

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

K.N., Appellant)	
)	
and)	Docket No. 12-1774
)	Issued: January 16, 2013
DEPARTMENT OF THE NAVY,)	
COMMANDER NAVY INSTALLATIONS,)	
Philadelphia, PA, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2012 appellant filed a timely appeal from the February 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly determined that appellant was not entitled to further review of the merits of his claim.

FACTUAL HISTORY

OWCP accepted that on June 18, 1986 appellant, then a 28-year-old rigger, sustained a cervical dorsal strain/sprain and herniated lumbar disc due to lifting and emptying trash cans. Appellant last worked for the employing establishment on January 25, 1989 and on March 12,

¹ 5 U.S.C. §§ 8101-8193.

2004 he underwent a discectomy at L4-5 and L5-S1 with anterior interbody fusion. The procedure was authorized by OWCP.

Appellant began working for 20 hours per week as an activities director for Kampgrounds of America, a private entity, on April 11, 2005. In a December 18, 2006 decision, OWCP adjusted appellant's compensation effective April 11, 2005 based on its determination that his actual wages as an activities director represented his wage-earning capacity.

Appellant stopped working on November 20, 2008 and he advised OWCP in a December 10, 2008 letter that his injury-related condition had worsened and that he could no longer work as an activities director. OWCP considered his letter to constitute a request for modification of its December 18, 2006 wage-earning capacity determination and requested that he submit evidence in support of the request. Appellant submitted several medical reports including a November 24, 2008 report in which Dr. David F. Grider, an attending Board-certified orthopedic surgeon, indicated that his worsened back condition prevented him from working in his present position.

In an October 1, 2009 decision, OWCP denied appellant's request for modification of its December 18, 2006 wage-earning capacity determination indicating that he had not shown that the original determination was erroneous or that he suffered a material worsening of his injury-related condition such that he could no longer work as an activities director.

Appellant requested modification of the December 18, 2006 wage-earning capacity determination and submitted a December 2, 2010 report of Dr. Ruben Fernandez, an attending Board-certified anesthesiologist.

In a February 11, 2011 decision, OWCP denied appellant's request for modification of its December 18, 2006 wage-earning capacity determination.

In a February 6, 2012 letter, appellant expressed his disagreement with OWCP's prior denial of his request for modification of its December 18, 2006 wage-earning capacity determination. He asserted that his attending physicians had concluded that the medical conditions caused by his June 18, 1986 work injury prevented him from working as an activities director after November 20, 2008. Appellant submitted a number of medical reports including new reports dated between March and December 2011 of Dr. Fernandez, Dr. Marc Levine, an attending Board-certified anesthesiologist, and Dr. Daniel Battaglia, an attending osteopath and Board-certified anesthesiologist. In these reports, the physicians diagnosed several back conditions, including postlaminectomy syndrome of the lumbar region and described the multiple medications prescribed for appellant's back pain.

In a February 27, 2012 decision, OWCP determined that appellant was not entitled to further review of the merits of his claim under section 8128 of FECA. It indicated that the additional evidence and arguments he provided were cumulative, repetitious, irrelevant or immaterial.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP 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.² The burden of proof is on the party attempting to show modification.³ There is no time limit for a claimant to submit a request for modification of a wage-earning capacity determination.⁴

ANALYSIS

OWCP accepted that on June 18, 1986 appellant sustained a cervical dorsal strain/sprain and herniated lumbar disc due to lifting and emptying trash cans. On March 12, 2004 appellant underwent a discectomy at L4-5 and L5-S1 with anterior interbody fusion. He began working as an activities director for Kampgrounds of America on April 11, 2005 and, in a December 18, 2006 decision, OWCP adjusted appellant's compensation effective April 11, 2005 based on its determination that his actual wages as an activities director represented his wage-earning capacity. Appellant stopped working on November 20, 2008 and asserted that his worsened injury-related condition prevented him from working as an activities director. In October 1, 2009 and February 11, 2011 decisions, OWCP denied his request for modification of its December 18, 2006 wage-earning capacity determination. In a February 6, 2012 letter, appellant expressed his disagreement with OWCP's prior denial of his request for modification of its December 18, 2006 wage-earning capacity determination. In a February 27, 2012 decision, OWCP determined that appellant was not entitled to further review of the merits of his claim under section 8128 of FECA.

OWCP considered appellant's February 6, 2012 letter to be a request for reconsideration of the prior wage-earning capacity determination under 5 U.S.C. § 8128(a). Although it found that appellant's request was timely, it further found that he did not submit sufficient new and relevant evidence or legal argument to require reopening his claim for merit review. Appellant asserted in his letter that OWCP erred in its December 18, 2006 wage-earning capacity determination as he was totally disabled for work on or before that date and that his injury-related condition had worsened since the loss of wage-earning capacity determination was made. His letter constitutes a request for modification of OWCP's wage-earning capacity determination and he submitted medical evidence in support of the request. The letter was not a request for reconsideration under section 8128(a) of FECA.⁵ Therefore, OWCP improperly adjudicated appellant's letter as request for reconsideration.⁶

As appellant has requested modification of OWCP's December 18, 2006 wage-earning capacity determination, the specific requirements of OWCP's regulations for requesting reconsideration do not apply in this case and he is entitled to a merit review on the wage-earning

² *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

³ *Darletha Coleman*, 55 ECAB 143 (2003).

⁴ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁵ See 5 U.S.C. § 8128(a).

⁶ *D.E.*, Docket No. 12-8 (issued June 7, 2012); *F.B.*, Docket No. 10-99 (issued June 21, 2010); *M.J.*, Docket No. 08-2280 (issued July 7, 2009).

capacity issue.⁷ The case will be remanded to OWCP in order to adjudicate appellant's request for modification of the wage-earning capacity determination and to issue an appropriate merit decision in this case.

CONCLUSION

The Board finds that appellant requested modification of OWCP's December 18, 2006 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: January 16, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁷ See 20 C.F.R. § 10.606; *D.E.*, *supra* note 6.