

FACTUAL HISTORY

On June 13, 2006 appellant, then a 55-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury in the performance of duty on June 1, 2006. He stated that he stepped out of a vehicle and hurt his right knee. OWCP accepted the claim for right knee contusion and a torn right lateral meniscus. Appellant underwent right knee surgery on March 1, 2007 and continued to receive compensation for wage loss.

Appellant was referred to vocational rehabilitation services. By decision dated August 27, 2008, OWCP reduced his compensation on the grounds that he could earn the wages of a receptionist/information clerk. In a decision dated October 9, 2008, it vacated the August 27, 2008 decision, finding that they failed to issue a preliminary notice of a proposed reduction of compensation.

In a letter dated April 6, 2009, OWCP advised appellant that it proposed to reduce his compensation for wage loss on the grounds that he had the capacity to earn wages of \$380.76 a week as a receptionist/information clerk. It indicated that appellant should submit evidence or argument within 30 days. The letter was sent to appellant's address of record.

On May 5, 2009 appellant submitted an undated letter, requesting that OWCP decline to reduce his compensation. He stated that he was still in pain when he walked short distances, up stairs, sitting with knees bent or riding distances.

By decision dated May 7, 2009, OWCP determined that appellant could earn wages of \$380.76 a week in the selected position of receptionist/information clerk. Appellant's net compensation was reduced to \$1,058.00 every four weeks.

In a memorandum of telephone call dated September 9, 2009, appellant asked why his compensation was reduced and why he was informed that a wage-earning capacity determination was completed on May 7, 2009 and he should exercise appeal rights. He stated that he did not receive a decision, and he was advised to submit a statement of his nonreceipt and a copy of the decision would be mailed to him.

On February 3, 2010 the Office received treatment notes from Dr. Thad Broussard, an attending orthopedic surgeon, covering the period February 20, 2008 to December 16, 2009. The notes included a July 21, 2008 treatment note stating appellant was totally disabled.

A Form CA-110 memorandum dated May 18, 2010 indicated that appellant asserted he did not receive the April 6 or May 7, 2009 letters. A letter from OWCP dated May 19, 2010 indicated that they had been unable to contact appellant by telephone, and a copy of the May 7, 2009 decision was being sent to him. On May 21, 2010 appellant submitted a March 31, 2010 note from Dr. Broussard, stating that appellant was disabled from his former occupation.

By letter dated and postmarked May 27, 2010, appellant requested reconsideration of the May 7, 2009 decision.

In a decision dated June 7, 2010, OWCP found that appellant had submitted an untimely application for reconsideration. It further denied the application on the grounds that it was insufficient to establish clear evidence of error.³

LEGAL PRECEDENT

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 a modification of the wage-earning capacity determination.⁵ There is no time limitation for a request to modify a wage-earning capacity determination.⁶

ANALYSIS

OWCP issued a decision dated May 7, 2009 reducing appellant's compensation pursuant to 5 U.S.C. § 8115.⁷ Appellant's May 27, 2010 letter and additional evidence was considered by OWCP to be an untimely application for reconsideration of the May 7, 2009 decision.

Although appellant requested "reconsideration," he submitted medical evidence on disability for work, both before and after the May 7, 2009 wage-earning capacity determination. As noted above, a claimant may request modification of a wage-earning capacity determination on the grounds that the original determination was erroneous, as well as on the grounds that there was a material change in the nature and extent of the injury-related condition. The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if a modification of the wage-earning capacity is warranted.⁸

In this case, OWCP improperly characterized the evidence as an untimely application for reconsideration. It was a request for modification of an existing wage-earning capacity

³ The Board notes the record also contains a September 2, 2010 decision suspending appellant's compensation for failure to accurately complete a (Form EN1032) regarding employment activity, dependents and receipt of other benefits. Appellant did not request review of this decision, and the Board notes that appellant did submit a Form EN1032 and the record indicates there was no interruption in compensation for wage-loss benefits.

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ *See W.W.*, Docket No. 09-1934 (issued February 24, 2010).

⁷ This section provides that if actual earnings do not fairly and reasonably represent wage-earning capacity, or if the claimant has no earnings, the wage-earning capacity is determined with due regards to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, availability of suitable employment and other factors that may affect his wage-earning capacity.

⁸ *See J.J.*, Docket No. 10-1379 (issued March 4, 2011); *see also L.C.*, Docket No. 10-827 (issued March 4, 2011); *W.W.*, *supra* note 5.

determination and OWCP should have issued an appropriate merit decision on the issue. The case will be remanded to OWCP for an appropriate decision.

CONCLUSION

The Board finds that appellant submitted a request for modification of a wage-earning capacity determination and the case is remanded for an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 7, 2010 is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: June 21, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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