

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

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C.R., Appellant

and

DEPARTMENT OF THE NAVY, MARINE  
CORPS AIR STATION, Cherry Point, NC,  
Employer

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**Docket No. 12-577  
Issued: July 26, 2012**

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

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

On January 19, 2012 appellant filed a timely appeal from an October 25, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration without conducting a merit review.<sup>1</sup> The Board docketed the appeal as No. 12-577.<sup>2</sup>

The Board has reviewed the case record and notes that on May 3 and October 6, 2011 appellant requested reconsideration. Appellant maintained that the job on which the wage-earning capacity was based was fraudulent and his right knee condition had worsened. He submitted additional evidence some of which was previously of record. Appellant also submitted a May 18, 2011 treatment note in which Dr. George J. Miller, an attending Board-certified orthopedic surgeon, noted the employment-related right knee injury and appellant's

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<sup>1</sup> The October 25, 2011 decision referenced the correct legal precedent for modification of wage-earning capacity decisions, but ultimately denied the claim without considering the merits.

<sup>2</sup> The last merit decision in this case was an April 14, 2011 decision in which the Board affirmed April 16, 2010 OWCP decisions. These OWCP decisions modified a December 20, 1993 wage-earning capacity decision, to find entitlement to a period of compensation in part of 1993 and 1994 but otherwise found that the 1993 determination was correct. The Board found that appellant had not established that the April 16, 2010 wage-earning capacity determination should be modified. Docket No. 10-1631 (issued April 14, 2011).

surgical history. Dr. Miller advised that appellant complained of constant right knee pain and that he used a cane and a motorized wheelchair. He noted additional medical conditions including asthma, chronic obstructive pulmonary disease, heart disease with previous bypass surgery and prostate cancer. Dr. Miller provided physical examination findings for both knees, noting negative laxity and meniscal tests bilaterally. He commented that appellant had anterior right knee skin sensitivity with excellent stability and strong extension of the right knee. Dr. Miller advised that, when observing appellant walk without his cane about the office, he did not fall but walked slowly and that balance without his cane was adequate. He diagnosed joint leg pain and status post knee joint replacement. Dr. Miller opined that appellant's right knee problems were work related. In a July 2, 2011 letter to his Senator, appellant described his work and medical history. In its October 25, 2011 decision, OWCP denied appellant's request for merit review.

As noted, OWCP had issued a formal decision on appellant's wage-earning capacity on December 20, 1993 and modified that decision on April 16, 2010. These decisions were issued prior to the time that appellant requested reconsideration on May 3 and October 6, 2011 and prior to Dr. Miller's May 18, 2011 treatment note. Board precedent and OWCP's procedural manual directs the claims examiner to consider the criteria for modification when a claimant requests resumption of compensation for total wage loss.<sup>3</sup> While appellant used the term reconsideration in his May 3 and October 6, 2011 correspondence, he asserted that the previous decisions were in error and that his employment-related right knee condition had worsened. The Board finds that OWCP should have adjudicated the issue of modification of the wage-earning capacity determination.<sup>4</sup> 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.<sup>5</sup>

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<sup>3</sup> *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).

<sup>4</sup> *F.B.*, Docket No. 09-99 (issued July 21, 2010).

<sup>5</sup> Appellant, through his Senator, also asked for authorization to treat hearing problems. On August 15, 2011 OWCP informed appellant's congressional office that he should file an occupational disease claim for an employment-related hearing loss. The record before the Board does not indicate that appellant has filed a claim for an employment-related hearing loss.

**IT IS HEREBY ORDERED THAT** the October 25, 2011 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 26, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board