

On June 12, 2019 OWCP referred appellant for a second opinion examination regarding his work capacity. In a July 2, 2019 medical report, Dr. Stephen Saris, a Board-certified

orthopedic surgeon and second opinion physician, noted appellant's history of injury and medical treatment, and reviewed medical records. He discussed examination findings and diagnosed the accepted condition of T7-12 compression fracture. Dr. Saris advised that appellant had fully recovered from his thoracolumbar surgery and opined that given his intact neurological examination and imaging, he could return to sedentary work. He explained that appellant could not return to his former job due to his injury, deconditioning, and increased age. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Saris noted that appellant could work eight hours per day with restrictions that would apply for an indefinite period.

On September 10, 2019 OWCP requested that appellant submit a report from his physician addressing his accepted employment-related condition and disability from work.

In an October 4, 2019 letter, the employing establishment informed OWCP that it had no jobs on base that appellant could safely perform in accordance with Dr. Saris' July 2, 2019 report. It requested that OWCP proceed with vocational rehabilitation for placement in employment in the private sector.

On November 5, 2019 OWCP referred the case to a vocational rehabilitation counselor based on Dr. Saris' work restrictions.

In an undated rehabilitation action report received by OWCP on January 21, 2020, a vocational rehabilitation counselor noted that appellant had not been an active participant in the vocational rehabilitation process.

A memorandum of telephone call (Form CA-110) dated February 20, 2020 indicated that appellant did not want to participate in vocational rehabilitation. An April 6, 2020 Form CA-110 indicated that appellant contended that he was aged and according to his wife he had dementia.

On April 10, 2020 the vocational rehabilitation counselor identified the position of printed circuit board assembly, Department of Labor, *Dictionary of Occupational Titles (DOT)* No. 726.684-110 as suitable to appellant's work experience, physical restrictions, and education.

In a March 20, 2020 letter, Dr. Peter Crosson, an attending Board-certified internist, requested that appellant be excused from work due to his cognitive deficit and severe osteoarthritis.

In a June 11, 2020 letter, appellant informed OWCP that he was unable to participate in vocational rehabilitation and could not return to gainful employment due to his health issues and age. He submitted an additional letter of even date from Dr. Crosson, who advised that appellant was unable to perform sedentary or physical work due to permanent pain issues related to his 2005 work-related thoracic condition and subsequent surgical repairs.

OWCP, in a letter dated August 19, 2020, notified appellant of the penalties under 5 U.S.C. § 8113(b) for failing to cooperate with vocational rehabilitation without good cause. It noted that the results of tests and evaluations performed by the vocational rehabilitation counselor clearly showed that he could perform the duties of a printed circuit board assembly person. OWCP advised appellant that, if he failed or refused to participate in vocational rehabilitation without

good cause, his compensation benefits would be reduced. It afforded him 30 days to contact OWCP and his rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return him to gainful employment. OWCP informed appellant that, if he believed he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. It noted that, if he did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b).

In a September 14, 2020 letter, Dr. Crosson continued to advise that appellant was unsuitable for work. He noted that appellant had severe osteoarthritis in the limbs and spine which required multiple surgeries, psoriatic arthritis in the joints which caused significant chronic pain, peripheral vascular disease of the legs, diastolic dysfunction of the heart, mild cognitive impairment which affected his ability to perform tasks requiring mental concentration and to undergo complex tasks, and peripheral neuropathy which affected his ability to ambulate and stand in one place for very long.

On October 28, 2020 OWCP closed its vocational efforts as appellant had refused rehabilitation services.

By decision dated November 20, 2020, OWCP reduced appellant's compensation to zero, effective November 8, 2020, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for his failure to cooperate with vocational rehabilitation without good cause. It noted that he did not respond to the August 19, 2020 letter.

On April 27, 2021 appellant requested reconsideration and submitted additional medical evidence including operative reports, discharge and post endoscopy instructions, diagnostic reports, laboratory test results, and a consent form dated from December 22, 2019 to March 18, 2021.

In a September 28, 2020 attending physician's report (Form CA-20), Dr. Crosson noted a date of injury as December 19, 2005. He diagnosed chronic back and other joint pain and checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by the December 19, 2005 employment activity of falling from a truck. Dr. Crosson advised that appellant was totally disabled from work.

Appellant also resubmitted copies of Dr. Crosson's March 20 and June 11, 2020 letters.

OWCP, by decision dated May 17, 2021, denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The Board, having duly considered the matter, concludes that the case is not in posture for decision.<sup>1</sup>

Modification of an LWEC determination is warranted if 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 erroneous.<sup>2</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>3</sup> Unlike reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting modification of a LWEC determination.<sup>4</sup>

The Board finds that appellant's April 27, 2021 request for reconsideration was, in fact, a request for modification of the November 20, 2020 LWEC determination. Appellant set forth evidence that his restrictions had changed and that he was totally disabled from work. It is well established that a claimant may establish that a modification of a LWEC determination is warranted if there has been a showing that there was, in fact, a material change in the nature and extent of his injury-related condition.<sup>5</sup>

The Board has held that when a LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.<sup>6</sup>

As OWCP improperly reviewed the case under the standard for a timely reconsideration request, the case must be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met his burden of proof to establish modification of his November 20, 2020 LWEC determination.<sup>7</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

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<sup>1</sup> *C.H.*, Docket No. 19-1114 (issued April 30, 2020); *B.H.*, Docket No. 18-1515 (issued June 20, 2019); *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

<sup>2</sup> 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

<sup>3</sup> *Id.* at § 10.511.

<sup>4</sup> *J.J.*, Docket No. 21-0479 (issued November 29, 2021); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>5</sup> See *L.M.*, Docket No. 20-1038 (issued March 10, 2021); see also *C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>6</sup> See *W.B.*, Docket No. 21-0272 (issued August 4, 2021); *L.P.*, Docket No. 18-1429 (March 8, 2019).

<sup>7</sup> See *L.H.*, Docket No. 18-1787 (issued July 29, 2019); *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).

**IT IS HEREBY ORDERED THAT** the May 17, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: June 1, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board