

**United States Department of Labor
Employees' Compensation Appeals Board**

A.P., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS LOGISTICS BASE, Albany, GA,
Employer**

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**Docket No. 11-152
Issued: July 12, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On October 25, 2010 appellant filed a timely appeal from a September 29, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. The Board docketed the appeal as No. 11-152.¹

This case has previously been before the Board. By decision dated August 7, 2003, the Board affirmed a March 29, 2002 OWCP decision that found that appellant did not establish that he had any disability on or after February 8, 2002 because the evidence did not support that his employment injury had worsened such that a March 27, 2001 wage-earning capacity determination that reduced his compensation to zero should be modified.² In a January 15, 2010 decision, the Board found that appellant did not meet his burden of proof to establish that the March 27, 2001 wage-earning capacity decision should be modified.³

¹ On December 6, 1999 appellant, then a 61-year-old recycling specialist, sustained an employment-related lumbar strain and displacement of intervertebral disc.

² Docket No. 02-1918 (issued August 7, 2003).

³ Docket No. 09-708 (issued January 15, 2010).

The Board has reviewed the case record and notes that on July 29, 2010 appellant requested reconsideration. Appellant attached a July 13, 2010 report from Dr. Russell L. Ingram, an attending Board-certified in family practitioner, who diagnosed lumbar degenerative disc disease with herniation causing right leg radiculopathy and noted that appellant continued to have low back pain and radicular right leg pain. Dr. Ingram advised that appellant attempted to work “this year” but could not for the 25 hours he was expected to and could not work at all at the present. By decision dated September 29, 2010, OWCP denied appellant’s request for merit review on the grounds that Dr. Ingram’s report was cumulative and repetitious.

As noted above, OWCP issued a formal decision on appellant’s wage-earning capacity on March 27, 2001, prior to the time he requested reconsideration on July 29, 2010. Board precedent and OWCP’s procedures direct the claims examiner to consider the criteria for modification when a claimant requests resumption of compensation for total wage loss.⁴ While appellant used the term reconsideration in his July 29, 2010 request, he submitted medical evidence in which his physician asserted that appellant’s condition had worsened.⁵ The Board finds that OWCP should have adjudicated the issue of modification of the wage-earning capacity determination.⁶ The Board will therefore remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant’s appeal rights.

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995) (if a formal decision on loss of wage-earning capacity is issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination).

⁵ 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 Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.11 (June 1996).

⁶ *F.B.*, Docket No. 09-99 (issued July 21, 2010).

IT IS HEREBY ORDERED THAT the September 29, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: July 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board