



## **FACTUAL HISTORY**

This case has previously been before the Board. The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts appear below.

In a February 15, 2013 decision,<sup>3</sup> the Board affirmed OWCP's March 1, 2012 decision, finding that OWCP had properly adjusted appellant's compensation to zero effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager.<sup>4</sup> The Board determined that OWCP had properly relied on the professional assessment of appellant's vocational rehabilitation counselor in finding that he was vocationally able to perform the operations manager position and that it was reasonably available within his commuting area.<sup>5</sup> The Board further found that OWCP properly determined that appellant could physically perform the duties of the operations manager position.<sup>6</sup>

On July 15, 2013 appellant, through counsel, requested reconsideration of his claim. He submitted several reports from attending physicians. In March 14, 2012 and January 3, 2013 work capacity evaluation form reports (Form OWCP-5c), Dr. Wood indicated that appellant must perform sedentary duty with the ability to sit or stand at will.<sup>7</sup> He advised that appellant could work on a full-time basis with these conditions. In a January 5, 2013 narrative report, Dr. Wood noted that appellant could only return to sedentary work for eight hours per day with the ability to sit and stand at will and that he could not lift, carry, push, or pull more than 20 pounds. In an April 2, 2013 narrative report, Dr. Sharmila Mudgal, an attending Board-certified occupational medicine physician, determined that appellant could work in a full-time position

---

<sup>3</sup> Docket No. 12-1218 (issued February 15, 2013).

<sup>4</sup> OWCP accepted that on June 1, 2006 appellant, then a 63-year-old logistical support worker, sustained a tear of the horn of his right knee posterior meniscus and a sprain/strain of his right knee. The accepted conditions were later expanded to include cervical radiculopathy. Appellant stopped work on June 5, 2006 and did not return. He underwent OWCP-approved right knee surgery, including meniscectomy, on November 6, 2006. Appellant received disability compensation on the daily rolls beginning July 23, 2006 and on the periodic rolls beginning July 8, 2007. On February 16, 2010 appellant was referred to an OWCP-sponsored vocational rehabilitation program and his vocational rehabilitation counselor later found that he could work in the constructed position of operations manager, a position bearing the official title "Manager, Operations" in the U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT). The position was classified as sedentary in the DOT, and it required occasional lifting of up to 10 pounds and brief periods of standing and walking.

<sup>5</sup> Appellant's vocational rehabilitation counselor made a determination that the operations manager position was reasonably available in appellant's commuting area according to the State Employment and Training Office and she noted that position openings were also identified on the internet. She found that appellant was vocationally capable of performing the position, noting that he had a Master of Business Administration degree with 27 years of experience as an operations specialist in the transportation field.

<sup>6</sup> On March 11, 2011 Dr. Robert Wood, an attending Board-certified orthopedic surgeon, determined that appellant could work eight hours per day performing sedentary duty work and the Board found that this opinion showed that he could physically work as an operations manager. The Board also found that OWCP properly denied appellant's subpoena request. In a June 14, 2013 order, Docket No. 16-1434 (issued June 14, 2013), the Board denied appellant's petition for reconsideration of the February 15, 2013 decision.

<sup>7</sup> In the January 3, 2013 report, Dr. Wood noted that appellant could lift, push, and pull up to 20 pounds, but that he could not engage in squatting or kneeling.

that was mostly sedentary with no significant lifting, carrying, bending, stooping, or twisting. She noted that appellant needed to change his position at will for comfort.

In an August 29, 2013 decision, OWCP found that it had properly adjusted appellant's compensation to zero effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager.

On October 15, 2013 appellant, through counsel, requested reconsideration of OWCP's August 29, 2013 decision. He submitted additional reports of Dr. Wood. In a January 6, 2013 Form OWCP-5c, Dr. Wood noted that appellant could perform sedentary work for eight hours per day with the ability to sit and stand at will. In a January 6, 2014 narrative report, he advised that appellant could perform sedentary activities as indicated by Dr. Mudgal in early-2013.

In a March 12, 2014 decision, OWCP denied modification of its August 29, 2013 decision, noting that it had properly adjusted appellant's compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager.

