



## **FACTUAL HISTORY**

On September 9, 1999 appellant, then a 57-year-old full-time manual distribution clerk, filed an occupational disease claim for tendinitis in his left wrist. He indicated that he was first aware of his condition on August 11, 1999 and its relationship to his employment on August 20, 1999. The Office assigned the claim file number 160341205 and accepted the condition of left wrist tendinitis. It additionally accepted appellant's subsequent claims. These include a right shoulder tendinitis and tear of the supraspinatus tendon under file number 162054190 and tendinitis of the supraspinatus tendon with an intra-substance tear of right shoulder and right carpal tunnel syndrome under file number 162054200. The Office paid appropriate benefits and eventually combined such claims under file number 160341205.

On May 5, 2003 the Office granted appellant a schedule award for a 21 percent impairment of his left upper extremity. In a September 8, 2005 decision, it determined that his actual earnings in his modified mail process clerk position, effective November 29, 2004, represented his wage-earning capacity.

On January 25, 2007 appellant filed a Form CA-7, claim for compensation, for leave without pay for the period June 12 through December 29, 2006. Attached time analysis forms indicated that he claimed he was totally incapacitated for work during the periods June 12 through June 16, 2006 (40 hours), July 17 through 21, 2006 (40 hours), August 25 through September 1, 2006 (42 hours) and December 18 through 29, 2006 (72 hours). Appellant also claimed compensation for times that he underwent physical therapy for three hours each day from September 22 through December 15, 2006.

On February 8, 2007 the Office noted receiving appellant's claims for leave without pay for a recurrence of disability from June 12 through December 29, 2006. He was advised of the information needed to establish the factual and medical aspects of his recurrence claim and given 30 days within which to submit this evidence.

Copies of prescription notes from Dr. Windsor S. Dennis, an orthopedic surgeon, dated January 3 through 27, 2007 advising that appellant had physical therapy three times a week were submitted. However, no factual or medical evidence regarding his claimed recurrence of disability was submitted.<sup>2</sup>

By decision dated March 20, 2007, the Office denied appellant's recurrence claim for the period June 12 through December 29, 2006. On April 17, 2007 he requested reconsideration of the Office's March 20, 2007 decision. In a letter dated April 16, 2007, appellant advised that he

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<sup>2</sup> Appellant filed a CA-7 claim for compensation alleging wage-loss compensation commencing February 7, 2007. In a February 9, 2007 letter, he stated that he was accepting a modified job offer from the employing establishment under protest. Appellant alleged that the employing establishment could only provide him with one hour of work a day within his restrictions and that he was told to request the remaining seven hours of work a day with the Office. He also noted that he planned to retire on June 1, 2007. On March 29, 2007 the Office spoke with the employing establishment and determined that the employing establishment did not provide appellant with a valid job offer. Accordingly, the Office paid appellant wage-loss compensation for the period February 7 to March 9, 2007.

had intermittent periods of temporary total disability from June 12 through December 29, 2006. He also submitted an undated statement from Dr. Dennis which noted that he was totally disabled during the periods June 12 through 16, 2006; July 17 through 21, 2006; August 25 through September 1, 2006; and December 18 through 29, 2006. Dr. Dennis also noted that appellant received physical therapy for his approved conditions from September 22 through October 27 and December 13 through 16, 2006.

Appellant also filed a CA-7 claim for compensation for wage loss beginning April 11, 2007. In a May 21, 2007 letter, the Office informed him that he had received a formal loss of wage-earning capacity determination on September 8, 2005 and provided him with information concerning the grounds for modifying such a formal decision.

In a June 27, 2007 decision, the Office modified its March 20, 2007 decision to reflect that appellant was not temporary totally disabled for the entire period encompassed by the claim for wage loss. It affirmed the denial of the wage-loss claim on the basis as no medical evidence had been submitted to support the intermittent periods of temporary total disability claimed or the dates claimed for physical therapy.

On June 21, 2007 appellant requested reconsideration of the Office's September 8, 2005 wage-earning capacity determination. By decision dated July 9, 2007, the Office denied reconsideration finding that the request was not timely filed and did not establish clear evidence of error. In an accompanying memorandum, the Office noted that the only evidence consisted of appellant's appeal request form with no medical evidence to support his reasons.

On July 25, 2007 the Office received additional information concerning appellant's June 21, 2007 request for reconsideration of the Office's September 8, 2005 wage-earning capacity determination.<sup>3</sup> Appellant's July 30, 2007 appeal to the Board which was postmarked July 25, 2007, also contained the same information submitted to the Office.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8128(a) vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.<sup>6</sup> 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

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<sup>3</sup> Appellant advised that he retired June 1, 2007.

<sup>4</sup> The Board's jurisdiction, however, is limited to a review of final decisions of the Office and the evidence that was before the Office at the time it issued its final decision. Consequently, the Board may not consider such evidence on appeal. 20 C.F.R. § 501.2(c).

<sup>5</sup> *Raj B. Thackurdeen*, 54 ECAB 396 (2003).

<sup>6</sup> *See Gary L. Moreland*, 54 ECAB 638 (2003).

or the original determination was in fact erroneous.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

### ANALYSIS

On June 21, 2007 appellant requested reconsideration of the Office's September 8, 2005 wage-earning capacity determination. The Office considered his request to be an untimely request for reconsideration under section 8128 and found that he failed to present clear evidence that the September 8, 2005 decision was erroneous.

Although appellant used the term "reconsideration" in his correspondence, it is evident that he sought modification of the September 8, 2005 wage-earning capacity determination. The Office specifically noted in its memorandum that he submitted no medical evidence to support his reasons for modification. The Board notes that appellant had previously submitted medical evidence from Dr. Dennis which the Office did not address. He was informed on May 21, 2007 of the grounds for modifying the wage-earning capacity decision and he requested reconsideration on June 21, 2007. However, the Office issued the July 9, 2007 decision, as noted, finding that appellant's request was untimely. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.<sup>9</sup> Appellant's request in this case is not a request for review of the September 8, 2005 decision under 5 U.S.C § 8128; rather the evidence supports that he is seeking modification of the wage-earning capacity determination as evidenced by his request for reconsideration following the Office's May 21, 2007 informational letter.<sup>10</sup> The Office improperly characterized appellant's request for reconsideration as being subject to the one-year time limitation set forth in 20 C.F.R. § 10.607(a). The Board finds that he has requested modification of the September 8, 2005 loss of 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 merit decision with regard to whether appellant's loss of wage-earning capacity should be modified.<sup>11</sup>

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<sup>7</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>8</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000); *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (April 1995).

<sup>9</sup> *See Gary L. Moreland*, *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

**CONCLUSION**

The Board finds that the Office improperly determined that appellant's June 21, 2007 request for review of the loss of wage-earning capacity determination was an untimely request for reconsideration and the case must be remanded for further development consistent with this decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated July 9, 2007 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: February 19, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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