

On appeal, appellant contends that the loss of wage-earning capacity determination was erroneous. He also contended that the Board's decision which affirmed OWCP's pay rate determination required clarification.

FACTUAL HISTORY

This case has previously been before the Board. On March 15, 1982 appellant, then a 32-year-old molder, injured his right hand in the performance of duty when hooking a chain into a gate. OWCP accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery.

In the first appeal, the Board issued a decision and order on May 15, 2003 affirming OWCP decisions dated October 29, 2001 and January 28, 2002.³ The Board found that OWCP properly reduced appellant's compensation benefits effective August 15, 1999⁴ based on its determination that the selected position of cashier 2 represented his wage-earning capacity and that the duties were not of a repetitive nature. The Board also found that appellant failed to meet his burden of proof to establish a recurrence of disability on or after August 28, 2000 causally related to his accepted March 15, 1982 employment injury.⁵

On December 12, 2004 the Board, in the second appeal, affirmed OWCP's April 12, 2004 decision denying modification of the loss of wage-earning capacity determination,⁶ but found further clarification was required as to appellant's pay rate.

In a decision dated October 24, 2006, the Board in its third decision affirmed an April 5, 2005 OWCP decision regarding appellant's pay rate.⁷ The Board also found that OWCP properly denied his request for merit review and affirmed OWCP's June 2 and September 15, 2005 nonmerit decisions. On July 30, 2007 the Board denied appellant's petition for reconsideration.⁸ In its decision, the Board also modified footnote 12 in its decision, and granted the Director's request for correction.

The Board, in a May 4, 2010 decision, found OWCP had applied an erroneous legal standard to appellant's request for modification of his July 16, 1999 loss of wage-earning capacity determination.⁹ The Board set aside OWCP's nonmerit decisions dated March 8, April 17, and August 6, 2008 and March 11, 2009 and remanded the case to OWCP to adjudicate the case under the correct legal standard.

³ Docket No. 02-2265 (issued May 15, 2003).

⁴ OWCP issued its initial decision reducing the rate of appellant's compensation benefits based on his wage-earning capacity as a cashier 2, effective August 15 on July 16, 1999.

⁵ On January 9, 2002 appellant had filed a claim for a recurrence of total disability beginning January 28, 2000. On the form, he indicated that he was employed by St. Joachim's Church at the time of his recurrence.

⁶ Docket No. 04-1438 (issued December 14, 2004).

⁷ Docket No. 06-40 (issued October 24, 2006).

⁸ Docket No. 06-40 (issued October 24, 2006); *petition for recon., denied*, (issued July 30, 2007).

⁹ Docket Nos. 09-1046 and 09-1294 (issued May 4, 2010).

On July 19, 2011 the Board affirmed an August 2, 2010 OWCP decision which denied modification of the wage-earning capacity determination.¹⁰

By decision dated January 17, 2013, the Board affirmed a July 23, 2012 nonmerit decision and February 2, 2012 decision denying modification of its loss of wage-earning capacity determination.¹¹

By *Order Remanding Case* dated August 12, 2013, the Board set aside decisions dated June 25 and October 31, 2012 denying modification of a loss of wage-earning capacity determination.¹² The Board found that OWCP had not discharged its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition of the case. The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and orders and are incorporated herein by reference.¹³

The evidence relevant to appellant's pay rate contained in the record from prior appeals is set forth below.

On June 22, 1982 OWCP placed appellant on the periodic rolls for temporary total disability using a weekly pay rate of \$398.00.

Appellant completed and signed Forms EN1032 on November 8, 1982, March 5, 1984, and August 5, 1985. He indicated that he had not worked either within the past 15 months or since his last employment and/or earnings had been reported to OWCP.

On August 13, 1984 and March 26, 1987 OWCP received information from the employing establishment providing the current pay rate for appellant's date-of-injury position of molder. It noted that he had been a WG-10, Step 3 at the time of his injury.

In a letter dated September 1, 2013, appellant argued that the July 16, 1999 loss of wage-earning capacity determination is erroneous. He contended that OWCP needed to set forth the rationale and authority used in correcting and amending the *Shadrick* formula in the April 5, 2005 decision. Appellant also argued the evidence used to calculate his pay rate was incorrect and required correction.

