United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 08-2280**
	)	**Issued: July 7, 2009**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Susanville, CA, 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 August 18, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 30, 2008 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's February 1, 2007 decision regarding appellant's wage-earning capacity and pay rate. Because more than one year has elapsed between the last merit decision and the filing of this appeal on August 18, 2008, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

The Office accepted that on July 15, 1993 appellant, then a 45-year-old fire engine operator, sustained a herniated disc at L4-5 due to lifting a cement block. On July 27, 1993 he underwent a lumbar discectomy at L4-5. The Office paid compensation for periods of disability. On April 19, 2004 appellant returned to work for the employing establishment as an information assistant.

In an April 13, 2005 decision, the Office determined that appellant's actual wages as an information assistant fairly and reasonably represented his wage-earning capacity. It noted that he earned $507.36 per week as a GS-6, step 8, at the time of the July 15, 1993 employment injury, that the current pay rate for the same grade and step was $728.88 per week and that he currently earned $839.73 per week. The Office calculated appellant's loss of wage-earning capacity and the amount of compensation to which he was entitled.

In an April 10, 2006 letter, appellant requested reconsideration of his claim. He argued that the position of information assistant was in no way equivalent to his date-of-injury position of fire engine operator (a category of fire technician) and therefore could not represent his wage-earning capacity. Appellant indicated that his date-of-injury position was upgraded to a GS-7 in 1997 and that his current earnings at GS-5 were not equivalent to what he would have received as a GS-7 had he not been injured. He stated that he was receiving the wages of a GS-6 step 10 under pay retention, but argued that his actual wage-earning capacity should be based upon the usual wages of the GS-5 information assistant position rather than his actual earnings in that position. Appellant also claimed that hazard pay, Sunday premium pay, night differential pay and holiday pay were not factored into the calculation of his pay rate.

In a February 1, 2007 decision, the Office affirmed its April 13, 2005 wage-earning capacity determination. It addressed the arguments raised by appellant in his April 10, 2006 letter. The Office determined that it was appropriate to base appellant's wage-earning capacity on his actual wages as information assistant at the retained pay level and noted that the possibility of future promotions or greater earnings (but for the employment injury) did not support a loss of wage-earning capacity. It indicated that all relevant forms of pay had been included in the calculation of his pay.

In a January 29, 2008 letter, appellant requested reconsideration of his claim. He argued that the position of information assistant was not equivalent to his date-of-injury position of fire engine operator and therefore could not represent his wage-earning capacity.[2] Appellant asserted that he was entitled to receive compensation equivalent to what he would have received as a GS-7 had he not been injured. He claimed that additional Sunday pay and 336 hours of hazard pay should have been factored into the calculation of his pay rate.[3] Appellant argued that the employing establishment did not adequately advise him regarding certain matters and stated, "I am claiming disability discrimination, reprisal, harassment, adverse actions, breach of contract,

[2] Appellant cited Merit System Protection Board cases and other non-Board precedent in support of some of his positions.

[3] Appellant submitted three earnings and leave statements from 1992 and 1993.

material misrepresentations of facts, failure to inform, silence (when I tried to obtain answers to many of my questions pertaining to grade, pay, and benefits, the agency remained silent), and fraud in the inducement as affirmative defenses, resulting in my reduction in grade and pay, and a constructed demotion."

In an April 30, 2008 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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.[4] The burden of proof is on the party attempting to show modification.[5] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[6]

ANALYSIS

The Office considered appellant's January 29, 2008 letter to be a request for reconsideration, under 5 U.S.C. § 8128(a), of its February 1, 2007 decision which had affirmed its April 13, 2005 wage-earning capacity determination. It found that appellant did not submit sufficient evidence or argument in connection with this request for reconsideration to require review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). In his January 29, 2008 letter, appellant used the term reconsideration. However, he argued in his letter that the Office's original April 13, 2005 wage-earning capacity determination was erroneous.[7] Appellant's January 29, 2008 letter is a request for modification of the Office's April 13, 2005 wage-earning

[4] *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

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

[6] *Gary L. Moreland*, 54 ECAB 638 (2003). *See also O.T.*, Docket No. 07-929 (issued May 9, 2008), *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), and *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004). In the *O.T.*, *Peoples* and *Taylor* cases, 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 these cases, the Board set aside the Office's decisions denying the claimants' 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.

[7] *See supra* note 1 and accompanying text regarding the standards for requesting modification of a wage-earning capacity determination. In his letter, appellant argued that the position of information assistant was not equivalent to his date-of-injury position of fire engine operator and therefore it could not to represent his wage-earning capacity. He asserted that he was entitled to receive compensation equivalent to what he would have received at the GS-7 pay level had he not been injured. Appellant claimed that additional Sunday pay and hazard pay should have been factored into the calculation of his pay rate.

capacity determination.[8] This request for modification is not a request for a review of the Office's February 1, 2007 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized appellant's January 29, 2008 letter as a request for reconsideration.

The Board finds that appellant has requested modification of the Office's April 13, 2005 wage-earning capacity determination. Appellant is entitled to a merit review on that issue.[9] 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.

CONCLUSION

The Board finds that appellant requested modification of the Office's April 13, 2005 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to the Office for all necessary development and issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 30, 2008 decision is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: July 7, 2009
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

[8] *See Gary L. Moreland*, *supra* note 6.

[9] *Id.*