

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

G.E., Appellant

and

**DEPARTMENT OF AGRICULTURE,
SEQUOIA NATIONAL FOREST,
Portersville, CA, Employer**

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**Docket No. 13-649
Issued: October 21, 2013**

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

On January 28, 2013 appellant filed a timely appeal from an August 3, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration of previous decisions reducing appellant's compensation based on her capacity to earn wages as a telemarketer. The Board docketed the appeal as No. 13-649.

By decision dated December 14, 2004, OWCP reduced appellant's compensation based on her loss of wage-earning capacity (LWEC) in the constructed position of part-time telemarketer working 20 hours a week. In a November 15, 2007 decision, it further reduced the amount of compensation appellant was paid as it found that OWCP met its burden of proof to show that the original LWEC was in error. In decisions dated November 12, 2008, September 11, 2009 and November 2, 2010, OWCP denied modification of its decisions after conducting a merit review.

On November 16, 2011 OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to establish clear evidence of error. By decision dated March 12, 2012, it vacated the November 16, 2011 reconsideration decision insofar as it found appellant's request untimely. OWCP then reviewed appellant's request for reconsideration under

the standard for timely filed reconsideration requests and determined that the evidence and argument submitted was insufficient to warrant review of the merits of the case.

By letter dated April 5, 2012, appellant again requested reconsideration. She challenged the suitability of the position of telemarketer, contending that her commuting time was too long based on the medical evidence, that she was incapable of performing the duties of the position and that there were no positions available within the commuting distance allowed by her treating physician. Appellant also alleged that the pay rate was improperly calculated as it was not based on telemarketing positions in her commuting area. She submitted new medical evidence in the form of a January 23, 2012 report by Dr. Michael L. Ball, an osteopath, wherein he indicated that appellant has multilevel degenerative disc disease, that she will never be able to perform the firefighting job she had at time of injury due to her original work-related back injury and also the degeneration that has progressed due to the required surgery of her injury-related disc of L4-L5 and L5-S1 as well as other lumbar discs. Dr. Ball placed permanent restrictions on appellant, including requiring frequent breaks so she can lie down and frequent position changes. In a January 23, 2012 work capacity evaluation, he limited appellant's commuting time to 30 minutes. Dr. Ball also noted that due to increased pain and muscle spasms, appellant should be restricted to working five hours a day maximum. Appellant also submitted a duty status report dated March 19, 2002, a portion of a labor market survey dated September 2, 2004, and a medical report dated July 10, 2008. Thereafter, OWCP issued its August 3, 2012 decision denying appellant's request for reconsideration without conducting a merit review.

The Board has duly reviewed the matter and finds that the case is not in posture for decision. As noted, OWCP issued formal decisions on appellant's wage-earning capacity on December 14, 2004 and November 15, 2007. Board precedent and OWCP procedures direct the claims examiner to consider the criteria for modification of a LWEC determination when a claimant requests resumption of compensation for total wage loss.¹ While appellant used the term reconsideration in his requests, he argued that the December 14, 2004 and November 15, 2007 decisions were in error and submitted additional medical evidence.² The Board finds that OWCP should have adjudicated the issue of modification of the LWEC determination.³ The Board will therefore remand the case to OWCP for proper adjudication, to be followed by a *de novo* decision to preserve appellant's appeal rights.

¹ *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 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).

² 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 (October 2009).

³ *F.B.*, Docket No. 09-99 (issued July 21, 2010).

IT IS HEREBY ORDERED THAT the August 3, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: October 21, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board