

counselor determined that there were two positions that appellant could perform with training listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT), an information clerk, DOT No. 237.367.022, with a \$446.00 weekly wage-earning capacity, and customer service representative, DOT No. 237.367.014, with a \$550.80 weekly wage-earning capacity. The labor market surveys indicated that these positions were within appellant's restrictions, reflected his ability to earn wages, and were reasonably available in his commuting area. On August 19, 2015 the rehabilitation counselor informed OWCP that appellant had failed to attend the start of training on August 17 and 18, 2015 for the two positions.

By decision dated October 28, 2015, OWCP reduced appellant's compensation pursuant to 5 U.S.C. § 8113(b), effective November 15, 2015, to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. It determined that appellant had failed, without good cause, to undergo vocational rehabilitation, as directed. With respect to his wage-earning capacity, OWCP further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of information clerk for substantially higher wages than the wages for the position held when injured.

On March 22, 2016 appellant requested reconsideration. By decision dated March 30, 2016, OWCP denied appellant's request for reconsideration of the merits of the claim. It found that the evidence submitted in support of reconsideration was irrelevant or immaterial.

In a March 20, 2017 letter, appellant, through counsel, again requested reconsideration of the October 28, 2015 wage-earning capacity decision. Counsel contended that OWCP did not consider the fact that appellant had severe heart disease prior to his accepted October 29, 2012 employment injury. Counsel indicated that an accompanying medical record from Dr. Jesus Carlos, a Board-certified internist, supported his contention. In a July 17, 2017 letter, he requested that OWCP provide the status of his March 20, 2017 request for modification.

By letter dated August 21, 2017, an OWCP claims examiner explained to counsel why the medical evidence submitted by appellant in support of his request for modification of its wage-earning capacity decision and other medical evidence of record were insufficient to establish that he had heart disease prior to his accepted October 29, 2012 work injury. She concluded that "[t]he October 28, 2015 decision is not modified." The August 21, 2017 letter did not provide appeal rights.

On September 5, 2017 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative regarding a purported August 21, 2017 decision.

In a September 26, 2017 letter, OWCP advised appellant that the correspondence dated August 21, 2017 was an informational letter and not a final OWCP decision, and thus the case was not in posture for a hearing. The September 26, 2017 correspondence did not provide appeal rights.

The Board, having duly considered the matter, notes that its jurisdiction is limited to the review of final adverse decisions issued under the Federal Employees' Compensation Act²

² 5 U.S.C. § 8149; 20 C.F.R. §§ 501.2(c) and 501.3(a).

(FECA). Section 8124(a) of FECA³ and section 10.126 of the implementing regulations⁴ require that final decisions of OWCP contain findings of fact and a statement of reasons and be accompanied by information about the claimant's appeal rights.

While the August 21, 2017 letter was not accompanied by appeal rights, the Board finds that it is a final adverse decision issued by OWCP. This letter contained findings of fact and a statement of reasons.⁵ The August 21, 2017 letter also specifically concluded that "[t]he October 28, 2015 decision is not modified." Given the circumstances of this case, the Board concludes that the August 21, 2017 letter was an appealable final decision subject to review under 20 C.F.R. §§ 501.2(c) and 501.3(a).

As OWCP's August 21, 2017 decision constitutes a final adverse decision in denying modification of its October 28, 2015 wage-earning capacity determination, the Board will remand the case to OWCP for proper adjudication of appellant's request for a telephonic hearing with an OWCP hearing representative regarding this matter. Following this and any necessary further development, OWCP shall issue a *de novo* decision in order to protect appellant's appeal rights.

IT IS HEREBY ORDERED THAT the September 26 and August 21, 2017 decisions are set aside and the case is remanded to the Office of Workers' Compensation Programs for issuance of an appropriate decision consistent with this order of the Board.

³ 5 U.S.C. § 8124(a).

⁴ 20 C.F.R. § 10.126.

⁵ *Id.*; 5 U.S.C. § 8124(a).

Issued: February 25, 2019
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