

FACTUAL HISTORY

On September 12, 2005 appellant, then a 53-year-old nursing assistant, filed an occupational disease claim alleging that he injured his back due to lifting heavy patients over many years. OWCP accepted the claim for lumbar sprain/strain, other affections of the right shoulder region, right plantar fascial fibromatosis, and aggravation of displaced lumbar discs at L3-4 and L4-5. On December 1, 2005 appellant underwent laminectomies and decompression at L3-4 and L4-5. He received appropriate compensation and returned to modified duty on May 1, 2006.

By decision dated May 30, 2007, OWCP found that appellant's actual earnings of \$654.23 per week as a medical support assistant fairly and reasonably represented his wage-earning capacity and reduced his compensation accordingly. In a July 3, 2008 decision, it amended its May 30, 2007 decision because it was based on incorrect pay information provided by the employing establishment. On July 18, 2008 appellant had additional back surgery at T10-11 with placement of a dorsal column stimulator. He received appropriate compensation and returned to modified duty on August 1, 2008. In decisions dated August 17 and November 18, 2009, and March 17, 2010, OWCP denied appellant's claims for brief periods of compensation. Appellant continued to work.

On April 29, 2010 appellant was granted a schedule award for 36 percent impairment of the right leg. By decision dated September 24, 2012, OWCP noted that he had filed multiple claims for intermittent compensation for the period May 24 through July 29, 2012 and denied modification of the wage-earning capacity determination. Appellant requested reconsideration, and in a January 11, 2013 decision, OWCP again denied modification of the wage-earning capacity determination.

On April 29, 2014 appellant again requested reconsideration. He indicated that two years previously he was told by his physician that he should reduce his work hours. In support of his request, appellant submitted treatment notes and disability slips from Dr. Lori Hill Marshall, Board-certified in anesthesiology and pain medicine, dated June 18, 2012 to February 3, 2014, and a functional capacity evaluation dated June 7, 2013.

By decision dated May 13, 2014, OWCP denied appellant's request on the grounds that it was untimely and failed to demonstrate clear evidence of error.

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.² Section 10.511 of OWCP regulations provide that if a formal loss of wage-earning capacity decision has been issued, the rating is left in place until that determination is modified by OWCP. Modification is only warranted where the party seeking modification establishes a material change in the nature and extent of the injury-related

² *Katherine T. Kreger*, 55 ECAB 633 (2004).

condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴ In addition, Chapter 2.1501 of OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.⁵

ANALYSIS

The Board finds this case is not in posture for decision. By decision dated May 30, 2007, amended on July 3, 2008, OWCP found appellant's actual earnings fairly and reasonably represented his wage-earning capacity. Following OWCP's July 3, 2008 decision, in decisions dated August 17 and November 18, 2009 and March 17, 2010, OWCP denied his claims for brief periods of compensation. In decisions dated September 24, 2012 and January 11, 2013, it denied modification of the wage-earning capacity determination. Appellant requested reconsideration on April 29, 2014. In support of his request, he submitted medical evidence. In a nonmerit decision dated May 13, 2014, OWCP denied his request for reconsideration, finding that it was untimely and failed to demonstrate clear evidence of error.

It is well established that a claimant may establish that a modification of a wage-earning capacity is warranted if there is a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.⁶ Although appellant's April 29, 2014 correspondence used the term "reconsideration," he contended that his medical condition had changed such that he could no longer work a full day. The Board finds that his April 29, 2014 communication offer constitutes a request for modification of the July 3, 2008 wage-earning capacity determination.⁷ The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁸ In this case, appellant asserted that his medical condition had changed, and he submitted medical evidence to support this assertion. However, rather than evaluating whether he established modification of the wage-earning capacity, OWCP in its May 13, 2014 decision evaluated his request as an untimely request for reconsideration under the clear evidence of error standard.

The Board finds that OWCP should have adjudicated appellant's April 29, 2014 letter, in which he asserted that his medical condition had changed, as a request for modification of the

³ 20 C.F.R. § 10.511.

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁶ *P.C.*, 58 ECAB 405 (2007).

⁷ *See M.N.*, Docket No. 10-51 (issued July 8, 2010).

⁸ *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

wage-earning capacity determination.⁹ The Board will, therefore, remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve his appeal rights.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: April 8, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

⁹ *F.B.*, Docket No. 09-99 (issued July 21, 2010); *see also M.D.*, Docket No. 12-1317 (issued December 21, 2012).