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M.K., Appellant	)	
	)	
and	)	Docket No. 10-2099
	)	Issued: July 19, 2011
DEPARTMENT OF THE NAVY,	)	
PHILADELPHIA NAVAL SHIPYARD,	)	
Philadelphia, PA, Employer	)	
	)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On August 17, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated August 2, 2010 denying modification of a loss of wage-earning capacity decision. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

On appeal appellant contends that the loss of wage-earning capacity determination was erroneous and cited to Board findings on prior appeals, also contending the Board's decisions were erroneous.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has been before the Board previously. In the first appeal, the Board issued a decision and order on May 15, 2003 affirming OWCP's decisions dated October 29, 2001 and January 28, 2002.² The Board found OWCP properly reduced appellant's compensation benefits effective August 15, 1999³ based on its determination that the selected position of cashier II represented his wage-earning capacity and that the duties were not of a repetitive nature. The Board also found appellant failed to meet his burden of proof in establishing a recurrence of disability on or after August 28, 2000 causally related to his accepted March 15, 1982 employment injury.⁴ On December 12, 2004 the Board, in the second appeal, affirmed the April 12, 2004 decision with respect to OWCP's determination that modification of the wage-earning capacity was not warranted.⁵ However, the Board found further clarification was required by OWCP on its calculation of appellant's wage rate by using a mean rate. In a decision dated October 24, 2006, the Board in its third decision affirmed an April 5, 2005 OWCP decision regarding appellant's pay rate.⁶ The Board also found OWCP properly denied appellant's request for merit review and affirmed OWCP's June 2 and September 15, 2005 nonmerit decisions. On July 30, 2007 the Board issued an order granting the Director's petition for reconsideration for correction and denying appellant's petition for reconsideration.⁷ In granting the Director's petition, the Board modified footnote 7 to delete inaccurate language. The Board, in a May 4, 2010 decision, found OWCP applied an erroneous legal standard to appellant's request for modification of his July 16, 1999 loss of wage-earning capacity decision.⁸ Thus, the Board set aside OWCP's nonmerit decisions dated March 11, 2009 and August 6, April 17 and March 8, 2008 and remanded the case to OWCP to adjudicate the case under the correct legal standard. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.⁹

Medical evidence submitted by appellant includes clinic notes and a report from Dr. Joseph J. Throder, an attending Board-certified orthopedic surgeon. In a January 5, 2005

² Docket No. 02-2265 (issued May 15, 2003).

³ OWCP issued its initial decision reducing the rate of appellant's compensation benefits based on his wage-earning capacity as a cashier II, effective August 15, 1999 on July 16, 1999.

⁴ On March 15, 1982 appellant, then a molder, injured his right hand in the performance of duty. OWCP accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery.

⁵ Docket No. 04-1438 (issued December 14, 2004).

⁶ Docket No. 06-40 (issued October 24, 2006).

⁷ Docket No. 06-40 (issued October 24, 2006), *order granting Director's petition for recon. for correction and denying appellant's petition for recon.* Docket No. 06-40 (issued July 30, 2007).

⁸ Docket Nos. 09-1046 & 09-1294 (issued May 4, 2010).

⁹ The Board notes that appellant filed an appeal of a May 15, 2003 decision on July 29, 2003 and the Board docketed the appeal as No. 03-1923 and No. 03-2022. On October 6, 2003 the Board granted appellant's request to dismiss his appeal in Docket No. 03-1923. The Board also issued an order dismissing Docket No. 03-2022 as a duplicate appeal of Docket No. 03-1923.

report, Dr. Throder opined that appellant had evidence of median neuropathy related to his right hand based on clinical examination and there was no significant change in his condition. In a July 27, 2005 clinic note, he reported no new clinical findings and that appellant was seen for a flare-up of wrist and hand pain. Dr. Throder, in an April 26, 2006 clinic note, noted that he had a hand injury and that there was no evidence of any worsening of his peripheral nerve complaints. In a March 14, 2007 clinic note, he noted that appellant was seen for complaints of right upper extremity painful dysfunction. Dr. Throder related that appellant had “episodic pain along the ulnar corridor of his hand” on and off for many years. He stated that appellant required no specific treatment for this complaint as appellant may use a sling or place “his hand in a carpal tunnel splint” for support.

