United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 09-2202**
	)	**Issued: March 2, 2010**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
John Eiler Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument January 5, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 31, 2009 appellant filed a timely appeal from a May 28, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a December 13, 2007 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied reconsideration of its December 13, 2007 decision.

FACTUAL HISTORY

On June 25, 2007 appellant, a 44-year-old letter carrier, filed an occupational disease claim (Form CA-2) that the Office accepted for right shoulder impingement. She underwent treatment and submitted additional evidence.

On September 14, 2006 appellant alleged she sustained a recurrence of disability on September 12, 2006, which the Office accepted. She underwent medical treatment and submitted additional evidence.

By decision dated October 10, 2007, the Office proposed to reduce appellant's compensation.

Pursuant to a loss of wage-earning capacity (LWEC) determination, by decision dated December 13, 2007, the Office found that appellant was capable of performing the duties of an information clerk and reduced appellant's compensation accordingly.

Appellant disagreed and on December 10, 2008 requested reconsideration. In that request, she notified the Office of her new mailing address and provided a medical report.

In the October 30, 2008 report, Dr. Isabel Puri, a Board-certified child and adolescent psychiatrist, opined:

> "[Appellant] is incapable of holding any job due to her long-standing cognitive and emotional difficulties further compounded by her recent physical disabilities and loss of support from her husband. She cannot effectively work as an information clerk due to the above longstanding [*sic*] difficulties and limitations."

By letter dated March 19, 2009, appellant's attorney inquired: "When do you anticipate making a decision on our request for reconsideration?"

By decision dated May 28, 2009, the Office denied reconsideration of its December 13, 2007 decision, stating it had not reviewed the merits of the case.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.[1] Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[2] Wage-earning capacity means the employee's ability to earn wages in her injured condition.[3]

Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings, if her actual earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings

[1] 5 U.S.C. § 8102(a).

[2] 20 C.F.R. § 10.5(f).

[3] *Robert H. Merritt*, 11 ECAB 64 (1959) (claim of partially disabled seaman-trainee that he should be awarded pay for 100 percent disability for as long as he was unable to find suitable employment was properly rejected, since the absence of earnings, where there is a capacity to earn, affords no basis for the payment of compensation for total disability).

of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity, as appears reasonable under the circumstances, is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.[4]

Once the 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

The Board finds this case not in posture for decision.

The Office stated that the issue was whether appellant submitted sufficient evidence or argument to warrant merit review of its December 13, 2007 decision. Although appellant and her attorney used the term "reconsideration," it is quite clear from the record that appellant was seeking modification of the LWEC determination based on the allegation that her condition had changed.[7]

It is well established that appellant need not use the word "modification" to obtain a merit review of an adverse wage-earning capacity decision.[8] Here, she submitted Dr. Puri's note with her request. Notwithstanding that the Office stated it had not reviewed the merits of appellant's claim, it clearly reviewed Dr. Puri's report using the standard for modification of wage-earning capacity decision rather than the reconsideration standard provided under the Act.[9] While the

[4] 5 U.S.C. § 8115(a).

[5] *W.G.*, 58 ECAB 243 (2006); *Elmer Strong*, 17 ECAB 226 (1965).

[6] *S.M.*, 58 ECAB 166 (2006); *Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

[7] *See M.J.*, Docket No. 08-2280 (issued July 7, 2009); *O.T.*, Docket No. 07-929 (issued May 9, 2008); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004); *Gary L. Moreland*, 54 ECAB 638 (2003); *Paul R. Reedy*, 45 ECAB 488 (1994).

[8] *Id.*

[9] 5 U.S.C. § 8128(a). Under section 8128(a) of the 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).

Office initially framed the issue as that appropriate for nonmerit reconsideration, a closer review of the Office's May 28, 2009 decision, particularly the first paragraph on page 6, reveals the Office afforded appellant a review as to whether the wage-earning capacity decision should be modified. Thus, it denied modification, not reconsideration, of its December 13, 2007 decision. As this was a merit decision, appellant should have been afforded full appeal rights.

The Office erred by informing appellant that she could only appeal to the Board and, consequently, its decision was not properly issued. There is no regulation or Board precedent that would limit a claimant's appeal rights in this situation. Following an adverse merit decision, the Office's procedural manual dictates that appellant has a right to request reconsideration, a hearing or appeal to the Board.[10] All three methods of further review should have been available to appellant. A decision is not properly issued if it effectively denies the claimant a full opportunity to exercise his or her appeal rights in a timely fashion.[11] Because the Office's decision did not include appropriate appeal rights, it was not properly issued and the case will be remanded to the Office to issue a proper decision with full appeal rights.

CONCLUSION

The Board finds this case not in posture for decision.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapters 2.1400.10 (October 22, 2005).

[11] *See Sara K. Pearce*, 51 ECAB 517 (2000).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 28, 2009 decision is set aside and the case remanded for further development and adjudication consistent with this decision of the Board.

Issued: March 2, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board