United States Department of Labor
Employees' Compensation Appeals Board

REGINALD C. WEITHERS, Appellant	)	
and	)	**Docket No. 02-1698**
	)	**Issued: June 1, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Capitol Heights, MD, Employer	)	

Appearances:
Reginald C. Weithers, pro se
Julia Mankata-Tamakloe, Esq., for the Director

Oral Argument January 27, 2004.

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 7, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions dated February 22 and April 4, 2002. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board lacks jurisdiction to review the last merit decision in this case, dated March 8, 2001, because more than one year elapsed between the issuance of that decision and the date appellant filed his appeal with the Board.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On May 3, 1993 appellant, then a 36-year-old general mechanic, filed a traumatic injury claim alleging that on May 1, 1993 he broke two bones in his left arm in the performance of duty. On June 4, 2003 the Office accepted the claim for multiple fractures of the left arm and authorized surgery. Appellant was placed on a short term periodic rolls and paid monthly compensation.

Appellant was referred for vocational rehabilitation on January 12, 1994. The employing establishment indicated that it wished to reemploy appellant and work restrictions were provided by his physician. On August 18, 1994 appellant returned to a light-duty position with the employing establishment as a maintenance mechanic working 8 hours per day, 40 hours per week at his original rate of pay. On February 7, 1996 he was awarded a schedule award for 65 percent permanent loss of use of the left upper extremity. Appellant ultimately stopped work due to a nonemployment-related injury on June 25, 1996.

On January 28, 2000 the Office reduced appellant's compensation for wage loss because the medical and factual evidence of record established that he was only partially disabled and had the capacity to earn wages as a maintenance mechanic at the rate of $715.63 per week.[1] The Office found that appellant's actual earnings as a maintenance mechanic fairly and reasonably represented his wage-earning capacity. Appellant requested review and by decision dated July 31, 2000, the Branch of Hearings and Review affirmed the district Office's decision.

On August 20, 2000 appellant requested reconsideration and indicated that the interpretation of his wage-earning capacity was solely based on what he was capable of earning in terms of salary and not on the wages he actually earned. Appellant argued that due to his current medical condition he was unable to actually earn 100 percent of his annual gross pay. By decision dated November 28, 2000, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of the original decision. Appellant again requested reconsideration on December 12, 2000 and on March 8, 2001, the Office denied his request once again on the grounds that the evidence was insufficient to warrant modification of the original decision.

On November 29, 2001 appellant requested reconsideration, contending that he did not actually gross $715.63 per week or $37,213.00 per year and that his actual wages should have been used to determine his wage-earning capacity. Appellant submitted a wage and tax statement for 1999, which showed annual earnings of $21,653.43.

By decision dated February 22, 2002, the Office denied appellant's application for reconsideration of the March 8, 2001 decision, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant review.

On March 4, 2002 appellant again requested reconsideration. Appellant outlined his reasons for disagreement with the original decision including his allegation that he did not earn $715.63 per week. By decision dated April 4, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence remained insufficient to warrant review.

[1] The Office based its decision on documentation submitted by appellant on November 24, 1999 which indicated that since March 9, 1991 he worked in a full-time light-duty position as a maintenance mechanic, which complied with work restrictions paying $715.63 per week or $37,213.00 per year.

LEGAL PRECEDENT

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.[2]

ANALYSIS

In connection with his November 29, 2001 and March 4, 2002 reconsideration requests, appellant indicated that he did not actually gross $715.63 per week or $37,213.00 per year as reported in the original decision because he only worked sporadically due to his worsening medical condition. Appellant submitted a wage and tax statement for 1999, in support of this assertion which showed that he only earned $21,653.43 that year. The Office determined that to the extent that his argument constituted a legal contention, such contention had been previously considered by the Office and further denied appellant's requests because he failed to submit medical evidence revealing that he was no longer capable of performing the light-duty mechanic position.

The record reflects that during telephone conferences with the employing establishment in October and November 1999, the Office was advised that appellant noted wages of $17.56 per hour with an unspecified number of hours per week for March 1999 on a 1032 Office form. The record further reflects that the Office continued to seek clarification from the employing establishment on January 11, 2000 regarding appellant's pay information. In light of this evidence, the Office should address the underlying issue of the loss of wage-earning capacity determination, which appellant is seeking to have modified. The Board finds that appellant was not seeking reconsideration of the prior decision but was seeking modification of the original loss of wage-earning capacity determination. Therefore, he is entitled to a merit decision and the case will be remanded to the Office for appropriate action.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant has established that modification of the wage-earning capacity determination was warranted.

[2] *Odessa C. Moore*, 46 ECAB 681 (1995); *see also Don J. Mazurek*, 46 ECAB 447 (1995).

ORDER

IT IS HEREBY ORDERED THAT the April 4 and February 22, 2002 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this opinion of the Board.

Issued: June 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member