

**United States Department of Labor  
Employees' Compensation Appeals Board**

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D.S., Appellant

and

**TENNESSEE VALLEY AUTHORITY,  
NUCLEAR POWER DIVISION,  
Chattanooga, TN, Employer**

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**Docket No. 14-1194  
Issued: September 9, 2014**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 29, 2014 appellant filed a timely appeal from the April 3, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP met its burden of proof to modify its January 14, 2004 wage-earning capacity determination.

**FACTUAL HISTORY**

OWCP accepted that on March 13, 1989 appellant, then a 34-year-old boilermaker, sustained an aggravation of degenerative joint disease and severe stenosis at L3-4 due to lifting and carrying ice baskets weighing 150 to 200 pounds. The physical requirements for the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

boilermaker position required intermittent sitting for four hours per day, intermittent walking for two hours per day, intermittent lifting of up to 50 pounds for two hours per day, intermittent bending for four hours per day, intermittent squatting for one hour per day, intermittent climbing for two hours per day, intermittent kneeling for one hour per day, and intermittent twisting for one hour per day. The job also required continuous standing as well as simple grasping, pushing, pulling, engaging in fine manipulation and reaching above the shoulder.

Appellant was terminated from his job as a boilermaker on May 23, 1989 because he was unable to perform the required duties. On October 22, 1990 he returned to work for the employing establishment as an engineering aide.

In a decision dated December 17, 1990, OWCP determined that appellant's actual earnings in the engineering aide position represented his wage-earning capacity. It found that appellant had a 53 percent wage-earning capacity. Appellant's new occupation paid less than that of his boilermaker position and he continued to have work-related residuals. He received wage-loss compensation and medical benefits.

On December 17, 2001 appellant accepted a position as a program administrator with the employing establishment. OWCP determined that the new position paid 25 percent more than the engineering aide position for which appellant was originally rated and noted that he had a 90 percent wage-earning capacity. The physical requirements of the program administrator position necessitated intermittent activities, including sitting for five hours per day, walking for one hour per day, standing for one hour per day, and other activities such as manual dexterity, simple grasping, and light lifting, pushing and pulling.

In a January 14, 2004 decision, OWCP modified its prior wage-earning capacity determination and reduced appellant's compensation. It found that the evidence of record established that he was self-rehabilitated with greater earnings in his position as a program administrator. The actual wages from this position were determined to represent appellant's new wage-earning capacity.

On February 3, 2012 Dr. Peter E. Boehm, Jr., an attending Board-certified orthopedic surgeon, performed a partial L3-4 laminectomy and decompression procedure. On February 15, 2013 he performed a reexploration, laminotomy, foraminotomy and discectomy at L3-4 with decompression. These procedures were authorized by OWCP.

Appellant returned to work as a program administrator after both surgeries. On September 18, 2013 the employing establishment noted that appellant's duties as a program administrator were the same as those he performed in January 2004 when his compensation was reduced.

A September 5, 2013 functional capacity evaluation report determined that appellant gave a reliable effort with 42 of 43 consistency measures within expected limits and that the findings contained in the report represented appellant's current functional capabilities. Based on his demonstrated dynamic lifting and carrying abilities, appellant was classified in the heavy physical demand strength level for work for the following activities: low lifting -- occasional 0 to 2.6 hours per day (80 pounds) and frequent 2.7 to 5.3 hours per day (40 pounds); carrying --

occasional 0 to 2.6 hours per day (80 pounds) and frequent 2.7 to 5.3 hours per day (40 pounds); walking -- 34 to 66 percent of the workday; climbing stairs; limited squatting motion; stooping – 0 to 33 percent of the workday; kneeling -- 0 to 33 percent of the workday; sitting -- 34 to 66 percent of the workday; standing -- 34 to 66 percent of the workday; and gripping/grasping strength -- 95.7 pounds on the left and 97 pounds on the right.

In a September 12, 2013 report, Dr. Boehm stated that appellant returned on September 12, 2013 for a follow-up examination and reported that he continued to have some cramping in his legs. Appellant continued to have some back pain but felt he was in better condition today than he was before his previous two surgeries. Dr. Boehm advised that the results of the functional capacity evaluation had come back. He noted that another physician had placed him on a medication for restless leg syndrome and that the medication seemed to help him sleep at night. Dr. Boehm stated that, upon physical examination, appellant had 5/5 strength and intact sensation throughout and his wounds were well healed. He noted:

“Overall, [appellant] has done quite well. I would agree with the functional assessment of their recommendations that he does meet the strength, lifting, carrying and positional demands of his job; therefore, within his current job description there are no restrictions to meet his job demands. If his job demands change, this may need to be reevaluated but he may follow-up on [an as-needed] basis.”

In a February 25, 2014 letter, OWCP advised appellant that it proposed to modify its January 14, 2004 wage-earning capacity determination on the grounds that there had been a material change in the nature and extent of his injury-related condition such that he could earn wages as a boilermaker. It stated that the proposed action was justified by the September 5, 2013 functional capacity evaluation report and the September 12, 2013 report of Dr. Boehm. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed action.

Appellant submitted a March 7, 2014 report in which Dr. Boehm stated that he returned for examination that day. Dr. Boehm noted that, upon physical examination, appellant continued to have 5/5 strength and intact sensation throughout. He stated:

“At his last visit he had undergone a functional assessment and based on the job description which he was in at that time he was cleared to return to work without restrictions but I was very clear in stating that there are no restrictions at his current job demand. Apparently he has received a letter stating that his current job will be changed to a much more physically demanding boiler job and he is here for review.”

