

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

P.M., Appellant)
and) Docket No. 10-340
DEPARTMENT OF DEFENSE, DECA) Issued: November 5, 2010
SOUTHWEST REGION, Fort Lee, VA,)
Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 18, 2009 appellant filed a timely appeal from the October 27, 2009 nonmerit decision of the Office of Workers' Compensation Programs which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 4, 2008 and the filing of the appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

¹ For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. See 20 C.F.R. § 501.3(d)(2). For Office decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. See 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On January 3, 1996 appellant, then a 31-year-old store worker, injured her right hand when a milk cart shelf fell on her right hand. The Office accepted the conditions of right wrist contusion, right de Quervain's tendinitis, right carpal tunnel syndrome and a consequential right knee condition. Appellant missed work intermittently from January 4 through March 11, 1996, when she was terminated by the employing establishment as her contract expired. She had de Quervain's release surgery on July 18, 1996, right knee arthroscopy on May 26 and October 6, 1999 and right carpal tunnel release and Guyon's canal release on December 22, 2000.

By decision dated February 16, 2007, the Office found the constructed position of billing clerk fairly and reasonably represented appellant's wage-earning capacity. It noted that, although appellant accepted a sales clerk position beginning on October 27, 2006 working 34 hours a week, she was medically capable of working 8 hours a day, 40 hours a week. Appellant's compensation was reduced effective February 18, 2007 based on the constructed position of billing clerk.²

On November 20, 2007 the Office received two letters from appellant dated November 13, 2007. Appellant requested the expansion of her claim to include an industrial back condition and continuing compensation following the completion of the schedule award payments on February 11, 2008. The record indicates that appellant had not worked since May 12, 2007 as she had hurt her back. By letter dated November 26, 2007, the Office advised appellant that it had previously found in its February 16, 2007 decision that the constructed position of billing clerk fairly and reasonably represented her wage-earning capacity. It also instructed her on the evidence needed to establish a claim of recurrence of total disability.

On December 3, 2007 appellant filed a notice of recurrence of disability commencing June 6, 2003. In a December 20, 2007 report, Dr. Norman Kane, a Board-certified orthopedic surgeon, noted that appellant last worked on March 12, 2007, when she developed lower back pain. Appellant was involved in a motor vehicle accident two weeks prior, but had no injury to her knee. Dr. Kane reviewed appellant's history, set forth findings on examination and provided an impression of status post right wrist surgery for de Quervain's, carpal tunnel syndrome and to the proximal interphalangeal joints of the right index finger with ulnar plus variants; and moderate osteoarthritis in right knee. He opined that the back injury came after the reoccurrence of her right knee pain and right wrist pain and that she was totally disabled from performing her regular duties of prolonged typing or standing as a cashier as a result of the work-related injury. In a January 8, 2008 report, Dr. Kane provided an impression of suspect torn meniscus right knee and left knee medial joint line sprain. Physical therapy notes and x-ray reports dated December 20, 2007 and January 8, 2008 were also received.

In a decision dated February 4, 2008, the Office denied appellant's recurrence claim. It found that the evidence was insufficient to establish that the current claimed total disability was

² On February 28, 2007 the Office issued appellant a schedule award for 10 percent impairment of the right arm and 7 percent impairment of the right leg.

due to the accepted work injury. The Office further noted that appellant did not provide any details or medical records about her motor vehicle accident or her back injury.

On August 3, 2009 the Office received a request for reconsideration dated July 3, 2009 together with a July 22, 2009 letter in which appellant explained that she sought disability beginning December 20, 2007 due to her right wrist and knee conditions. Appellant submitted evidence previously of record with information pertaining to administrative matters, including address changes, disability benefits and authorization for a right knee arthroscopy, etc. She also submitted a magnetic resonance imaging (MRI) scan of the right knee dated April 7, 2008.

