

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

S.C., Appellant)

and)

DEPARTMENT OF THE ARMY,)
WATERVLIET ARSENAL, Watervliet, NY,)
Employer)

**Docket No. 10-2327
Issued: August 5, 2011**

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

Case Submitted on the Record,

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 30, 2010 appellant filed a timely appeal from a March 23, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year elapsed between the last merit decision, issued by the Board on August 19, 2005, to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.

On appeal, appellant contends that OWCP misinterpreted his December 17, 2009 request for modification of a wage-earning capacity determination as a request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for modification of a wage-earning capacity determination.

FACTUAL HISTORY

This is appellant's fifth appeal before the Board. By decision and order issued August 19, 2005,² the Board affirmed January 20 and July 1, 2004 OWCP decisions denying his claim for a recurrence of disability from August 12, 1994 to February 21, 1995. The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

During the pendency of the prior appeal, OWCP issued an October 1, 2004 decision denying wage-loss compensation beginning October 31, 1995, the date the employing establishment eliminated his part-time light-duty position as an identification clerk due to a reduction-in-force. Appellant had performed the identification clerk position since October 18, 1993. OWCP issued a wage-earning capacity determination on January 13, 1995 based on his actual earnings as an identification clerk. It modified the wage-earning capacity determination on May 22, 1998 to reflect that from June 12, 1994 to October 31, 1995, appellant earned \$189.36 a week on a compressed schedule. Appellant did not return to work. He remained under medical care for residuals of his accepted lumbar and left knee injuries.

On April 28, 2006 OWCP obtained a second opinion from Dr. Bryan S. Bilfield, a Board-certified orthopedic surgeon, who noted that it accepted an L1 spinal fracture, lumbago, left foot fracture, chondromalacia of the left patella and a ruptured left anterior cruciate ligament as work related. On examination, Dr. Bilfield found limited lumbar motion, a diminished right ankle jerk reflex and restricted left knee motion. He diagnosed status post medial meniscectomy of the left knee with loss of extension, possible S1 nerve root irritation with radiculopathy and an annular tear at L5-S1. Dr. Bilfield found appellant able to work four hours a day with restrictions.

On May 22, 2008 Dr. Richard L. Katz, an attending Board-certified orthopedic surgeon, performed a repeat left knee arthroscopy and chondroplasty of the left medial femoral condyle, authorized by OWCP.

In an August 25, 2008 report, Dr. Sashi D. Patel, an attending Board-certified orthopedic surgeon, noted treating appellant in July 1993 for chronic lumbar pain. He opined that as of November 26, 1993, appellant was medically unable to perform the duties of an identification clerk. Dr. Patel found appellant moderately disabled due to lumbar spondylosis and disc degeneration.³

² Docket No. 04-2186 (issued August 19, 2005). The history of two prior appeals is set forth in Docket No.04-2186. Docket No.10-2351 (issued August 5, 2011) is proceeding separately to adjudication before the Board.

³ Dr. Luke V. Rigolosi, an attending Board-certified physiatrist, administered lumbar epidural injections from January 8, 2007 through December 23, 2009, authorized by OWCP. He found appellant totally and permanently disabled for work.

In a December 17, 2009 letter, appellant requested modification of OWCP's May 22, 1998 wage-earning capacity determination. He asserted that the original January 13, 1995 rating was in error as the identification clerk position he performed from October 1993 to 1995 required bending, squatting, kneeling and twisting in violation of Dr. Patel's medical restrictions. Appellant submitted a November 26, 1993 work restriction evaluation from Dr. Patel prohibiting lifting, bending, squatting, climbing, kneeling and twisting due to the occupational lumbar injuries. Dr. Patel also provided a November 19, 2008 letter from an employing establishment manager stating that when she supervised appellant in 1995, his duties as an identification clerk required lifting, bending, squatting, kneeling and twisting.

By decision dated March 23, 2010, OWCP denied reconsideration on the grounds that appellant's request was untimely filed and did not present clear evidence of error. It found that appellant's December 17, 2009 request was not filed within one year of the Board's August 19, 2005 decision, the most recent merit decision in the case. OWCP further found that the evidence submitted did not establish clear evidence of error as it did not address whether appellant was totally disabled for work on and after August 12, 1994, the issue adjudicated by the Board's August 19, 2005 decision and order.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination.⁴

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.⁵ OWCP's procedure manual provides that, "[i]f 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. In this instance the claims examiner (CE) will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

OWCP accepted that appellant sustained an L1 fracture, lumbago, chondromalacia of the left patella and rupture of the left anterior cruciate ligament. By decision dated January 13, 1995, it found that appellant's actual earnings as an identification clerk properly represented his

⁴ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

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

⁷ *Sue A. Sedgwick*, *supra* note 5.

wage-earning capacity. OWCP modified the determination on May 22, 1998 to reflect salary changes due to a compressed work schedule.

On December 17, 2009 appellant requested modification of the May 22, 1998 wage-earning capacity determination. He asserted that the original January 13, 1995 determination was in error as the identification clerk position exceeded his medical restrictions. Appellant submitted a November 19, 2008 letter from his supervisor asserting that in 1995, the identification clerk position required lifting, bending, squatting, kneeling and twisting. He also provided November 26, 1993 work restrictions from Dr. Patel, an attending Board-certified orthopedic surgeon, forbidding those activities.

OWCP issued a March 23, 2010 decision denying appellant's December 17, 2009 request for modification on the grounds that it was an untimely request for reconsideration of the Board's August 19, 2005 decision and the evidence submitted did not establish clear evidence of error. This decision did not adjudicate whether the May 22, 1998 wage-earning capacity determination should be modified.⁸ The Board has held that, when a wage-earning capacity determination has been issued, and a claimant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁹

OWCP's procedure manual directs the CE to consider the criteria for modification when the claimant requests resumption of compensation for total wage loss. This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. In the March 23, 2010 decision, OWCP failed to address the wage-earning capacity issue. Rather, it adjudicated the timelines of the request for reconsideration and clear evidence of error. Under the circumstances of this case, however, the Board finds that the issue presented was whether the May 22, 1998 wage-earning capacity determination should be modified.¹⁰ The case will be remanded for adjudication of the wage-earning capacity issue. Following such development as OWCP deems necessary, it shall issue an appropriate decision in the case.

On appeal, appellant contends that OWCP misinterpreted his December 17, 2009 request for modification of a wage-earning capacity determination as an untimely request for reconsideration. As noted, OWCP should have treated his December 17, 2009 letter as a request to modify the May 22, 1998 wage-earning capacity determination.

⁸ *Supra* note 6.

⁹ *See Sharon C. Clement, supra* note 4. The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

¹⁰ *See Gary L. Moreland*, 54 ECAB 638 (2003); *D.O.*, Docket No. 10-1727 (issued March 7, 2011).

CONCLUSION

The Board finds that the case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2010 decision of the Office of Worker's Compensation Programs is set aside. The case is remanded to OWCP for further development consistent with this decision and order.

Issued: August 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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