In an October 1, 2013 letter, OWCP informed appellant that the evidence of record was insufficient to support modification of the July 16, 1999 loss of wage-earning capacity determination. It found that appellant submitted no evidence supporting his contention that the date-of-injury pay rate should not have been used in calculating his pay rate.

¹⁰ Docket No. 10-2099 (issued July 19, 2011); *petition for recon., denied*, (issued October 26, 2011).

¹¹ Docket No. 12-1663 (issued January 17, 2013); *petition for recon., denied*, (issued May 13, 2013).

¹² Docket No. 13-259 (issued August 12, 2013).

¹³ The Board notes that appellant filed an appeal of a May 15, 2003 decision on July 29, 2003 and the Board docketed the appeal as Docket No. 03-1923 and Docket No. 03-2022. On October 6, 2003 the Board granted his request to dismiss his appeal in Docket No. 03-1923. *See* Docket No. 03-1923 (issued October 6, 2003). The Board also issued an order dismissing Docket No. 03-2022 as a duplicate appeal of Docket No. 03-1923. *See* Docket No. 03-2022 (issued October 6, 2003).

In a letter dated October 2, 2013, appellant requested modification of the July 16, 1999 loss of wage-earning capacity decision. He argued that OWCP incorrectly calculated his weekly pay rate.

By letter dated September 7, 2013, appellant argued that the vocational rehabilitation counselor discriminated against appellant as well as violating his civil rights when it selected the pay rate for men instead of the mean rate. Thus, he argues that this is sufficient to warrant reversal of the loss of wage-earning capacity determination. Appellant also argued that OWCP failed to meet its burden of proof when it corrected his pay rate in its April 5, 2005 decision to \$327.52.

Appellant in an October 10, 2013 letter, he claimed that he returned to work for at least 14 years and that his employing establishment has refused to provide him with the date of his work return.

By letter dated October 12, 2013, appellant argued that March 15, 1981 should be the effective date of his Consumer Price Index (CPI) increases. He also argued that the April 12, 2004 OWCP decision is incorrectly taking 52 percent of his compensation pay when it was only 56 percent in the July 16, 1999 loss of wage-earning capacity determination. Appellant argued that OWCP is required to obtain his correct pay rate information from the employing establishment. He argued that OWCP should have used the pay rate for a WG-10 and not the weekly pay rate it had used in its determination. Lastly, appellant contended that as OWCP corrected the pay rate this established error in the original loss of wage-earning capacity determination.

In a letter dated October 13, 2013, appellant submitted a cost-of-living increase chart supporting his contention that the 1982 and 1983 CPI increases were not included by OWCP in calculating his pay rate. He argued that OWCP is continuing to incorrectly calculate the percentage of his pay and using an incorrect CPI in its calculation of his pay rate.

Appellant submitted additional letters reiterating his argument that OWCP had used an incorrect pay rate and failed to consider the correct CPI increases in its determination.

By letter dated October 30, 2013, appellant stated that he had returned to work, but his employing establishment had refused to provide him the dates. He argues that, as he had returned to work, this changes his date-of-injury pay rate and calculation under the *Shadrick* formula. He stated that he needs to find the date he returned to work and use that in calculating his wage-earning capacity.

By letters dated February 5 and March 14 and 25, 2014, again appellant requested modification of his loss of wage-earning capacity determination as OWCP had incorrectly amended his record under the wrong statute and erred in its pay rate determination. He claimed that this errors warranted reversal.

By letter dated April 5, 2014, appellant argued that OWCP erred when it corrected his pay rate as this was not subject to correction and OWCP used the wrong statute when it corrected his pay rate using a median pay rate.

By decision dated June 12, 2014, OWCP denied modification of the loss of wage-earning capacity determination. It found that appellant failed to submit any evidence showing the he had returned to work and was entitled to a recurrent pay rate. OWCP also found that he presented arguments regarding his pay rate that had been previously considered and rejected by both OWCP and the Board. It also found that appellant had submitted no evidence warranting modification of the loss of wage-earning capacity determination as he had not submitted any evidence showing the original determination was erroneous -- including pay rate, that there had been a material change in either the extent or nature of his accepted employment injury or that he had been vocationally rehabilitated, or retrained.

