

FACTUAL HISTORY

On November 7, 2012 appellant, then a 27-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging a left hip and thigh cramp as a result of picking up a full tray of mail. She stopped work on that day. OWCP accepted appellant's claim for a left hip sprain on February 12, 2013 and she began receiving periodic rolls payments.

In a duty status report dated December 3, 2013, Dr. William Payne, a Board-certified orthopedic surgeon, recommended work restrictions of lifting or carrying no more than 10 to 20 pounds; sitting no more than four hours per day; walking no more than four hours per day; simple grasping no more than four hours per day; operating machinery no more than four hours per day; and no twisting, climbing, kneeling, pushing or pulling, bending or stooping.

On February 1, 2014 appellant accepted a modified position as a rural carrier within her work restrictions.

By decision dated June 12, 2014, OWCP notified appellant that it had found that her actual earnings fairly and reasonably represented her wage-earning capacity and met or exceeded the current wages of the job held when she was injured. This loss of wage-earning capacity determination found that her wage-loss compensation ended when she was reemployed with no loss in earning capacity.

On September 4, 2014 appellant requested compensation for leave without pay from July 17 through 28, 2014. She explained that on these dates she was not working while under the orders of her physician.

By letter dated August 20, 2014, Dr. Eugene Lopez, a Board-certified orthopedic surgeon, noted that on July 17, 2014 he took appellant off work beginning July 17, 2014, with a return to work with restrictions on July 28, 2014 due to the severe flare-ups and pain she was experiencing. He noted that it was imperative that appellant refrain from any kind of work during that period to decrease her symptoms.

By decision dated September 16, 2014, OWCP denied appellant's claim for compensation for the period July 17 through 28, 2014. It stated that the letter dated August 20, 2014 was insufficient to support her claim for compensation, because increased subjective pain complaints or becoming symptomatic at work did not support total disability from all work. OWCP requested that appellant provide a well-rationalized medical report providing explanation based on objective findings supporting a material worsening of the work injury of November 7, 2012 and how such material worsening prevented her from performing the limited-duty position she had worked since February 8, 2014.

In a work restriction form dated October 3, 2014, Dr. Bruce J. Montella, a Board-certified orthopedic surgeon, recommended that appellant work a limited-duty position with restrictions of no excessive twisting, turning, bending, climbing stairs, kneeling, squatting, lifting over 15 pounds, sitting, or standing and no sitting for more than two hours. He noted that appellant could only work up to six hours per day and that she could return to work with these restrictions on October 13, 2014.

On October 6, 2014 appellant requested reconsideration of OWCP's June 12, 2014 wage-earning capacity decision. She stated that she had new symptoms due to her original November 7, 2012 injury. Appellant noted that she was required to sit excessively to perform the duties of her modified position and that her current duties did not coincide with her current restrictions as set forth in the most recent medical reports. On the same date, she requested reconsideration of OWCP's September 16, 2014 decision regarding compensation for the period July 17 to 28, 2014. Appellant noted that on the relevant dates she could not perform duties of her position due to an inability to sit at her desk due to numbness in her left leg and foot.

In a report dated September 3, 2014, Dr. Montella noted no significant changes in her current symptoms. He also noted that she could return to work with restrictions of no excessive twisting, turning, bending, sitting, standing, climbing of stairs, kneeling, or squatting; and no lifting over 15 pounds.

In a report dated September 22, 2014, Dr. Lopez noted no significant changes in appellant's current symptoms. He also noted that she could return to work with the same restrictions as in Dr. Montella's September 3, 2014 report.

In a note dated September 29, 2014, Dr. Lopez duplicated word-for-word his report dated August 20, 2014.

On February 11, 2015 OWCP denied appellant's request for reconsideration of its wage-earning capacity decision dated June 12, 2014. It noted that she had failed to raise substantive legal questions or include new and relevant evidence. On the same date, OWCP denied appellant's request for reconsideration of its decision dated September 16, 2014 regarding the limited period of total disability. It found that the note of Dr. Lopez dated September 29, 2014 was a duplication of his August 20, 2014 note and therefore did not prove wage loss for the claimed period.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by 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.² Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.³

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁴ The Board also has held that the submission of evidence which

² 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

³ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁴ *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

does not address the particular issue involved does not constitute a basis for reopening a case.⁵ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁶

It is well established that either a claimant or OWCP may seek to modify a formal wage-earning capacity 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 modification.⁸ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁹

ANALYSIS

OWCP issued a June 12, 2014 decision finding that appellant had experienced no loss of her wage-earning capacity. It also issued a September 16, 2014 decision denying her claim for compensation for leave without pay for the period July 17 through 28, 2014. On October 6, 2014 appellant requested reconsideration of both of these decisions. In two separate decisions dated February 11, 2015, OWCP denied her requests for reconsideration without reviewing the merits of her claims.

