

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. MORELAND and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 03-1063; Submitted on the Record;
Issued June 20, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's November 26, 2002 request for review of a loss of wage-earning capacity determination constituted an untimely request for reconsideration.

On March 25, 1988 appellant, then a 38-year-old electronics mechanic, sustained a right ankle sprain in the performance of duty. Appellant underwent arthroscopic surgery on July 22, 1988, which the Office authorized. He returned to part-time, limited duty; working four hours per day and the Office placed appellant on the periodic compensation rolls effective June 4, 1989. On March 11, 1992 the Office awarded appellant a schedule award for a 20 percent impairment of his right lower extremity.

Effective May 12, 1995, the employing establishment relieved appellant of his duties due to his ongoing disability. Following appellant's separation from duty, the Office paid wage-loss compensation for temporary total disability.

In June 1997, appellant began participating in vocational rehabilitation. The program objective was to provide training in information systems technology, which the Office approved on November 24, 1997. Appellant completed the instructional component of his rehabilitation program in February 2000. He received a diploma in information systems technology with a cumulative grade point average of 3.34. Appellant also received job placement assistance through May 16, 2000.

In a decision dated November 28, 2000, the Office found that the constructed position of computer programmer represented appellant's wage-earning capacity. Accordingly, the Office reduced appellant's compensation to reflect his ability to earn wages as a computer programmer.

On November 26, 2002 appellant requested reconsideration. By decision dated December 20, 2002, the Office denied appellant's request for reconsideration on the basis that the request was untimely and appellant failed to present clear evidence of error.

The Board finds that the Office improperly determined that appellant's November 26, 2002 request for review of the loss of wage-earning capacity determination was an untimely request for reconsideration.

In his November 26, 2002 correspondence, appellant alleged that the Office failed to respond to various letters he submitted between November 3, 2000 and February 19, 2002. Appellant also took issue with some of the vocational rehabilitation services he received. He argued that his limited skills in the areas of reading, spelling and written expression precluded him from obtaining work as a computer programmer. Appellant also noted that his rehabilitation specialist was unable to secure any employment interviews during the 90-day placement period. Lastly, appellant indicated that he was limited due to bilateral carpal tunnel syndrome. He argued that this condition, which had been accepted by the Office (A14-231233), should have been taken into consideration in determining his ability to perform work as a computer programmer. Appellant noted that he underwent surgery on May 24, 2002 for carpal tunnel syndrome and that he had permanent restrictions. He submitted a report of physical limitation from Dr. Michael McManus, who stated as of November 25, 2002, that appellant may use a keyboard/mouse 20 minutes at a time, 4 hours per day maximum.¹

The computer programmer position the Office found vocationally and medically suitable required, among other things, frequent reaching and fingering. Appellant could be reasonably expected to perform those particular duties from one-third to two thirds of the time. The May 16, 1997 report from Dr. Irving Tobin, who the Office relied upon in establishing the medical suitability of the constructed position, does not address appellant's bilateral carpal tunnel syndrome. A more recent report dated October 9, 2000 from Dr. Lynn L. Staker also does not address what limitations, if any, appellant's bilateral carpal tunnel syndrome imposed. Thus, it appears that the Office did not take into account the affects of appellant's preexisting bilateral carpal tunnel syndrome on his ability to perform the duties of a computer programmer. Impairments that preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within appellant's work tolerance.² However, subsequently acquired impairments unrelated to the injury are excluded from consideration in the determination of the employee's work capabilities.³

As previously noted, the Office considered appellant's November 26, 2002 correspondence as an untimely request for reconsideration and found that appellant failed to present clear evidence that the Office's final merit decision was erroneous. The Office noted, among other things, that Dr. McManus' November 25, 2002 physical limitations pertained to bilateral carpal tunnel syndrome rather than the right ankle injury for which the claim was accepted. The Office further noted that Dr. McManus did not provide an adequate basis to

¹ Regarding appellant's bilateral carpal tunnel syndrome, Dr. McManus identified the date of injury as June 1, 1987. The record further indicates that appellant previously underwent a right carpal tunnel release on July 22, 1988; the same day appellant underwent surgery on his right ankle as a result of his March 25, 1988 employment injury. Appellant's then-treating physician, Dr. Kenneth W. Eder, performed both procedures.

² *William H. Woods*, 51 ECAB 619, 622 (2000).

³ *Id.*

justify the limitations imposed. However, the Office did not specifically respond to appellant's allegation that the rehabilitation counselor had not taken into consideration all of his disabilities.

Although appellant used the term "reconsideration" in his November 26, 2002 correspondence, it is evident from his letter that he is seeking modification of the November 28, 2000 loss of wage-earning capacity determination. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.⁴ The request for modification in this case is not a request for review of the November 28, 2000 decision under 5 U.S.C. § 8128. It is a request for additional compensation.

The Office improperly characterized appellant's November 26, 2002 letter as a request for reconsideration subject to the one-year time limitation set forth in 20 C.F.R. § 10.607(a). The Board finds that appellant has requested modification of the November 28, 2000 loss of wage-earning capacity determination and is entitled to a merit decision on that issue. On remand, the Office should develop the record as necessary and issue a *de novo* decision with regard to appellant's loss of wage-earning capacity.

The December 20, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
June 20, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁴ 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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination. *Tamra McCauley*, 51 ECAB 375, 377 (2000).