In a June 19, 2014 letter, appellant requested reconsideration. He argued that OWCP failed to follow the Board's instructions regarding the pay rate calculation and the evidence required to show that it was incorrectly calculated under the *Shadrick*¹⁴ formula.

By decision dated July 10, 2014, OWCP denied reconsideration, finding that the arguments were previously considered by OWCP and the Board and thus did not warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

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.¹⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁶ OWCP's procedures provide that if 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.¹⁷ 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.¹⁸

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.¹⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁰

¹⁴ 5 ECAB 376 (1953).

¹⁵ *D.M.*, 59 ECAB 59 ECAB 164 (2007); *Harley Sims, Jr.*, 56 ECAB (2005).

¹⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5 (June 2013). See *Mary E. Marshall*, 56 ECAB 420 (2005).

¹⁸ *Id.* at, Chapter 2.1501.1&3 (June 2013). See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹⁹ See *D.M.*, *supra* note 15; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

²⁰ *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

ANALYSIS -- ISSUE 1

The issue before the Board is whether OWCP correctly calculated appellant's pay rate when it issued its loss of wage-earning capacity. In its July 16, 1999 and amended April 5, 2005 loss of wage-earning capacity, OWCP used the weekly pay rate of \$398.00 to calculate his loss of wage-earning capacity. In its third decision on October 24, 2006, the Board affirmed an April 5, 2005 OWCP decision regarding appellant's pay rate based on the wages from the constructed position of Cashier II. On appeal, appellant argues that he did return to work between his third and fourth step increases. He contends that his correct loss of wage-earning capacity is \$265.83, not the \$247.00 he is currently receiving.

While appellant has provided a new argument regarding the calculation of his pay rate, he submitted no evidence or argument establishing an incorrect pay rate by OWCP. The record establishes that he was placed on the periodic rolls for temporary total disability by letter dated June 22, 1982 using a weekly pay rate of \$398.00. The employing establishment informed OWCP that appellant had been a WG-10, step 3 at the time of his injury on March 15, 1982. There is nothing in the record reflecting a higher step or that his pay rate was more than the \$398.00 OWCP used in calculating his loss of wage-earning capacity using the *Shadrick* formula. While appellant contends that he returned to work, he has not submitted any evidence supporting this contention. Moreover, his declarations found in the EN1032 forms he completed November 8, 1982, March 5, 1984 and August 5, 1985 refute this contention. In each of the forms, appellant denied that he was employed or self-employed. There is no other evidence showing that appellant was entitled to a recurrent pay rate or other increases for 1983. The Board finds that he has failed to establish a modification of his loss of wage-earning capacity.

Appellant has the burden of proof to show that a modification of his wage-earning capacity is warranted but he has not submitted sufficient evidence establishing that OWCP used an incorrect pay rate. OWCP therefore properly denied modification of the July 16, 1999 wage-earning capacity determination.²¹

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,²² OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year

²¹ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Elbert Hicks*, 55 ECAB 151 (2003).

²² *Supra* note 1. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²³ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

of the date of that decision.²⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.²⁵

ANALYSIS -- ISSUE 2

Appellant's June 19, 2014 request for reconsideration did not show that OWCP erroneously applied a specific point of law, and did not advance a relevant legal argument not previously considered. He reiterated his contentions that the pay rate was incorrect and that the method for explaining the pay rate had not been provided. OWCP considered these arguments when it denied appellant's request for modification on June 12, 2014. Appellant has added nothing new. The Board has held that evidence or argument which repeats or duplicates the existing case record does not constitute a basis for reopening a case.²⁶ Appellant has presented no evidence with his request for reconsideration to support his arguments regarding the pay rate used by OWCP. Thus, he has not advanced a relevant legal argument not previously considered. The Board finds therefore that appellant has failed to satisfy either of the first two requirements under section 10.606(b)(2) and that he did not submit relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3) and thus properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not established a modification of the wage-earning capacity. The Board further finds that it properly denied reconsideration.

²⁴ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

²⁵ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

²⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); see also *A.K.*, Docket No. 15-451 (issued April 13, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 10 and June 12, 2014 are affirmed.

Issued: June 3, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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