In medical reports dated April 14, 2008 to October 15, 2009, Dr. Kane noted treatment of appellant. On October 27, 2008 he sought authorization for right knee arthroscopy due to appellant's original injury.³ In a May 27, 2009 disability report, Dr. Kane indicated that appellant was totally disabled for the period December 20, 2007 until June 5, 2009 with an injury to her right knee. He noted appellant's progress following a May 29, 2009 arthroscopic surgery. Dr. Kane opined that appellant was temporarily totally disabled as a result of the surgery. On July 7, 2009 he reported that appellant felt a tearing sensation in her wrist while putting on her knee brace and noted marked tenderness over the first dorsal compartment and decreased sensibility in the median nerve. Dr. Kane advised that this was the same wrist where she had de Quervain's surgery and that an x-ray of the wrist revealed slight irregularity of the scapholunate area. He listed an impression of right wrist sprain was provided and status post right knee arthroscopic surgery. In an August 11, 2009 report, Dr. Kane advised that appellant was totally disabled since December 20, 2007. He stated that it took almost a year and a half to get the authorization and, for that reason, appellant had been unable to perform her regular duties during that period. Dr. Kane stated that appellant could perform duties that were semi-sedentary in nature.

In a September 1, 2009 report, Dr. Kane stated that the combined effects of appellant's back, right wrist, shoulder and right knee conditions precluded her from work. He advised that appellant could not stand or sit for prolonged periods of time and that her knee tended to give way, which resulted in back problems. Dr. Kane opined that appellant remained temporarily totally disabled. In an October 15, 2009 report, he found that appellant's right knee condition reached a permanent and stationary status. Dr. Kane opined that appellant was precluded from kneeling, squatting, climbing, running or jumping on her right lower extremity as a result of her right knee condition but indicated that she could perform her regular duties. He indicated that she was not currently working as a result of her right upper extremity and a nonindustrial back injury.

In a September 23, 2009 report, Dr. Andrew P. Hartman, a Board-certified orthopedic surgeon and associate of Dr. Kane, evaluated appellant's right wrist. He provided an impression of right wrist ulnar carpal abutment with possible triangular fibrocartilage complex tear. Dr. Hartman indicated disability was according to Dr. Kane for appellant's knee injury.

³ On November 13, 2008 the Office accepted the additional condition of precipitation of right knee degenerative disease and approved the requested surgery. Appellant underwent a right knee arthroscopic surgery on May 29, 2009.

In an October 27, 2009 decision, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

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 adjudicated appellant's July 3, 2009 claim for total disability compensation commencing December 20, 2007 as a request for reconsideration of the February 16, 2007 wage-earning capacity determination. It found the July 3, 2009 request untimely filed and that appellant did not establish clear evidence of error.

Although appellant's correspondence and her July 22, 2009 letter used the term reconsideration, she contended that she sustained disability and was unable to perform any work due to her accepted injuries. The Office determined on February 16, 2007 that the constructed position of billing clerk fairly and reasonably represented her wage-earning capacity. It noted that, although appellant accepted a sales clerk position on October 27, 2006 working 34 hours a week, she was medically capable of working 40 hours a week. Appellant stopped working on May 12, 2007. In her July 3, 2009 reconsideration request, she claimed total disability as of December 20, 2007. The medical reports from Dr. Kane refer to a period of disability beginning December 20, 2007 due to a right knee injury and other accepted conditions. As noted, the Office accepted the additional condition of precipitation of right knee degenerative disease and approved right knee arthroscopic surgery, which appellant underwent on May 29, 2009.

The Board has held 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 whether modification of the wage-earning capacity is warranted.⁷ The

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

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

⁶ *W.W.*, 61 ECAB ____ (Docket No. 09-1934, issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003). See also *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004). In *Peoples* and *Taylor*, the Board determined that the claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification of the decision. The Board set aside the Office's decision denying the claimant's reconsideration request as untimely and remanded both cases for the Office to adjudicate the issue of modification of a loss of wage-earning capacity determination.

⁷ *Katherine T. Kreger*, *supra* note 4.

Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests a resumption of compensation for total wage loss.⁸ This section of the procedure manual covers the situation when a claimant has stopped working, as in this case. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.⁹ The case will be remanded for an appropriate decision on this issue.

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the February 16, 2007 wage-earning capacity decision was warranted.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 5, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); *see Katherine T. Kreger, supra* note 4.

⁹ The record does indicate that the Office began payment of wage-loss compensation for total disability beginning May 29, 2009, the date of his authorized right knee surgery but there is no indication that the Office considered whether appellant's wage-earning capacity determination should be modified.