

FACTUAL HISTORY

This case has previously been before the Board. By decision dated August 7, 2003, the Board affirmed a March 29, 2002 OWCP decision that found that appellant had failed to establish any disability on or after February 8, 2002. The evidence did not support that his injury-related lumbar strain had worsened such that a March 27, 2001 wage-earning capacity determination that reduced his compensation to zero should be modified.² In a January 15, 2010 decision, the Board affirmed OWCP's decision.³ By order dated July 12, 2011, the Board found that, in a September 29, 2010 decision, OWCP should have adjudicated the issue of modification of the wage-earning capacity determination rather than issuing a decision denying further merit review from a reconsideration request. The Board remanded the case to OWCP for proper adjudication.⁴ In a June 24, 2013 decision, the Board affirmed an August 15, 2012 OWCP decision that found appellant had failed to establish that the March 27, 2001 wage-earning capacity decision should be modified.⁵ The facts of the previous Board decisions are incorporated herein by reference.

On August 5, 2013 appellant again requested reconsideration. The medical evidence submitted after OWCP's August 15, 2012 decision consists of monthly reports from Dr. Hugh G. Maddox, an attending pain management specialist and a Board-certified anesthesiologist. In treatment notes dated July 12, 2012 to September 25, 2013, Dr. Maddox listed appellant's complaints of back pain. He provided examination findings and diagnosed degenerative disc disease with radiculopathy at L4-5 and facet joint arthropathy of the lumbar spine. On March 26, 2013 Dr. Maddox advised that he was not sure that appellant was capable of work, even as a Walmart greeter, noting a positive electrodiagnostic test that was consistent with a herniated disc and chronic lower lumbar radiculopathy of the L4-5 nerve roots. Appellant underwent a functional capacity evaluation (FCE) on March 26 and 27, 2013. The physical therapist conducting the study advised that appellant did not demonstrate enough tolerable physical abilities to be productive in an employed capacity. On July 11, 2013 Dr. Maddox reviewed the FCE and concurred with the test results.

By decision dated October 25, 2013, OWCP found that the evidence submitted did not establish a material worsening of appellant's employment-related condition. It denied modification of the March 27, 2001 wage-earning capacity decision. OWCP noted that the conditions diagnosed by Dr. Maddox had not been accepted and that he did not provide an adequate opinion relating these diagnoses to the December 6, 1999 employment injury.

² Docket No. 02-1918 (issued August 7, 2003). On December 6, 1999 appellant, a term appointment recycling specialist, sustained an employment-related lumbar strain. The accepted condition was expanded to include displacement of intervertebral disc. On March 27, 2001 OWCP determined that appellant's actual earnings in a light-duty recycling position fairly and reasonably represented his wage-earning capacity with zero loss. Appellant stopped work on February 8, 2002 when his term expired.

³ Docket No. 09-708 (issued January 15, 2010).

⁴ Docket No. 11-152 (issued July 12, 2011).

⁵ Docket No. 13-101 (issued June 24, 2013).

On December 5, 2013 appellant again requested reconsideration, asserting that his low back condition had worsened. He submitted an October 23, 2013 treatment note from Dr. Maddox who diagnosed degenerative disc disease and facet joint arthropathy of the lumbar spine. In a November 19, 2013 report, Dr. Mohammad Z. Quereshi, a Board-certified internist, noted that appellant had a many year history of chronic back pain and that his x-rays demonstrated degenerative joint disease of the lower back.

In a nonmerit decision dated December 16, 2013, OWCP denied appellant's reconsideration request. It found that the reports submitted had no bearing on his accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

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

OWCP's regulations provide that if OWCP issues a formal loss of wage-earning capacity determination, including a finding of no loss of wage-earning capacity, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP. Modification of such a determination is only warranted where the party seeking the modification establishes either that 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 erroneous. However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision, such as where an employee has a demonstrated need for surgery.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden to modify the March 27, 2001 wage-earning capacity determination. In the March 27, 2001 decision, OWCP found that the modified recycling specialist position fairly and reasonably represented his wage-earning capacity.