The Board finds that appellant has not met any of the requirements under 20 C.F.R. § 10.606(b)(3) requiring OWCP to reopen her claim for disability for the period July 17 to 28, 2014. Appellant did not submit any relevant and pertinent new evidence with her request for reconsideration of the September 16, 2014 decision. While she submitted a note dated September 29, 2014 from Dr. Lopez that was relevant to this issue, this note was previously considered by OWCP in its September 16, 2014 decision. The note, in its entirety except for the date, was a duplicate of Dr. Lopez's August 20, 2014 letter. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value on reconsideration.¹⁰ Hence, the note dated September 29, 2014 was insufficient to require OWCP to reopen this decision for merit consideration. Appellant did not submit any other evidence relevant to the dates of disability in question. As such, the Board finds that OWCP properly denied her request for reconsideration of its September 16, 2014 decision.

⁵ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

⁶ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

⁸ *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

¹⁰ *Supra* note 4.

However, as to the request for reconsideration of her loss of wage-earning capacity, Board precedent and OWCP procedures direct that a claims examiner must consider the criteria for modification of a loss of wage-earning capacity determination when a claimant requests resumption of compensation for total wage loss in a pending claim.¹¹

OWCP considered appellant's October 6, 2014 letters as requests for reconsideration of the June 12, 2014 wage-earning capacity determination and the September 16, 2014 decision, denying her claim for wage loss, under the standards set forth in 5 U.S.C. § 8128(a). It found that her requests were timely, but failed to set forth a basis for reconsideration of the merits of her claims.

While appellant used the term reconsideration in both letters, she was in fact arguing that the June 12, 2014 loss of wage-earning capacity should be modified. She submitted additional medical evidence which set forth work restrictions that she alleged made her unable to sit at her desk or put pressure on her hip. Appellant argued that she was no longer able to perform her modified work position as her new restrictions precluded some of her work activities and resulted in new and increased symptoms. A material change in the nature and extent of the accepted condition is one basis on which a claimant may seek modification of a wage-earning capacity determination.¹² Appellant's letter of October 6, 2014, in reference to the decision of June 12, 2014, is therefore properly considered as a request for modification of the wage-earning capacity determination, not as a request for a review of her claim under 5 U.S.C. § 8128(a). The Board therefore finds that OWCP should have adjudicated the issue of her claim as a request for modification of the wage-earning capacity determination,¹³ and was in error to adjudicate that issue as a request for reconsideration.¹⁴

The case will be remanded to OWCP to adjudicate her request for modification of the wage-earning capacity determination, to be followed by a *de novo* decision to preserve appellant's appeal rights.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for review of the merits of her claim for leave without pay for the period July 17 through 28, 2014 pursuant to 5 U.S.C.

¹¹ *Katherine T. Kreger*, *supra* note 7; *Sharon C. Clement*, *supra* note 7; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5(a) (June 2013) (if a claim for wage loss is received, OWCP should review the file to determine whether a formal loss of wage-earning capacity is in place, and, if so, the claim should be developed, if necessary, as a request for modification of the loss of wage-earning capacity).

¹² 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. *Stanley B. Plotkin*, 51 ECAB 700 (2000); *see also* Federal (FECA) Procedure Manual, *id.* at Chapter 2.1501.2(b) (June 2013).

¹³ *G.E.*, Docket No. 13-649 (issued October 21, 2013); *F.B.*, Docket No. 10-99 (issued July 21, 2010).

¹⁴ *F.B.*, *id.* *See M.J.*, Docket No. 08-2280 (issued July 7, 2009). *See also Gary L. Moreland*, *supra* note 9.

§ 8128(a), but improperly denied appellant's request for modification of the June 12, 2014 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 11, 2015 are affirmed in part and set aside and remanded in part for further proceedings consistent with this decision and order of the Board.¹⁵

Issued: August 25, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁵ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective, November 16, 2015.