United States Department of Labor
Employees' Compensation Appeals Board

MARILYN E. NELSON, Appellant	)	
and	)	**Docket No. 05-428**
	)	**Issued: July 11, 2005**
DEPARTMENT OF AGRICULTURE, POTATO RESEARCH LABORATORY, East Grand Forks, MN, Employer	)	

Appearances:
Marilyn E. Nelson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 6, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated September 2, 2004, which denied her request for a merit review of an August 12, 2003 hearing representative's decision, which affirmed that she had a loss of wage-earning capacity based on a 32-hour position as an engineering technician. Because more than one year has elapsed between the last merit decision dated August 12, 2003 and the filing of this appeal on December 6, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 but has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether the Office properly determined that the issue presented was whether appellant was entitled to merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 1984 appellant, a 39-year-old engineer technician, filed a traumatic injury claim alleging that she injured her neck while loosening bolts on a pressure panel. The Office accepted the claim for cervical strain and temporary aggravation of the thyroid, which resolved by November 15, 1984, fibrosistis and fibromyalgia. Appellant received compensation for the period September 20, 1984 to February 8, 1985, intermittent compensation for the period February 9, 1985 to July 26, 2002.

Appellant was referred to vocational rehabilitation on September 14, 2000.

In work capacity evaluation forms (OWCP-5c) dated November 27, 2000 and November 21, 2001, Dr. Joseph B. Sleckman, a treating Board-certified internist, concluded that appellant was capable of working 32 hours per week with restrictions. The restrictions on standing, walking, reaching, twisting, operating a motor vehicle, repetitive movements, no pushing more than 10 pounds, no pulling more than 10 pounds, no lifting more than 10 to 20 pounds, squatting, kneeling and climbing. Dr. Sleckman also indicated that she needed to have a five-minute break every hour.

The Office obtained a copy of appellant's job engineering technician job description working 32 hours per week. The physical requirements of the position included average agility, dexterity and mobility and the ability to "occasionally" lift samples weighing approximately 60 pounds. On January 5, 2001 the rehabilitation counselor performed on-sight job analysis and confirmed that the physical requirements were within the restrictions noted by her physician.

On August 13, 2002 the Office issued a loss of wage-earning capacity decision based upon appellant working 32 hours a week as an engineering technician.[1] The Office noted that the employment was effective November 20, 2000.

Appellant requested an oral hearing before an Office hearing representative in a letter dated September 11, 2002. A hearing was held on June 11, 2003 at which appellant testified and submitted evidence.

In a June 5, 2003 report, Dr. Sleckman noted that appellant "will have flare-ups of her illness periodically, whereby she misses work for either all of the day or part of the day." With regard to appellant's work restrictions, he stated that she could work no more than an 8-hour day and 32 hours per week. He also noted that there will be exacerbations of her condition, which has been infrequent in the past year.

By decision dated August 12, 2003, an Office hearing representative affirmed the August 13, 2002 loss of wage-earning capacity decision.

Appellant requested reconsideration in a letter dated August 10, 2004 and submitted evidence in support of her request. Appellant also contended that the loss of wage-earning

[1] Subsequent to the August 13, 2002 loss of wage-earning capacity decision appellant continued to file claims for compensation (Form CA-8) alleging intermittent disability.

capacity decision was erroneously issued as she had returned to her date-of-injury position and that she had never been offered a modified position by the employing establishment. In support of her argument that the loss of wage-earning capacity decision was erroneously issued, appellant contended that she only "worked less than 32 hours a week about 20 [percent] of the time." Appellant stated that her compensation was improperly "reduced from approximately $420.[00] per month to $126.[00] per month" and that the Office failed to establish that her "disability had lessened or that it changed from T[otal] T[empoary] D[isability] (as it has been accepted for years) to partial." With regard to the wages used to determine her loss of wage-earning capacity, appellant contended that her weekly wages were $764.98 and not $609.92, which was the amount used by the Office. She also referenced a March 17, 2000 report of telephone conference noting that she was doing her date-of-injury job with no restrictions. In addition appellant noted that the statement of accepted facts issued with the referral for nurse intervention on March 20, 2000 stated that she had frequent periods of temporary total disability. She also contended that she does perform the duties of her date-of-injury position and that "[m]ost of the time I am not disabled" but acknowledged she did "have periods of temporary total disability."

In an addendum dated August 11, 2004, appellant provided additional argument as to why the loss of wage-earning capacity decision was in error. She contended that her tour of duty was 40 hours a week and that her temporary disability usually does not "exceed eight[-]hour (sic) of LWOP [leave without pay] for temporary total disability per week."

On September 2, 2004 the Office denied appellant's request for reconsideration. The Office found that appellant submitted medical evidence which was repetitive and thus failed to represent any relevant new evidence and that she failed to raise a substantive legal question.

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.[2]

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.[3] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[4]

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

[3] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[4] *Id.*

ANALYSIS

The Office determined that the issue presented was whether appellant submitted sufficient evidence or argument to warrant merit review under 5 U.S.C. § 8128.[5] It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination. Although appellant characterized her August 10, 2004 correspondence as a request for reconsideration, in this instance it is not a request for review of the hearing representative's August 13, 2003 decision under 5 U.S.C. § 8128. It is a request for additional compensation and modification of the loss of wage-earning capacity decision on the grounds that it was erroneously determined. Appellant contended that the Office used an incorrect weekly wage rate as her weekly wage rate was $764.98 not $609.92. She also contended that she does perform the duties of her date-of-injury position and that "[m]ost of the time I am not disabled" but acknowledged she did "have periods of temporary total disability." Furthermore, appellant argued that her tour of duty was 40 hours a week and that her temporary disability usually does not "exceed eight[-]hour (sic) of LWOP for temporary total disability per week."

In *Harry Portolos*,[6] the Board found that Office failed to properly identify the employee's request for modification of his wage-earning capacity decision when it determined that he had filed a request for reconsideration of a hearing representative's decision affirming the loss of wage-earning capacity decision. The Board found that the employee was seeking modification of the wage-earning capacity decision as he alleged his wages were less than the earnings of the constructed position.

In this case, the Office should not have considered appellant's May 7, 2004 letter as a request for reconsideration subject to the limitations set forth in 20 C.F.R. §§ 10.606-10.608. The Board finds that appellant requested modification of the August 13, 2002 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 an appropriate decision with regard to appellant's loss of wage-earning capacity.

CONCLUSION

The Board finds that appellant's August 10, 2004 claim for additional compensation raised the issue of whether modification of the Office's August 13, 2002 wage-earning capacity determination was warranted. As the Office did not properly identify the issue or apply the correct standard of review, the case will be remanded for an appropriate decision on this issue.

[5] Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits. 5 U.S.C. § 8128(a). Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.606(b)(2) (1999). Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. § 10.608(b).

[6] Docket No. 05-2003, issued April 4, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member