Appellant did not assert that the March 27, 2001 wage-earning capacity determination was erroneous.⁹ There is no evidence of record that he was retrained or otherwise vocationally

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

⁷ *Id.*

⁸ 20 C.F.R. § 10.511. This has been memorialized in OWCP procedures. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.2 (June 2013).

⁹ *Id.*

rehabilitated.¹⁰ On appeal, appellant stated that his medical condition had worsened. The accepted conditions in this case are lumbar strain with displacement of an intervertebral disc.

The Board finds the medical evidence is insufficient to modify the March 27, 2001 wage-earning capacity determination. In treatment notes dated July 12, 2012 to September 25, 2013 Dr. Maddox generally described appellant's complaints of back pain and presented examination findings. He diagnosed degenerative disc disease with radiculopathy at L4-5 and facet joint arthropathy of the lumbar spine. On March 26, 2013 Dr. Maddox stated that he was not sure that appellant was capable of working at his age, noting a positive electrodiagnostic test that was consistent with a herniated disc and chronic lower lumbar radiculopathy of the L4-5 nerve roots. He concurred with a March 2013 FCE study that appellant did not demonstrate enough tolerable physical abilities to be productive in an employed capacity.

The Board notes that neither degenerative disc disease nor facet arthropathy has been accepted as employment related. Dr. Maddox indicated that appellant was incapable of any type work, noting that he had positive electrodiagnostic testing consistent with a herniated disc and chronic lower lumbar radiculopathy. He did not provide a reasoned explanation addressing how 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.¹¹

As to the physical therapist's opinion, lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA,¹² as a physical therapist is not a "physician" as defined by section 8101(2).¹³

Appellant has the burden of proof to establish that a modification of his wage-earning capacity is warranted. As the medical evidence submitted with appellant's August 5, 2013 request is insufficient,¹⁴ OWCP properly denied modification of the March 27, 2001 wage-earning capacity determination by its October 25, 2013 decision.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁶ Section 10.608(a) of the Code of Federal Regulations provides that

¹⁰ *Id.*

¹¹ *Id.*

¹² See *David P. Sawchuk*, 57 ECAB 316 (2006).

¹³ Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102; see *Roy L. Humphrey*, 57 ECAB 238 (2005).

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

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

¹⁶ 5 U.S.C. § 8128(a).

a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).¹⁷ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁸ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁹

ANALYSIS -- ISSUE 2

It is well established that a claimant may request modification of a wage-earning capacity at any time and provide supportive evidence or argument. In such case, OWCP must review the merits of whether a claimant has met his or her burden of proof by showing that there has been material change in the nature and extent of an injury-related condition or by showing that the original determination was, in fact, erroneous.²⁰ The Board finds that the medical evidence appellant submitted with his December 5, 2013 request does not warrant further merit review. In an October 23, 2013 treatment note, Dr. Maddox diagnosed degenerative disc disease and facet joint arthropathy of the lumbar spine. In a November 19, 2013 report, Dr. Quereshi, a Board-certified internist, noted that appellant had chronic back pain for years and that his x-rays demonstrated degenerative joint disease of the lower back. Neither physician, however, provided an opinion that appellant's employment-related conditions of lumbar strain and displaced lumbar disc had materially changed. Their reports are therefore not relevant on the merit issue of whether appellant met his burden of proof to establish that the March 27, 2001 wage-earning capacity determination should be modified.²¹

Appellant did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.²²

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP, in its December 16, 2013 decision OWCP properly denied his reconsideration request under the 5 U.S.C. § 8128(a) standard.²³

¹⁷ 20 C.F.R. § 10.608(a).

¹⁸ *Id.* at § 10.606(b)(3).

¹⁹ *Id.* at § 10.608(b).

²⁰ *P.C.*, 58 ECAB 405 (2007).

²¹ 20 C.F.R. § 10.606(b).

²² *Id.*

²³ *Supra* note 17.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that a March 27, 2001 wage-earning capacity decision should be modified. The Board further finds that OWCP properly refused to reopen his case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16 and October 25, 2013 are affirmed.

Issued: September 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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