United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 09-791**
	)	**Issued: November 13, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Syracuse, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2009 appellant filed a timely appeal from January 30 and September 24, 2008 merit decisions of the Office of Workers' Compensation Programs denying modification of its wage-earning capacity determination. He also appeals a January 12, 2009 nonmerit decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the January 12, 2009 nonmerit decision.

ISSUES

The issues are: (1) whether appellant established that his wage-earning capacity determination should be modified; (2) whether the Office, in its September 24, 2008 decision, properly denied modification of its wage-earning capacity determination; and (3) whether the Office properly denied appellant's request for a hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On February 6, 1998 appellant, then a 46-year-old letter carrier, filed an occupational disease claim alleging that he experienced left knee pain causally related to factors of his federal

employment. The Office accepted his claim for bilateral tendinitis of the knee and bilateral chondromalacia patella.

On October 5, 2001 appellant accepted a position as a city carrier with restrictions. The position required continuous standing for two hours per day, intermittent standing for six hours per day, reaching above the shoulders for two hours per day, continuous twisting for two hours per day, bending and stooping for a half hour each day and continuous grasping. By decision dated June 15, 2002, the Office determined that appellant's actual earnings as a modified letter carrier effective October 5, 2001 fairly and reasonably represented his wage-earning capacity and established that he had no loss of wage-earning capacity.

On November 19, 2007 appellant filed a notice of recurrence of disability on October 18, 2007 causally related to his January 27, 1998 work injury. He stopped work on October 18, 2007.

In a report dated October 22, 2007, Dr. Wayne A. Eckhardt, a Board-certified orthopedic surgeon, evaluated appellant for bilateral knee pain and noted that x-rays showed "moderate narrowing of the lateral compartment of the patellofemoral joint with some spurring and mild osteopenia, but his findings are really not that great." He found that his pain "far outstrips his physical findings and has consistently over the years." Dr. Eckhardt stated, "At this point I have taken [appellant] out of work because of chronic pain in his knees." He reiterated "in terms of physical findings there is very little in the way of strong objective findings, both on x-ray and physical examination, to explain all the pain that he is having."

Appellant underwent a functional capacity evaluation on October 30, 2007 which demonstrated that he could work at a sedentary/light level for eight hours per day. On November 1, 2007 Dr. Carri A. Jones, a Board-certified physiatrist, diagnosed mild patellofemoral arthritis and noted that he had a "subjective history of severe pain…." She found a reactive anxiety/depressive component and asserted that appellant's symptoms outweighed the findings. Dr. Jones opined that he could stand and walk for half of the workday and perform sedentary work for the remainder of the day.

By letter dated November 23, 2007, the Office informed appellant of the criteria for modification of a wage-earning capacity determination. It advised that he must submit medical evidence showing a material worsening of his accepted work injury.

On December 7, 2007 Dr. Timothy Izant, a Board-certified orthopedic surgeon, noted that appellant had "gone off work because the demand level has gone beyond his restrictions, which has caused him pain, and therefore he was pulled out of work by Dr. Eckhardt. He states that his condition is the same." Dr. Izant found no effusion and moderate crepitation in the patellofemoral compartment on examination. He diagnosed patellofemoral syndrome, knee joint pain and osteopenia. Dr. Izant recommended work restrictions in accordance with the findings of the functional capacity evaluation.

On December 11, 2007 appellant accepted a modified position with the employing establishment requiring eight hours of intermittent standing and sitting.

By decision dated January 30, 2008, the Office denied modification of its June 15, 2002 wage-earning capacity determination. It found that the medical evidence was insufficient to show that appellant's condition materially worsened such that the wage-earning capacity finding should be modified.

In a work restriction evaluation dated July 11, 2008, Dr. Izant diagnosed crepitus of the lower leg joint, knee joint pain, patellofemoral syndrome and osteopenia. He found that appellant was partially disabled. In an accompanying duty status report, Dr. Izant listed work restrictions of standing intermittently up to four hours per day, walking intermittently up to six hours per day, lifting intermittently 11 to 18 pounds, three hours per day, pushing and pulling intermittently one hour per day and no climbing, bending or stooping. In a progress report dated July 15, 2008, he asserted that it would not be appropriate to change the work restrictions outlined in his previous report.

