms dated February 7, 2011 to January 8, 2013 in which appellant described his medical conditions and physical limitations. Dr. Wilson provided no objective findings based on a contemporary examination to support a worsening of appellant's accepted lumbar condition or no opinion as to whether he was unable to perform the duties of the constructed classification control clerk position on which the original LWEC determination was based.

The other medical reports discuss conditions other than appellant's accepted lumbar condition and are not relevant to the issue on appeal. In a September 27, 2011 report, Dr. Sinclair noted appellant's belief that his back injury caused a short right leg. However, appellant did not submit any medical opinion evidence to support that there was a worsening in his accepted condition which caused or contributed to the shortening of his right leg.

The diagnostic testing of record is not relevant as it offers no opinion as to whether appellant is unable to perform the duties of the constructed position or whether there is a worsening in his accepted condition.

Appellant contends that his medical condition changed as he lost an inch in height and had to wear shoes with a heel lift on one side to adjust his height. As noted the medical evidence of record does not support a worsening in his accepted back condition or that he is unable to perform the selected position on which the original LWEC determination was based.

The Board finds that appellant has not met any of the requirements for modification of OWCP's November 4, 2010 wage-earning capacity determination. Appellant did not establish

that he was retrained or otherwise vocationally rehabilitated or that the original wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in his employment-related condition.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the November 4, 2010 wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2014
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