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“From my standpoint, I think that the workers compensation has misconstrued my information. I was very clear and stated that if his job demands change that he may need to be reevaluated. The functional assessment that was completed before was based on a job that was simply a desk job and I do not think that the current change to a much more demanding boiler job based on the prior functional

assessment is a fair evaluation or change. I would recommend that he undergo another functional assessment based on the new current demands of his job and it is my feeling based on reading these demands that it is unlikely he will be able to perform that.”

In an April 3, 2014 decision, OWCP modified its January 14, 2004 wage-earning capacity determination to find a material change in the nature and extent of appellant’s injury-related condition such that he could earn wages as a boilermaker. It reduced appellant’s wage-loss compensation to zero. OWCP noted that it based its determination on a September 5, 2013 functional capacity evaluation report and a September 12, 2013 report of Dr. Boehm and indicated that the March 7, 2014 report of Dr. Boehm did not change this 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>2</sup> OWCP’s regulations provide that, if OWCP issues a formal loss of wage-earning capacity determination, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP.<sup>3</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>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

Medical questions can only be resolved by medical opinion evidence, and the reports of a nonphysician cannot be considered to constitute probative medical opinion evidence in adjudicating such matters.<sup>6</sup>

### **ANALYSIS**

OWCP accepted that on March 13, 1989 appellant sustained an aggravation of degenerative joint disease and severe stenosis at L3-4 due to lifting and carrying ice baskets weighing 150 to 200 pounds.<sup>7</sup> At the time he was injured, appellant was working as a

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<sup>2</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>3</sup> 20 C.F.R. § 10.511.

<sup>4</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

<sup>7</sup> On February 3, 2012 Dr. Boehm, an attending Board-certified orthopedic surgeon, performed a partial L3-4 laminectomy and decompression procedure. On February 15, 2013 he performed a reexploration, laminotomy, foraminotomy and discectomy at L3-4 with decompression. These procedures were authorized by OWCP.

boilermaker. The position required substantial physical activity, including intermittent lifting of up to 50 pounds for two hours per day, intermittent walking for two hours per day, intermittent bending for four hours per day, intermittent squatting for one hour per day, intermittent climbing for two hours per day, intermittent kneeling for one hour per day and intermittent twisting for one hour per day.

In a decision dated December 17, 1990, OWCP determined that the engineering aide position appellant returned to on October 22, 1990 represented his wage-earning capacity. OWCP found that appellant had a 53 percent wage-earning capacity and paid appropriate compensation.

In a January 14, 2004 decision, OWCP modified its prior wage-earning capacity determination and reduced appellant's compensation. It found that the evidence of record established that appellant was self-rehabilitated with greater earnings in his program administrator position which he started on December 17, 2001. The actual wages from this position were determined to represent appellant's new wage-earning capacity.

In an April 3, 2014 decision, OWCP modified its January 14, 2004 wage-earning capacity determination on the grounds that there had been a material change in the nature and extent of his injury-related condition such that he could earn wages as a boilermaker. It reduced appellant's wage-loss compensation to zero. OWCP noted that it based its determination on a September 5, 2013 functional capacity evaluation report and a September 12, 2013 report of Dr. Boehm.

The Board finds that OWCP did not meet its burden of proof to modify the January 14, 2004 wage-earning capacity determination because it did not present sufficient medical evidence to show that appellant could work as a boilermaker. The medical evidence of record does not clearly establish that appellant has the physical capacity to perform this job. OWCP did not document a material change in the nature and extent of appellant's injury-related condition such that he could perform the duties of a boilermaker.

In a September 12, 2013 report, Dr. Boehm stated that the results of appellant's September 5, 2013 functional capacity evaluation had come back.<sup>8</sup> He noted: "I would agree with the functional assessment of their recommendations that he does meet the strength, lifting, carrying and positional demands of his job, therefore, within his current job description there are no restrictions to meet his job demands. If his job demands change, this may need to be reevaluated but he may follow-up on [an as-needed] basis."

The Board notes that Dr. Boehm did not provide a clear opinion that appellant could work as a boilermaker. Dr. Boehm specifically noted that he was only analyzing the September 5, 2013 functional capacity evaluation results in the context of the job that appellant was then performing, the position of program administrator. The position of program

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<sup>8</sup> The functional capacity evaluation predicted work capacity by analyzing the results of testing for various physical activities, including lifting, carrying, walking, climbing stairs, squatting, stooping, kneeling, sitting, standing and hand gripping/grasping. It was concluded that appellant fell under in the heavy physical demand strength level for work.

administrator is an essentially sedentary position with far fewer physical demands than those of the boilermaker job. In addition, Dr. Boehm specifically indicated, "If his job demands change, this may need to be reevaluated but he may follow-up on [an as-needed] basis."

Prior to the issuance of OWCP's April 3, 2014 decision modifying the January 14, 2004 wage-earning capacity determination, appellant submitted a March 7, 2014 report from Dr. Boehm, who clarified that appellant could not work as a boilermaker. Dr. Boehm stated, "From my standpoint, I think that the workers compensation has misconstrued my information.... The functional assessment that was completed before was based on a job that was simply a desk job and I do not think that the current change to a much more demanding boiler job based on the prior functional assessment is a fair evaluation or change."

For these reasons, OWCP did not meet its burden of proof to modify its January 14, 2004 wage-earning capacity determination.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to modify its January 14, 2004 wage-earning capacity determination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 3, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 9, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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