United States Department of Labor
Employees' Compensation Appeals Board

W.P., Appellant	)	
and	)	**Docket No. 07-834**
	)	**Issued: December 18, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Birmingham, AL, Employer	)	

Appearances:
John M. Poti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 1, 2007 appellant, through his attorney, filed an appeal from a November 3, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration. He did not appeal the September 29, 2006 merit decision affirming prior denials of a schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit denial of reconsideration.

ISSUE

The issue is whether the Office properly determined that appellant's October 16, 2006 request for a review of a July 18, 2003 wage-earning capacity determination constituted an untimely request for reconsideration.

FACTUAL HISTORY

The Office accepted that on December 5, 1997 appellant, then a 44-year-old food service worker, sustained a lumbar strain and herniated lumbar disc when pushing a cart up a ramp. He

underwent an L4-5 microdiscectomy on July 29, 1998. Appellant returned to a modified-duty position at the employing establishment beginning on December 8, 1998.

In an October 22, 2002 report, Dr. Billy Y. Chiou, an attending Board-certified physiatrist, opined that appellant required a 20-minute rest break each hour according to a 1999 functional capacity evaluation. In a November 12, 2002 report, Dr. Chiou opined that an October 2002 functional capacity evaluation showed that appellant's condition had improved and he required only a 10 minute rest break each hour. Appellant remained in the limited-duty position.

On November 27, 2002 the employing establishment withdrew the limited-duty position in which appellant worked. The Office accepted appellant's November 30, 2002 claim for a recurrence of disability on the grounds that his light-duty position was no longer available. He received compensation for temporary total disability commencing December 1, 2002.[1]

In January 2003, the Office referred appellant for a vocational rehabilitation program. A vocational rehabilitation counselor interviewed appellant and assessed his academic and vocational abilities. In a March 11, 2003 report, the vocational rehabilitation counselor identified the position of parking lot attendant as commensurate with appellant's education, vocational aptitudes and medical restrictions. The position was described as sedentary. The counselor asserted that the position was reasonably available in appellant's commuting area. After a 90-day placement effort did not result in appellant's employment, the Office closed the vocational rehabilitation effort effective May 14, 2003.

By notice dated June 5, 2003, the Office advised appellant of its preliminary determination that the position of parking lot attendant reasonably represented his wage-earning capacity. It explained that the position was commensurate with his vocational aptitudes and medical restrictions. In response, appellant submitted an April 11, 2003 letter from Dr. Richard C. Dale, an attending family practitioner and an April 15, 2003 letter from Dr. James Halsey, an attending neurologist, both stating that appellant was totally disabled for work due to the accepted December 5, 1997 injury.

By decision dated July 18, 2003, the Office found that the selected position of parking lot attendant was suitable work within his medical restrictions and properly represented his wage-earning capacity. It reduced appellant's compensation effective August 10, 2003, based on his ability to earn wages in the selected position.

In late 2003, the Office conducted development regarding a schedule award claim appellant originally made on November 8, 2002. It found a conflict of medical opinion between appellant's attending physician and a second opinion examiner for the Office. In a January 27, 2004 report, Dr. John Weaver, a Board-certified orthopedic surgeon and impartial medical examiner, found that the accepted lumbar injury caused no permanent impairment of the lower extremities according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. An Office medical adviser reviewed Dr. Weaver's report

[1] Appellant's application for disability retirement benefits through the Office of Personnel Management (OPM) was approved effective February 25, 2003.

on April 15, 2004 and concurred with his finding of a zero percent impairment of the lower extremities.

By decision dated April 16, 2004, the Office denied a schedule award for lower extremity impairment related to the accepted lumbar injury. In an April 15, 2005 letter, appellant requested reconsideration, asserting that the Office medical adviser's report was not well rationalized. By decision dated July 5, 2005, the Office denied modification. Appellant again requested reconsideration by July 1, 2006 letter, asserting that Dr. Weaver's report was insufficiently rationalized. He submitted additional evidence. By decision dated September 29, 2006, the Office again denied modification.

By letters dated October 2 and 16, 2006, appellant, through his representative, requested reconsideration of the Office's July 18, 2003 decision. Appellant asserted that the July 18, 2003 wage-earning capacity determination was in error as he was totally disabled for work prior to that decision. He noted that he remained totally disabled for work due to chronic lumbar pain and sciatica. Appellant also asserted that Dr. Chiou's recommendation of periodic rest breaks would have made it impossible for him to work as a parking lot attendant. He submitted a September 3, 2006 report from Dr. Halsey finding him totally disabled for work due to back pain, chronic sciatica and radiculopathy related to the accepted lumbar injury.

By decision dated November 3 2006, the Office denied reconsideration of the July 18, 2003 decision on the grounds that the application was not timely filed within the one-year time limitation under 20 C.F.R. § 10.607(a) and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination. 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.[2] The burden of proof is on the party attempting to show modification.[3] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[4]

[2] *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). *See also Tamra McCauley*, 51 ECAB 375 (2000).

[3] *Darletha Coleman*, 55 ECAB 143 (2003).

[4] *Gary L. Moreland*, 54 ECAB 638 (2003). *See also Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004) (in *Peoples* and *Taylor*, the Board determined that the claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside the Office's decision denying appellant's reconsideration request as untimely and remanded for the Office to address the merits of his request for modification of a loss of wage-earning capacity decision).

ANALYSIS

The Office considered appellant's October 16, 2006 correspondence as a request for reconsideration of the July 18, 2003 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the request untimely and that appellant did not submit relevant evidence or legal argument establishing clear evidence of error. In his October 16, 2006 correspondence, appellant used the term "reconsideration." However, his letter asserts that the July 18, 2003 wage-earning capacity determination was made in error as he was totally disabled for work on or before that date. Appellant's October 16, 2006 letter is a request for modification of the Office's July 18, 2003 wage-earning capacity determination.[5] This request for modification is not a request for a review of the July 18, 2003 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized appellant's October 16, 2006 letter as a request for reconsideration subject to the one year time limitation set forth at 20 C.F.R. § 10.607(a).

The Board finds that appellant has requested modification of the July 18, 2003 wage-earning capacity determination. He is entitled to a merit review on that issue. On remand, the Office shall adjudicate appellant's request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.[6]

CONCLUSION

The Board finds that appellant requested modification of the July 18, 2003 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to the Office for all necessary development and issuance of an appropriate decision.

[5] *See Gary L. Moreland*, *supra* note 4.

[6] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2006 is set aside and the case remanded for further action consistent with this decision.

Issued: December 18, 2007
Washington, DC

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

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

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