

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

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E.R., Appellant)	
)	
and)	Docket No. 08-1238
)	Issued: March 24, 2009
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Paicines, CA,)	
Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 21, 2008 appellant timely appealed the January 8, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of his previously denied recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established a basis for modifying the September 13, 2000 loss of wage-earning capacity determination.

FACTUAL HISTORY

Appellant, a 61-year-old former maintenance worker, has an accepted claim for lumbago and permanent aggravation of spondylolisthesis, which arose on or about April 25, 1980. On September 13, 2000 the Office issued a formal loss of wage-earning capacity (LWEC) determination. Appellant's wage-loss compensation was reduced based upon his ability to earn

\$400.00 per week in the constructed position of Assembler II (Office Machines).¹ He requested reconsideration on March 25, 2003. In its April 16, 2003 nonmerit decision, the Office found appellant's request untimely. Additionally, it found that appellant had not demonstrated clear evidence of error. The Office advised appellant that if his medical condition had worsened since the September 13, 2000 LWEC determination, he should file a notice of recurrence of disability (Form CA-2a).

On May 1, 2003 appellant filed a claim for recurrence of disability beginning April 30, 2003. He explained that he had been walking for exercise on April 30, 2003 when his back pain worsened and the pain began radiating down his legs. Appellant submitted additional medical evidence from his treating physician, Dr. Butcher. By decision dated September 9, 2003, the Office denied appellant's recurrence claim. On four subsequent occasions it reviewed the merits of the May 1, 2003 recurrence claim, but denied modification. The Office denied modification on March 26 and October 22, 2004, March 9, 2006 and most recently on January 8, 2008. Each request for reconsideration was accompanied by additional medical evidence from appellant's treating physician, Dr. Butcher. With the exception of the March 9, 2006 decision, the Office did not consider whether appellant established a basis for modification of the September 13, 2000 LWEC determination.

Appellant filed his most recent request for reconsideration on July 30, 2006. His then-counsel clearly indicated that his client was seeking further review of the September 13, 2000 LWEC determination. Counsel argued, among other things, that the Assembler II position was not vocationally suitable. Appellant's counsel renewed his request for reconsideration on December 5, 2006 and March 7, 2007. Counsel's latest filing urged the Office to consider whether appellant's LWEC determination should be modified due to deterioration of his accepted condition.

In its January 8, 2008 decision, the Office referenced appellant's September 13, 2000 LWEC determination. However, it did not specifically address whether appellant established a basis for modifying the LWEC determination. The Office essentially denied modification of the September 9, 2003 decision that initially found that appellant had not established a recurrence of disability beginning April 30, 2003.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.² Compensation payments are based on the wage-earning capacity determination and it

¹ The Office determined appellant's physical restrictions based on an undated work restriction evaluation (Form OWCP-5) from Dr. Michael D. Butcher, a Board-certified orthopedic surgeon, whose evaluation was reportedly received on September 6, 1991. Nine years later when the Office issued its LWEC determination, it noted that there was "no evidence in [the] file to indicate that [appellant's] work restrictions [had] changed since [1991]." The medical evidence the Office relies on must provide a detailed description of appellant's condition. *Samuel J. Russo*, 28 ECAB 43 (1976). Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation. *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

² 5 U.S.C. § 8115(a) (2006); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

remains undisturbed until properly modified.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 rehabilitated or the original determination was erroneous.⁴ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁵

The Federal (FECA) 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.⁶ 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 [LWEC] decision.”⁷

ANALYSIS

Both the Federal (FECA) 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.⁸ In its January 8, 2008 decision, it mistakenly considered whether appellant established a basis for modifying the previously denied May 1, 2003 recurrence claim. Although the reconsideration examiner referenced the September 13, 2000 LWEC determination, she did not properly analyze whether appellant had met the three criteria for modification.⁹ Appellant’s then-counsel attempted to properly frame the issue, however, the claims examiner apparently disregarded counsel’s arguments for modifying the September 13, 2000 LWEC determination. The Board also notes that the Office’s most recent prior decision dated March 9, 2006 properly framed the issue as one of modification of the September 13, 2000 LWEC determination. But this fact apparently went unnoticed by the latest claims examiner. Because the January 8, 2008 merit decision did not properly adjudicate the issue of modification of the September 13, 2000 LWEC determination, the case will be remanded for an appropriate decision.

³ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

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

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁷ *Id.*

⁸ *Katherine T. Kreger*, *supra* note 3; *Sharon C. Clement*, 55 ECAB 552, 555-56 (2004).

⁹ The claims examiner stated: “To effectively change the loss of wage earning capacity decision dated September 13, 2000, the medical evidence would ... have to explain how the change in his condition makes the claimant unable to perform the rated Assembler II position.” This is neither an accurate nor complete statement of the law with respect to modification of an LWEC determination.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further action consistent with this decision.

Issued: March 24, 2009
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