

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
FRANK G. ANDERSON, Appellant)	
)	
and)	Docket No. 03-1929
)	Issued: December 23, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Yonkers, NY, Employer)	
_____)	

<i>Appearances:</i>	Oral Argument December 15, 2004
<i>Frank G. Anderson, pro se</i>	
<i>Miriam D. Ozur, Esq., for the Director</i>	

DECISION AND ORDER

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

JURISDICTION

On July 30, 2003 appellant filed a timely appeal of the July 16, 2003 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Appellant also timely appealed the Office's November 5, 2002 merit decision denying a recurrence of disability beginning June 27, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether the Office properly determined that the issue presented was a recurrence of disability beginning June 27, 2000; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 45-year-old former letter carrier, sustained a traumatic injury to his right upper extremity while in the performance of duty on July 10, 1995. The Office initially accepted appellant's claim for "[f]oreign object impaled in right thumb, surgical removal of same, and

possible digital nerve injury/damage of right thumb.” Appellant underwent surgery on July 10 and December 11, 1995 and October 13, 1997. He received appropriate wage-loss compensation and also participated in an Office-sponsored vocational rehabilitation program beginning in February 1998.

In a decision dated February 9, 1999, the Office reduced appellant’s wage-loss compensation based upon his ability to earn weekly wages of \$659.00 in the selected position of computer technician. The Office found that the constructed position of computer technician represented appellant’s wage-earning capacity. Appellant requested an oral hearing, which the Office denied as untimely. The Office also denied appellant’s request for reconsideration, by decision dated July 26, 1999.

On April 19, 2001 appellant filed a notice of recurrence (Form CA-2a). He claimed to have sustained a recurrence of disability beginning June 27, 2000, causally related to his July 10, 1995 employment injury. Appellant also submitted recent medical reports dated April 17 and May 14, 2001 from his treating physician, Dr. Salvatore R. Lenzo, a Board-certified orthopedic surgeon, who reported that appellant had been unable to return to perform any type of work because of continuing problems with his right upper extremity.

By decision dated November 5, 2002, the Office found that appellant failed to establish that he sustained a recurrence of disability on June 27, 2000 causally related to his July 10, 1995 employment injury. The Office found that there was no evidence showing that appellant was “totally disabled due to a right finger injury.” Appellant requested reconsideration, which the Office denied in a decision dated July 16, 2003.

LEGAL PRECEDENT

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹

The Office’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.² The procedure manual further indicates that under these circumstances, “the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity] decision.”³

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

¹ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

³ *Id.*

rehabilitated or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

ANALYSIS

In his April 17, 2001 report, Dr. Lenzo indicated that he had been treating appellant since July 10, 1997 and that appellant had multiple problems with regard to his neck and right upper extremity. Dr. Lenzo also reported that appellant had undergone surgery, but he continued to have problems with his right upper extremity. He also described problems with appellant's cervical spine. Dr. Lenzo advised that appellant was unable to return to work because of continuing problems in the right upper extremity, which precluded him from performing any type of work.

The Office determined that the issue presented was whether appellant had established a recurrence of disability on June 27, 2000, causally related to his July 10, 1995 employment injury. The Office denied the claim for compensation because there was no evidence showing that appellant was "totally disabled due to a right finger injury." As noted above, both the Office's procedure manual and Board precedent provide that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of the Office's wage-earning capacity decision is warranted.⁶ Accordingly, the Office should have considered whether appellant established a basis for modification of the February 9, 1999 wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's April 19, 2001 claim for compensation raised the issue of whether modification of the Office's February 9, 1999 wage-earning capacity determination was warranted. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.⁷

⁴ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁵ *Id.*

⁶ *Katherine T. Kreger*, *supra* note 1; *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁷ In view of the Board's disposition of the claim on the merits, the question of whether the Office properly denied merit review under 5 U.S.C. § 8128(a) is a moot issue.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 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.

Issued: December 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member