United States Department of Labor
Employees' Compensation Appeals Board

P.C, Appellant	)	
and	)	**Docket No. 09-1279**
	)	**Issued: January 21, 2010**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 15, 2008. He also appealed an April 8, 2009 decision that denied his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

This is the third appeal in the present case. In a March 9, 2005 decision, the Board affirmed an April 21, 2004 Office decision finding that the Office properly determined that the constructed position of customer service representative represented appellant's wage-earning

capacity.[1] In an April 7, 2008 decision, the Board found that the Office improperly characterized appellant's May 13, 2007 letter as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a) when it was actually a request for modification of the Office's April 21, 2004 wage-earning capacity determination. The Board noted that he was entitled to a merit determination regarding the wage-earning capacity issue and remanded the matter to the Office.[2] The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.

After the Office's April 21, 2004 wage-earning capacity decision, appellant continued submitting evidence regarding his claim.[3] On October 25, 2005 Dr. Don Edward Miller, a clinical psychologist, noted that appellant had undergone training but was unable to obtain employment. He opined that appellant had residuals of his May 10, 2000 injury in that he experienced anxiety when he was close to obtaining a job. Dr. Miller noted that appellant had no work restrictions provided he could sufficiently control his anxiety to get a job or start a business. In work capacity evaluations dated October 26, 2005 and March 27, 2007, he advised that there was no reason appellant should not attempt to return to work for the employing establishment but there were no guarantees he could work full time. On March 27, 2007 Dr. Miller indicated that appellant pursued several avenues for employment including job training and a private painting business; however, he failed to commit to a long-term concerted job search and therefore was unable to find employment. He indicated that appellant's episodes of depression and anxiety interfered with his pursuit of work. Also submitted was a letter from Nordstrom Business Institute dated November 17, 2003, which noted appellant's typing scores. Dr. Miller referred appellant to Dr. Lawrence Saben, a Board-certified psychiatrist, who treated appellant from February 8, 2002 to April 7, 2004 for depression. Dr. Saben provided a history of appellant's work-related injury and subsequent treatment.

In a September 5, 2007 statement, appellant indicated that he obtained employment as a security guard and was interested in taking classes and moving up in the security business. He asserted that since he was not employable until July 23, 2007 he should receive compensation for the period April 18, 2004 to July 22, 2007. Appellant submitted a January 3, 2008 report from Dr. Miller who opined that he was disabled from his work due to his job injury from May 10, 2000 to July 23, 2007. Dr. Miller diagnosed depression and post-traumatic stress disorder and recommended continuing therapy and medications.

On February 7, 2008 the Office requested Dr. Miller to address whether appellant's current symptoms and treatment were causally related to the work-related injury. In a March 4, 2008 report, Dr. Miller referenced his prior reports and diagnosed depression and post-traumatic stress disorder. He opined that appellant was disabled from his work due to his job injury from May 10, 2000 to July 23, 2007. Dr. Miller noted that appellant returned to work in July 2007 as a security guard and he recommended continuing therapy and medications.

[1] Docket No. 04-2293 (issued March 9, 2005).

[2] Docket No 07-2347 (issued April 7, 2008).

[3] On May 10, 2000 appellant, a 51-year-old temporary data census enumerator, sustained injury while attempting to obtain census information. The Office accepted acute reactions to stress, generalized anxiety disorder and prolonged depressive reaction.

On May 15, 2008 the Office denied modification of the April 24, 2004 Office decision.

On March 7, 2009 appellant requested an oral hearing. He submitted new evidence in addition to evidence previously of record.[4]

In a decision dated April 8, 2009, the Office denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Once the loss of wage-earning capacity 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.[5] The burden of proof is on the party attempting to show modification of the award.[6]

ANALYSIS -- ISSUE 1

Appellant alleged that the Office's April 21, 2004 wage-earning capacity decision was made in error as he remained disabled before and after that date. After the Office properly determined that he could perform the duties of a customer service representative and reduced his compensation, he sought modification of the wage-earning capacity determination. The Board finds that the evidence does not establish that the Office's April 21, 2004 wage-earning capacity determination was, in fact, erroneous nor does the evidence show that appellant's wage-earning capacity determination should be modified because he has been retrained or otherwise vocationally rehabilitated.

