United States Department of Labor
Employees' Compensation Appeals Board

O.T., Appellant	)	
and	)	**Docket No. 07-929**
	)	**Issued: May 9, 2008**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Birmingham, AL, 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 February 20, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated November 20, 2006 which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated July 16, 2003 and the filing of this appeal on February 20, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 48-year-old special agent, injured his lower back when the vehicle he was driving was struck by another vehicle on August 7, 1985. The Office accepted his claim for low

back strain and herniated nucleus pulposus at L4-5. The Office commenced appropriate payment for temporary total disability and placed appellant on the periodic rolls.

In a report dated November 26, 2001, Dr. Anthony C. Pitts, a specialist in physical and rehabilitative medicine, stated that appellant experienced ongoing pain and discomfort in the back and leg since his August 1985 work injury. He noted that appellant had several lumbar epidural steroid injections and magnetic resonance imaging (MRI) scans in 1998 and electromyograms (EMG) in 1989 and November 2001. Dr. Pitts stated:

> "After comprehensive review of [appellant's] medical records, comprehensive history and physical examination, it is my opinion that he is not totally disabled. He has failed back syndrome. Specifically, [appellant] was found to have disc herniation and underwent lumbar hemilaminectomy at the L5-S1 level on the left. He has been medication dependent. Reportedly, [appellant] has not worked.
>
> "[Appellant] should be permanently restricted from any frequent bending [and] lifting activities. He is ideally suited for sedentary work. [Appellant] should be allowed to stand and ambulate as needed. [By] his own admission, he has increased pain with prolonged immobilization.
>
> "We had EMG nerve conduction studies completed. There was subtle suggestion of chronic radiculopathy. This likely manifest with scar tissue. [Appellant] was without any acute findings on the EMG nerve conduction studies. If the restrictions of avoiding any frequent bending, lifting, squatting [and] stooping activities are avoided and he has a sedentary position which allows him to stand as needed and avoid protracted immobilization, he is well suited for the work force. [Appellant's] medication profile should be adjusted. The Flexeril he takes two or three times daily is not suited for chronic low back pain.... His activities of daily living are independent and he in my opinion is not totally disabled. [Appellant's] degenerative disc disease is evolutionary with age. His facet joint hypertrophy is evolutionary with age."

In a work capacity evaluation dated June 17, 2002, Dr. Pitts found that appellant could work an eight-hour day. He outlined the following restrictions: no twisting, sitting for no more than four to six hours per day; walking, standing, pushing, pulling and lifting for no more than one to two hours per day; and squatting and kneeling for no more than five minutes per day. Dr. Pitts instructed appellant to take 15- to 20-minute breaks every 2 to 3 hours.

In a vocational rehabilitation report dated October 22, 2002, a vocational rehabilitation counselor issued a report summarizing his efforts to find vocational training or suitable alternate employment for appellant within his indicated restrictions. The vocational counselor recommended a position as credit authorizer, listed in the Department of Labor, *Dictionary of Occupational Titles*, which, she determined, reasonably reflected appellant's ability to earn wages.

By decision dated July 16, 2003, the Office reduced appellant's compensation to reflect his wage-earning capacity in the position of credit authorizer.

By letter dated October 17, 2006, appellant requested reconsideration of the Office's July 16, 2003 decision reducing compensation. He stated that Dr. Pitt's medical opinion was flawed because he ordered appellant to undergo an MRI scan and nerve conduction studies, but failed to cite the results of these tests in conjunction with his medical evaluation. Appellant also objected to Dr. Pitt's assertion that he was drug dependent. He stated that he required treatment with medication to cope with chronic pain caused by his work injury. In addition, appellant alleged that his compensation checks were not based on the correct formula.

In support of his request, appellant submitted:

(a) The results of the EMG tests he underwent on November 29, 2001, at the behest of Dr. Pitts. The results indicated, at the left peroneal nerve, normal distal latencies with a moderate decrease in amplitudes and normal conduction speeds. At the right peroneal nerve, there were normal distal latencies, amplitudes and conduction speeds. F-waves studies to the left tibial and peroneal nerves revealed normal latencies. On examination, appellant displayed normal tone with no evidence of atrophy and full range of motion;

(b) A July 16, 2003 MRI scan report which revealed degenerative disc disease and lumbar spondylosis, but no central stenosis or focal herniated nucleus pulposus;

(c) A July 7, 2003 report from Dr. John Featheringill, a Board-certified orthopedic surgeon, who stated that appellant experienced pain stemming from an automobile accident which occurred on May 17, 2003. Dr. Featheringill noted slight lumbar scoliosis and degenerative arthritis at L4-5 and L5-S1 on examination. He stated that he would have appellant undergo MRI scan testing;

(d) A May 17, 2006 MRI scan report which revealed degenerative disc disease and lumbar spondylosis, but no central stenosis or focal herniated nucleus pulposus.

By decision dated November 20, 2006, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in 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.[1] The burden of proof is on the party attempting to show modification.[2] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[3]

ANALYSIS

The Office considered appellant's October 17, 2006 correspondence as a request for reconsideration of the July 16, 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 17, 2006 correspondence, appellant used the term "reconsideration." However, his letter asserts that the Office erred in its July 16, 2003 wage-earning capacity determination as he was totally disabled for work on or before that date; that his loss of wage-earning capacity compensation was not calculated using the correct formula; and that his condition had worsened since the loss of wage-earning capacity determination was made. Appellant's October 17, 2006 letter is a request for modification of the Office's July 16, 2003 wage-earning capacity determination.[4] This request for modification is not a request for a review of the July 16, 2003 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized appellant's October 17, 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 16, 2003 wage-earning capacity determination. He is entitled to a merit review on that issue.[5] 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 16, 2003 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The

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

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

[3] *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 claimants' requests 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 decisions denying appellants' reconsideration requests as untimely and remanded the cases for the Office to address the merits of their requests for modification of a loss of wage-earning capacity decision).

[4] *See Gary L. Moreland*, *supra* note 3.

[5] *Id*.

[6] The Board notes that appellant submitted additional evidence to the record following the November 20, 2006 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

case will be remanded to the Office for all necessary development and issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 20, 2006 is set aside and the case remanded for further action consistent with this decision.

Issued: May 9, 2008
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