

This case is on appeal to the Board for the second time. The Office accepted appellant's claim for an aggravation of a lumbar sprain/strain resulting from an employment injury on

April 1, 1998.¹ He filed claims for wage-loss compensation for the period July 8, 1998 to June 18, 2003. By decision dated September 25, 1998, the Office issued a loss of wage-earning capacity decision based upon appellant's temporary letter carrier position.² The Office noted his actual wages met or exceeded the wages of his date-of-injury job and fairly and reasonably represented his wage-earning capacity. By decision dated April 13, 1999, the Office hearing representative affirmed the Office's September 25, 1998 decision. In a September 25, 2000 decision, the Board affirmed the Office hearing representative's April 13, 1999 decision, finding that his actual earnings in the position of temporary letter carrier represented his wage-earning capacity as of September 28, 1998.

Subsequent to the April 13, 1999 hearing representative's decision, the Office received reports from Dr. Mollie Holtzman, a Board-certified physiatrist, Dr. Y.C. Joe Chen, a Board-certified anesthesiologist with a subspecialty certification in pain management, Dr. Howard L. Smith, a Board-certified neurological surgeon, and Dr. John J. McCloskey, a treating Board-certified neurological surgeon, an August 12, 1999 functional capacity evaluation and a January 28, 2000 computerized tomography (CT) scan of the lumbar and cervical spine.

Subsequent to the Board's decision, the Office received additional reports from Dr. McCloskey and Dr. Jeffrey T. Laseter, a treating physician, a November 16, 2000 lumbar discography surgical report and a November 16, 2000 CT scan.

Appellant filed a recurrence of disability claim on May 9, 2001 alleging a recurrence of disability beginning July 7, 1998.

By decision dated July 26, 2001, the Office denied appellant's claim for a recurrence of disability on and after July 7, 1998 due to his accepted April 1, 1998 employment injury.³

Subsequent to the denial of his recurrence claim, the Office received reports from Dr. Douglas A. McDowell, a Board-certified emergency medicine physician, Dr. Laseter and Dr. McCloskey, a February 9, 2004 magnetic resonance imaging (MRI) scan and reports dated January 30, March 11 and May 9, 2004 and a March 11, 2003 capacity evaluation form by Dr. Tim D. Jackson, a second opinion Board-certified orthopedic surgeon.⁴

Appellant filed a recurrence of disability claim on August 11, 2003 alleging a recurrence of disability beginning July 7, 1998. In a letter dated October 31, 2003, the Office noted that his recurrence claim was similar to recurrence claim denied on July 26, 2001 and that "it has been

¹ Docket No. 99-2246 (issued September 25, 2000). Appellant was a temporary city mail carrier whose one year-term expired on July 7, 1998. On November 22, 2001 he filed a traumatic injury claim alleging that his lower back pain and dislocated sacrum were due to his April 1, 1998 employment injury.

² Appellant accepted the April 24, 1998 limited-duty position on May 5, 1998.

³ Appellant, on August 11, 2003, subsequently filed another claim for a recurrence of disability beginning July 7, 1998. On July 7, 2004 the Office issued him a schedule award for a 10 percent impairment of the left leg and a 7 percent impairment of the right leg. In his appeal letter, appellant specifically stated that he was appealing the denial of his claim for lost wages and made no reference to dissatisfaction with the schedule award decision.

⁴ Appellant was referred to Dr. Jackson for an evaluation on his schedule award claim.

determined that, since the recurrences were for the same thing,” he needed to follow the appeal rights noted in that decision.

On July 19, 2004 the Office received a June 10, 2004 report by Dr. Brian Tsang, a Board-certified anesthesiologist. He noted an April 1, 1998 injury date and diagnosed left lower extremity radiculopathy, back pain, myofascial pain, muscle spasm and left SI arthropathy.

In a letter dated July 29, 2004, appellant requested reconsideration on the denial of his claim for lost wages. He stated that the claim “was denied on October 31, 2003 for the period July 8, 1998 to the present.” Appellant noted that he was granted a schedule award under a different claim number on May 9, 2004,⁵ “after my los[t] wages was denied for lack of medical evidence.”

On October 5, 2004 the Office received a July 5, 2004 report by Dr. Tsang, in which he diagnosed left lower extremity radiculopathy, back pain, myofascial pain and muscle spasm and left SI arthropathy.

In a nonmerit decision dated November 5, 2004, the Office denied appellant’s request for reconsideration pursuant to 5 U.S.C. § 8128(a), finding that it was untimely filed and failed to present clear evidence of error. The Office explained that appellant did not submit new and relevant evidence or present legal contentions not previously considered and did not provide any evidence demonstrating error by the Office in issuing the July 26, 2001 decision or demonstrating that the decision was incorrect at the time of issuance.”

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

⁵ Office File No. 060700366.

⁶ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

⁷ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

ANALYSIS

The Office considered appellant's July 29, 2004 correspondence as a request for reconsideration pursuant to 5 U.S.C. § 8128(a) and found that he did not submit new, relevant evidence or raise legal contentions not previously considered.⁹ Additionally, appellant did not demonstrate error on the part of the Office in issuing the July 26, 2001 decision or that the decision was incorrect. However, appellant's contention in his July 29, 2004 request is that he became totally disabled and was unable to work as a temporary letter carrier. In effect, he is requesting modification of the Office's September 25, 1998 formal wage-earning capacity decision. The request for modification in this case is not a request for review of the July 26, 2001 decision under 5 U.S.C. § 8128(a). It is a request for additional compensation. The Board finds that the Office improperly characterized appellant's July 29, 2004 letter as a request for reconsideration subject to the limited review set forth in 20 C.F.R. § 10.606.

CONCLUSION

The Board finds that appellant's requested modification of the September 25, 1998 loss of wage-earning capacity determination and is entitled to a merit decision on that issue. The case will be remanded for the Office to address the merits of his request for modification. On remand the Office should develop the record as necessary and issue a decision with regard to appellant's loss of wage-earning capacity.

⁹ See *Emmit Taylor*, Docket No. 03-1178 (issued July 21, 2004) (the Board set aside the Office decision denying appellant's reconsideration request and remanded for the Office to address the merits of his request for modification of a loss of wage-earning capacity decision).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision.

Issued: July 19, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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