On July 23, 2008 appellant filed a recurrence of disability claim beginning June 23, 2008 causally related to his January 27, 1998 work injury. He related that the employing establishment did not provide him work beginning June 23, 2008. On the claim form, the employing establishment indicated that it was looking for positions within his restrictions and trying to obtain clarification from his physician as to his limitations. Appellant missed intermittent days of work because there was no work available. On July 23, 2008 he also filed claims for compensation on account of disability (Form CA-7) requesting wage-loss compensation beginning June 23, 2008.

On July 29, 2008 the Office again informed appellant of the evidence necessary to establish modification of a wage-earning capacity determination. It requested a reasoned report from his attending physician describing how and why his condition had materially worsened.

In a report dated August 8, 2008, Dr. Izant indicated that he was treating appellant for increased knee symptoms. He stated:

> "[Appellant's] symptoms are progressing and his condition seems to be worsening. At some point [he] is going to have to consider vocational rehab[ilitation] training for a job that is more suitable for him that he can tolerate. The physical demands and activities of a mail carrier are not being tolerated by [him] at this point. I do [not] foresee that he is going to tolerate most of these activities in the future either."

By decision dated September 24, 2008, the Office denied modification of its June 15, 2002 wage-earning capacity determination.

In a letter dated October 20, 2008, received by the Office on November 25, 2008, appellant requested an oral hearing. The letter was postmarked November 21, 2008.

By decision dated January 12, 2009, the Office denied appellant's request for a hearing as untimely.

LEGAL PRECEDENT -- ISSUES 1 & 2

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.[1] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[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.[3] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[4]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral knee tendinitis and chondromalacia patella due to factors of his federal employment. Appellant accepted a modified position as a city carrier on October 5, 2001. By decision dated June 15, 2002, the Office found that his actual earnings in his October 5, 2001 position fairly and reasonably represented his wage-earning capacity.

In order to establish modification of the established wage-earning capacity determination, appellant has the burden of proof to show either that the original determination was erroneous or that his condition worsened such that he could no longer perform the duties of his position.[5] On November 9, 2007 he filed a notice of recurrence of disability on October 18, 2007 due to his accepted work injury. In a report dated October 22, 2007, Dr. Eckhardt found that appellant's complaints of knee pain exceeded the physical findings. He took appellant off work due to knee pain, again noting that "there is very little in the way of strong objective findings, both on x-ray and physical examination, to explain all the pain that he is having." Dr. Eckhardt did not find a material change in appellant's condition such that he was unable to perform his work duties. He opined that appellant should not work due to knee pain; however, pain is a general description of symptoms rather than a clear diagnosis of a medical condition, and does not constitute a basis for the payment of compensation.[6] Dr. Eckhardt did not specifically relate any increase in

[1] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

[2] *Sharon C. Clement*, 55 ECAB 552 (2004).

[3] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[4] *Id*.

[5] *K.S.*, 60 ECAB ___ (Docket No. 08-2105, issued February 11, 2009); *C.W.*, 60 ECAB ___ (Docket No. 07-1816, issued January 16, 2009).

[6] *Robert Broome*, 55 ECAB 339 (2004).

symptoms to the accepted employment injury and thus his opinion is of diminished probative value.[7]

On November 1, 2007 Dr. Jones diagnosed patellofemoral arthritis and indicated that appellant had a "subjective history of severe pain." She found that he could stand and walk for half of the workday and perform sedentary work for the rest of the day. Dr. Jones did not address the cause of appellant's work restrictions and thus her report is of little probative value. Medical evidence that does not offer an opinion on the cause of an employee's condition is of limited probative value on the issue of causal relationship.[8]

On December 7, 2007 Dr. Izant noted that Dr. Eckhardt had taken appellant off work because the duties exceeded his physical limitations. He diagnosed patellofemoral syndrome, knee joint pain and osteopenia. Dr. Izant found that appellant could perform work in accordance with the October 30, 2007 functional capacity evaluation. The functional capacity evaluation indicated that appellant could perform sedentary/light duty for eight hours per day. Dr. Izant did not attribute appellant's work restrictions to his employment injury and did explain how the accepted conditions of bilateral knee tendinitis and chondromalacia patella worsened such that he was unable to perform his duties as a modified city carrier.[9] The Office thus properly found in its January 30, 2008 decision that appellant did not establish that the June 15, 2002 wage-earning capacity determination should be modified.

