

ISSUE

The issue is whether appellant has established that the August 12, 2014 wage-earning capacity determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On August 4, 2010 appellant, then a 49-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his knees, neck, back, groin, and elbow when he was thrown from an all-terrain vehicle. OWCP accepted the claim for multiple contusions, degeneration of the lumbar intervertebral discs, a sprain of the right foot, a sprain on the right at an unspecified site, a sprain of the right lateral collateral ligament of the knee, right chondromalacia patellae, and a tear of the right lateral meniscus.³ Appellant stopped work on August 5, 2010 and received compensation for total disability beginning November 21, 2010.

Dr. Lowell M. Anderson, a Board-certified orthopedic surgeon and OWCP referral physician, evaluated appellant on October 10, 2012. He diagnosed lumbar disc degeneration, an aggravation of preexisting disc pathology, lumbar facet arthropathy, and a permanent aggravation of preexisting patellofemoral joint chondromalacia due to the August 4, 2010 employment injury. In an October 12, 2012 work restriction evaluation, Dr. Anderson opined that appellant could work full time, sitting for six hours, walking and standing for two hours, and pushing, pulling, and lifting up to 25 pounds. He found that appellant could not squat, kneel, climb, bend/stoop, or twist, required a 10-minute break each hour, and should alternate sitting, standing, and walking as needed. On February 5, 2013 Dr. Anderson clarified that appellant could bend while working in a sedentary position and could perform limited squatting, kneeling, and climbing alternating sitting, standing, and walking as necessary. He marked through the requirement that he take a 10-minute break each hour.

In a duty status report dated April 16, 2013, Dr. Michael D. Nolan, Board-certified in family medicine, diagnosed lumbar disease and found that appellant could lift up to 10 pounds, sit for three hours per day, and stand and walk for two hours per day. In a progress report dated April 16, 2013, he diagnosed thoracic and lumbosacral neuritis/radiculitis and limb pain. Dr. Nolan noted that a second opinion physician found that appellant could do activities that he believed he was unable to perform without pain.⁴

³ OWCP previously accepted that on December 21, 2009 appellant sustained a partial rupture of the left quadriceps, left knee and leg sprain, and thoracic or lumbosacral neuritis/radiculitis on December 21, 2009 under subsidiary File No. xxxxxx260.

⁴ Dr. Nolan evaluated appellant for back pain on April 23, 2013 and indicated that "he will continue to be disabled related to his back problem indefinitely." He advised that sitting for up to six hours straight or standing for four hours was different from his "understanding of his condition."⁴

OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation on April 19, 2013. By letter dated February 14, 2014, it informed appellant that he was obstructing vocational rehabilitation efforts by failing to complete the rehabilitation plan, telling the rehabilitation counselor not to work without his approval, verbally abusing the rehabilitation counselor, and acting in a threatening way.⁵ OWCP notified appellant of the penalty for refusing to cooperate with vocational rehabilitation and provided him 30 days to contact both OWCP and the rehabilitation counselor and agree to participate with good effort. It advised appellant that if he believed that he had good cause for not participating he should provide such reasons in writing with supporting documentation. If he did not cooperate with vocational rehabilitation or show good cause, it would reduce his compensation based on his prospective wage-earning capacity.

On April 18, 2014 the vocational rehabilitation counselor completed a job classification form (OWCP-66) for the position of eligibility worker from the Department of Labor's *Dictionary of Occupational Titles*. The position was sedentary and required occasional lifting of up to 10 pounds. The rehabilitation counselor found that appellant had the vocational ability to perform the position due to his work history and college degree in psychology, and that there were sufficient openings for the position in his commuting area at entry-level wages of \$486.40 per week, as confirmed by the state employment offices and direct contact with employers.

OWCP's vocational rehabilitation specialist recommended that OWCP reduce appellant's compensation as he could perform the identified position of eligibility worker earning wages of \$486.40 per week.⁶ He found that the position of eligibility worker was available, suitable, and a good fit for appellant's degree in psychology.

On July 9, 2014 OWCP notified appellant of its proposed reduction of his compensation based on its findings that he had the capacity to earn wages as an eligibility worker. It provided him 30 days to respond to the proposed reduction of compensation.

By decision dated August 12, 2014, OWCP reduced appellant's compensation, effective August 12, 2014, after determining that he had the capacity to earn wages of \$486.40 per week as an eligibility worker. It applied the formula set forth in *Albert C. Shadrick*⁷ in calculating his wage-earning capacity.

In a report dated September 4, 2014, Dr. Wilbert Pino, a Board-certified orthopedic surgeon, indicated that appellant had a "very convoluted history of a work-related injury dating

⁵ In a February 14, 2014 letter to OWCP's vocational rehabilitation specialist, the rehabilitation counselor advised that appellant made threatening statements, indicated that he carried a concealed weapon, and used intimidating body language. Appellant also refused to meet with the counselor in a public location or complete the offered rehabilitation plan.

⁶ By letter dated May 15, 2014, appellant related that he filed a grievance against the rehabilitation counselor with his company. He indicated that he provided reasons for not cooperating with vocational rehabilitation within 30 days, noting that the primary reason was that he was unable to work full time. Appellant asserted that his physician found that he was unable to work eight hours a day.

⁷ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

back to 2000.” He diagnosed degenerative disc disease of the lumbar spine at multiple levels and moderate-to-advanced joint disease of both hips. Dr. Pino opined that appellant could lift, push, and pull up to 20 pounds occasionally and had restrictions on kneeling, squatting, or stooping.

Dr. Pino, in a December 9, 2014 medical status form, advised that appellant could occasionally lift up to 20 pounds, could not bend, kneel, squat, or climb, and required breaks. In a report dated December 9, 2014, he opined that appellant would have difficulty working full time due to his limitations.