On March 9, 2015 OWCP received a request for reconsideration of OWCP's March 12, 2014 decision. Counsel argued on behalf of appellant that OWCP improperly adjusted his compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager. She also argued that previously submitted medical evidence produced after June 5, 2011 showed that appellant had an increased disability that prevented him from working in the constructed position of operations manager. A second copy of the request for reconsideration was received by OWCP on March 9, 2015.

In an April 17, 2015 decision, OWCP denied appellant's request for reconsideration of the merits of his claim because his request was untimely filed and failed to demonstrate clear evidence of error. It found that his reconsideration request was untimely, indicating that it was received on March 9, 2015, more than one year after OWCP's March 12, 2014 decision. OWCP then found that the evidence and argument submitted by appellant in support of his reconsideration request did not demonstrate clear evidence of error in its March 12, 2014 decision.

In a February 8, 2016 decision,<sup>8</sup> the Board set aside OWCP's April 17, 2015 decision finding that, in its April 17, 2015 decision, OWCP improperly determined that appellant had filed an untimely request for reconsideration of its March 12, 2014 decision. The Board found that his reconsideration request was in fact timely because it was received on March 9, 2015, a date less than one year after OWCP's March 12, 2014 decision. The Board remanded the case to OWCP for consideration of appellant's timely reconsideration request under the standards for timely reconsideration requests, to be followed by the issuance of an appropriate decision.

In a June 1, 2016 decision, OWCP denied modification of its March 12, 2014 decision, noting that OWCP properly adjusted appellant's compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager.

---

<sup>8</sup> Docket No. 16-0038 (issued February 8, 2016).

## LEGAL PRECEDENT

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>9</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>10</sup> The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>11</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>12</sup> The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.<sup>13</sup>

## ANALYSIS

The Board finds that this case must be remanded to OWCP for further development because OWCP has not considered the question of whether appellant met his burden of proof to modify OWCP's June 15, 2011 loss of wage-earning capacity determination.

In this case, OWCP essentially determined that the issue presented was whether it had met its burden of proof to adjust appellant's compensation, effective June 5, 2011, based on his ability to earn wages in the constructed position of operations manager. Under the circumstances of this case, however, the Board finds that the issue presented was whether appellant met his burden of proof to modify OWCP's June 15, 2011 loss of wage-earning capacity determination.

As noted above, the question of whether a given claimant has met his or her burden of proof to modify a loss of wage-earning capacity determination involves a three-prong standard.<sup>14</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

---

<sup>9</sup> *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

<sup>10</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>11</sup> *Id.*

<sup>12</sup> *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>13</sup> *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>14</sup> *See supra* note 12.

injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>15</sup> With respect to the third prong of this test, the Board notes that it affirmed OWCP's March 1, 2012 decision, finding that OWCP had properly adjusted appellant's compensation to zero effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager. The Board determined in that case that OWCP had properly found that appellant was vocationally and physically able to perform the operations manager position and that it was reasonably available within his commuting area.

The Board has held that, when a wage-earning capacity determination has been issued and a claimant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>16</sup> In this case, appellant submitted medical evidence, including reports from his attending physicians, Drs. Wood and Mudgal, which he claimed showed an increased disability that prevented him from working in the constructed position of operations manager. The burden of proof to modify OWCP's June 5, 2011 loss of wage-earning capacity determination would be on appellant as he is the party requesting modification.<sup>17</sup>

The Board finds that appellant's claim for compensation raised the issue of whether he met his burden of proof to modify OWCP's June 15, 2011 loss of wage-earning capacity determination. The case is remanded to OWCP for further development, including a determination of whether appellant met his burden of proof to modify OWCP's June 15, 2011 loss of wage-earning capacity determination. After carrying out this development, OWCP shall issue a *de novo* decision on this matter.

### CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to modify OWCP's June 15, 2011 loss of wage-earning capacity determination.

---

<sup>15</sup> *Id.*

<sup>16</sup> See generally *Katherine T. Kreger*, 55 ECAB 633 (2004). The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the loss of wage-earning capacity determination. See *id.*

<sup>17</sup> See *supra* note 13.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 1, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Issued: June 26, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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