ANALYSIS -- ISSUE 2

On July 23, 2008 appellant filed a recurrence of disability claim beginning June 23, 2008. He asserted that the employing establishment did not have work available within his work restrictions and filed a claim for intermittent periods missed from work. As discussed, Office procedures and Board case law require that once a formal wage-earning capacity decision is in place, 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 rehabilitative, or the original determination was, in fact, erroneous.[10] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[11]

Appellant has not submitted any evidence showing that the original determination was erroneous.[12] The issue, therefore, is whether he has established a material change in the nature and extent of his injury-related condition warranting modification of the June 15, 2002 wage-

[7] *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2005).

[8] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *See T.M.*, *supra* note 7.

[10] *See C.W.*, *supra* note 5.

[11] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[12] The Board cannot consider evidence that was not weighed by the Office in its last merit decision; *see* 20 C.F.R. § 501.2(c).

earning capacity determination. In a work restriction evaluation dated July 11, 2008, Dr. Izant diagnosed crepitus of the lower leg joint, knee joint pain, patellofemoral syndrome and osteopenia. He found that appellant was partially disabled and listed increased work restrictions. Dr. Izant reiterated his work restrictions in a July 15, 2008 progress report. He did not, however, specifically relate appellant's work restrictions to a progression of his accepted condition or explain how his condition worsened to the degree that he was unable to work in the modified city carrier position approved by the Office in June 2002. To be of probative value, the opinion of a physician must be based on a complete and accurate factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the relationship between the diagnosed conditions and appellant's employment.[13]

On August 8, 2008 Dr. Izant asserted that appellant's symptoms were progressing and that "at some point" he would need to find another position. He diagnosed crepitus, osteopenia, knee joint pain and patellofemoral syndrome. Dr. Izant found that appellant was unable to tolerate the physical requirements for a mail carrier but could work limited duty. As he did not specifically address whether appellant was able to perform the physical requirements of his modified position of city carrier, his report is of diminished probative value. Appellant, consequently, has not submitted medical evidence sufficient to establish a material change in the nature and extent of his employment-related conditions.

Appellant, however, is not precluded from receiving wage-loss compensation for intermittent periods even though a formal wage-earning capacity determination has been issued.[14] Beginning in June 2008, he claimed intermittent wage-loss compensation because he was sent home as there was no work available within his restrictions. Thus, upon return of the case record, the Office should adjudicate appellant's CA-7 claims for compensation.

On appeal appellant argues that the Office did not consider all of the pertinent medical information. There is no evidence, however, that the Office failed to properly review the case record.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[15] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[16]

[13] *John F. Glynn*, 53 ECAB 562 (2002); *Allen C. Hundley*, 53 ECAB 551 (2002).

[14] *See Sandra D. Pruitt*, 57 ECAB 126 (2005).

[15] 5 U.S.C. § 8124(b)(1).

[16] *Leona B. Jacobs*, 55 ECAB 753 (2004).

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[17]

Section 10.616(a) further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[18]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.[19] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[20]

ANALYSIS -- ISSUE 3

The Office issued a decision on September 24, 2008 denying modification of its June 15, 2002 wage-earning capacity determination. Appellant sought an oral hearing by letter dated October 20, 2008 and postmarked November 21, 2008. The Office denied his hearing request as untimely by decision dated January 12, 2009. As appellant's request for a hearing was postmarked more than 30 days after the Office issued its September 24, 2008 decision, he was not entitled to a hearing as a matter of right.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter or right.[21] It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from

[17] 20 C.F.R. § 10.615.

[18] *Id.* at § 10.616(a).

[19] *See André Thyratron*, 54 ECAB 257 (2002).

[20] *Sandra F. Powell*, 45 ECAB 877 (1994).

[21] *Afegalai L. Boone*, 53 ECAB 533 (2002).

established facts.[22] The evidence of record does not establish that the Office committed any action in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion. For these reasons, the Office properly denied his request for an oral hearing as untimely under section 8124 of the Act.

CONCLUSION

The Board finds that the Office, in its January 30 and September 24, 2008 decisions, properly denied modification of the established wage-earning capacity determination. The Board further finds that the Office properly denied appellant's request for a hearing as untimely under section 8124.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 12, 2009 and September 24 and January 30, 2008 are affirmed.

Issued: November 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[22] *See André Thyratron*, *supra* note 19.