On March 17, 2015 counsel requested reconsideration. He maintained that the reports from Dr. Pino established that appellant was not able to perform the duties of an eligibility worker.⁸

By decision dated June 10, 2015, OWCP denied modification of its August 12, 2014 wage-earning capacity determination. It found that the physical requirements for the position of eligibility worker did not exceed the limitations set forth by Dr. Pino.

Appellant appealed the June 10, 2015 OWCP decision to the Board.

On October 13, 2015 OWCP referred appellant to Dr. Allen M. Weinert, Jr., a Board-certified physiatrist, for a second opinion examination. In a report dated January 19, 2016, Dr. Weinert discussed appellant’s history of back, neck, and right knee pain after work injuries. He reviewed the diagnostic studies. On examination, Dr. Weinert found reduced motion of the back with some tenderness, right knee tenderness of the medial more than the lateral joint line, and normal strength and sensation. He diagnosed a right paracentral disc herniation with facet arthropathy at L5-S1, right foraminal stenosis at L5-S1, low back pain, and right radiculitis at L5. Dr. Weinert further diagnosed right knee pain after a repair of the right anterior cruciate ligament with a partial meniscectomy and lateral release, and mild cervical spondylosis. He related, “I believe [appellant] is employable in the sedentary to light physical demand classification restricting lifting to no more than 20 pounds on an occasional basis. Dr. Weinert should not do any lifting from floor level and should avoid squatting or kneeling.” He further found that appellant should work at a desk that could be modified so that he could alternate sitting and standing and advised that he should not stand over 15 minutes at a time or walk more than 10 minutes occasionally. In a February 8, 2016 work capacity evaluation (OWCP-5c), Dr. Weinert found that appellant could work for eight hours per day sitting up to six hours, walking and standing for one to two hours, and pushing, pulling, and lifting up to 20 pounds for one hour.

On May 18, 2016 appellant, through counsel, requested reconsideration of OWCP’s June 10, 2015 decision. Counsel submitted Dr. Weinert’s January 19, 2016 report and asserted

⁸ Dr. Pino, in a March 21, 2015 duty status report, diagnosed lumbar degenerative disc disease and found that appellant could lift up to 10 pounds, sit and walk for two hours, and stand for one hour. In a March 31, 2015 report, he diagnosed low back pain with radiculopathy on the right and weakness on ambulation. Dr. Pino found that appellant should continue with the same work restrictions. In a progress report dated April 20, 2015, he diagnosed employment-related multilevel degenerative disc and joint disease of the lumbar spine and recommended a functional capacity evaluation.

that OWCP should vacate its wage-earning capacity determination based on the second opinion physician's findings.

OWCP, by letter dated May 23, 2016, advised Dr. Weinert of the duties of an eligibility worker and its physical requirements. It requested that he address whether the position was medically suitable for appellant.

In a June 7, 2016 response, Dr. Weinert related that he had "reviewed the physical requirements of the job title of eligibility worker and feel that [appellant] is suitable to perform this job with an ergonomic variable height workstation that allows him to sit and stand as necessary."

In a June 10, 2016 decision, the Board affirmed the June 10, 2015 decision. The Board determined that the opinion of Dr. Anderson constituted the weight of the evidence and established that appellant had the capacity to earn wages as an eligibility worker, a sedentary position requiring lifting of up to 10 pounds.

By decision dated June 16, 2016, OWCP denied modification of its June 10, 2015 decision. It found that the January 19, 2016 report from Dr. Weinert supported that appellant could perform the position of eligibility worker.

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.⁹ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰

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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS

The Board finds that appellant has not established that the August 12, 2014 wage-earning capacity decision should be modified.

⁹ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

¹⁰ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹¹ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹² *Id.*

On prior appeal, the Board affirmed OWCP's reduction of appellant's compensation effective August 12, 2014 based on his capacity to earn wages in the selected position of eligibility worker. The Board found that the opinion of Dr. Anderson represented the weight of the evidence and demonstrated that the sedentary position was medically suitable. The Board further determined that OWCP properly found the position vocationally suitable.

Appellant has not alleged a change in the nature and extent of his injury-related condition. Instead, through counsel, he contended that the January 19, 2016 report from Dr. Weinert established that the selected position was not suitable.

On January 19, 2016 Dr. Weinert diagnosed a right paracentral disc herniation with facet arthropathy at L5-S1, right foraminal stenosis at L5-S1, low back pain, right radiculitis at L5, right knee pain following a repair of the right anterior cruciate ligament with a partial meniscectomy and lateral release, and mild cervical spondylosis. He found that appellant could perform sedentary to light work occasionally lifting up to 20 pounds with no squatting or kneeling and no lifting from the floor. Dr. Weinert additionally opined that appellant should sit and stand alternatively at a modified desk, standing no more than 15 minutes at a time or walking more than 10 minutes occasionally. In a work capacity evaluation, he found that appellant could sit for six hours, walk and stand for one to two hours, and push, pull, and lift up to 20 pounds for one hour.

OWCP requested that Dr. Weinert review the physical requirements and job duties of an eligibility worker and discuss whether the position was medically suitable. On June 7, 2016 Dr. Weinert determined that the position of eligibility worker was suitable as long as appellant could sit or stand as necessary with a variable height workstation. As he found that appellant was capable of performing the duties of the selected position of eligibility worker, Dr. Weinert's report does not establish error by OWCP in its original loss of wage-earning capacity determination. Appellant has thus not met his burden of proof to modify the August 12, 2014 loss of wage-earning capacity determination.¹³

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

CONCLUSION

The Board finds that appellant has not established that the August 12, 2014 wage-earning capacity determination should be modified.

¹³ See *W.G.*, Docket No. 16-0679 (issued June 16, 2016).

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2017
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