In a letter dated May 7, 2010, appellant requested OWCP modify the July 16, 1999 loss of wage-earning capacity decision. He contended that OWCP based its decision on inaccurate information. Specifically, appellant contended that the job description for the selected position was erroneous as the position was not sedentary and OWCP erred in finding a conflict in the medical opinion evidence.

In a June 24, 2010 letter, OWCP requested appellant submit evidence supporting his request for modification of the July 16, 1999 loss of wage-earning capacity decision. Appellant was given 30 days to provide the requested evidence.

In response to OWCP’s request appellant stated that he had previously sent evidence establishing that the cashier II job position was erroneous and that the July 16, 1999 loss of wage-earning capacity decision was erroneous.

By decision dated August 2, 2010, OWCP denied modification of the July 16, 1999 loss of wage-earning capacity decision.

LEGAL PRECEDENT – ISSUE 1

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.¹⁰ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹¹ OWCP’s procedure manual provides that if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.¹² In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.¹³

¹⁰ *D.M.*, 59 ECAB 164 (2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹¹ *Katherine T. Kreger*, 55 ECAB 633 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, *supra* note 10.

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.¹⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁵

ANALYSIS

Appellant contends on appeal that the original loss of wage-earning capacity determination was erroneous.¹⁶ The Board finds that appellant did not submit sufficient evidence to show that OWCP's original determination with regard to his wage-earning capacity should be modified. In a July 16, 1999 decision, OWCP determined that appellant had the wage-earning capacity to perform the position of cashier II and reduced his wage-loss benefits accordingly. This determination was reviewed by the Board in a prior appeal and affirmed. The Board also affirmed the determination that there had been a conflict in the medical evidence in a prior appeal.

Appellant has the burden of proof to show that a modification of his wage-earning capacity is warranted but has not submitted sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions. OWCP therefore properly denied modification of the July 16, 1999 wage-earning capacity determination.¹⁷

In his requests for reconsideration, appellant reiterated the same arguments previously raised before the claims examiner and in prior Board appeals. As noted above, the Board on May 15, 2003 affirmed OWCP's determination that the position of cashier II was medically suitable and the duties of the position were not repetitive. The Board also affirmed there was a conflict in the medical opinion evidence and that OWCP properly referred appellant for an impartial medical examination to resolve the conflict. Appellant did not claim that he had been retrained or otherwise vocationally rehabilitated nor did he allege that there had been a material change in the nature and extent of his injury-related condition. As such, the only remaining basis for modification is for appellant to demonstrate that the original determination was erroneous.

In support of his claim that the original determination was erroneous, appellant submitted clinic notes and a report from Dr. Throder. Although the clinic notes and report from Dr. Throder provide diagnosis and examination findings, none provided an opinion regarding appellant's disability status or ability to perform the duties of the constructed position of cashier

¹⁴ See *D.M.*, *supra* note 10; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹⁵ *Id.*; *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

¹⁶ With regard to appellant's allegations that the findings of the Board in its prior decisions were erroneous with regard to his loss of wage-earning capacity determination, the Board notes that these decisions became final upon the expiration of 30 days of their issuance and are final as to the subject matter appealed. See 20 C.F.R. § 501.6(d).

¹⁷ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Elbert Hicks*, 55 ECAB 151 (2003).

II due to the accepted fracture of the fifth right metacarpal. Without that medical evidence, appellant cannot establish that his injury-related condition had materially changed and he submitted no evidence to establish that he had been retrained or otherwise was vocationally rehabilitated. Further he offered no new evidence to establish the July 16, 1999 wage-earning capacity decision was erroneous. Appellant therefore did not establish that the July 16, 1999 wage-earning capacity decision should be modified.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not established that a modification of the wage-earning capacity is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 2, 2010 is affirmed.

Issued: July 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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