Appellant has not submitted medical evidence relevant to the pertinent medical issue of whether there had been any change in his condition that would render him unable to perform the duties of a customer service representative.[7] For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.[8] Medical evidence submitted by appellant after the loss of wage-earning capacity determination did not sufficiently explain why he was unable to perform the duties of the position of customer service representative. These reports also do not provide any medical reasoning to explain how the

[4] As the Office has not considered this new in reaching a final decision, the Board may not consider it for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[5] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[6] *D.S.*, 58 ECAB 392 (2007); *James D. Champlain*, 44 ECAB 438 (1986); *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[7] *See Phillip S. Deering*, 47 ECAB 692 (1996).

[8] *Id.*

April 21, 2004 wage-earning capacity determination was erroneous in finding that appellant was able to perform the constructed position.

In an October 25, 2005 report, Dr. Miller opined that appellant had residuals of his May 10, 2000 injury in that he experienced anxiety when he was close to obtaining a job. He also indicated that appellant had no work restrictions provided he could sufficiently control his anxiety to obtain a job. In work capacity evaluations dated October 26, 2005 and March 27, 2007, Dr. Miller advised that there was no reason appellant should not attempt to return to work for the employing establishment but there were no guarantees he could work full time. On March 27, 2007 he indicated that appellant pursued several avenues for employment; however, he failed to commit to a long-term concerted job search and therefore was unable to find employment. Appellant did not provide medical rationale[9] explaining how his current condition would have prevented him from performing the position of a customer service representative. In fact, the medical report from appellant's psychologist reflected no reason appellant should not attempt to return to work and attributed his unemployment to his failure to commit to a concerted job search.

In other reports dated January 3 and March 4, 2008, Dr. Miller opined that appellant was disabled from his work due to his job injury from May 10, 2000 to July 23, 2007 and noted that he had returned to work in July 2007 as a security guard. He did not provide any medical rationale as to how appellant's accepted condition disabled him from working as a customer service representative. Dr. Miller failed to note a change in appellant's condition which would render him unable to perform the position nor did he retract his earlier opinion confirming that appellant could perform this position.

Appellant also submitted reports from Dr. Saben and Dr. Miller that were either submitted before the Office reduced his compensation or did not address duties of the constructed position. As such, these reports are insufficient to show a material change in his injury-related condition after the Office issued its April 21, 2004 wage-earning capacity determination.

Consequently, appellant has not met his burden of proof to establish a basis for modification of his wage-earning capacity determination as he has not established a material change in the nature and extent of the injury-related condition, has not shown that he has been retrained or otherwise vocationally rehabilitated or established that the original determination was, in fact, erroneous.

On appeal, appellant resubmitted his June 11, 2008 statement and reiterated that he was not employable until July 23, 2007 and should receive compensation for the period from 2004 to July 22, 2007. However, as noted above, he failed to submit sufficient evidence to establish that the April 21, 2004 wage-earning capacity determination was erroneous or that his injury-related condition materially changed.

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[10] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[11] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[12] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[13]

ANALYSIS -- ISSUE 2

In the present case, appellant requested a hearing in a March 7, 2009 letter. As the hearing request was made more than 30 days after issuance of the Office's May 15, 2008 decision, his request for an oral hearing was untimely filed.

The Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[14] There is no indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

[10] 5 U.S.C. § 8124(b)(1).

[11] 20 C.F.R. §§ 10.616, 10.617.

[12] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[14] *Samuel R. Johnson*, 51 ECAB 612 (2000).

CONCLUSION

The Board further finds that appellant did not submit sufficient evidence to justify modification of the Office's loss of wage-earning capacity determination. The Board further finds that the Office did not abuse its discretion when it denied his request for a hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2009 and May 15, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 21, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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