

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, SOUTHERN)
MARYLAND PROCESSING & DISTRIBUTION)
CENTER, Capital Heights, MD, Employer)

**Docket No. 15-685
Issued: June 12, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 10, 2015 appellant filed a timely appeal from a December 22, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the most recent merit decision dated March 3, 2010 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that it does not have jurisdiction to review the August 17, 2014 decision denying appellant's request for a hearing. For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e); *D.G.*, Docket No. 12-770 (issued April 20, 2012).

On appeal appellant asserts that an OWCP wage-earning capacity determination was in error because he was incapacitated at the time and could not properly respond due to mental illness.

FACTUAL HISTORY

On April 24, 2006 OWCP accepted that appellant, then a 40-year-old mail handler, sustained an employment-related herniated disc. Appellant had stopped work on January 30, 2006 and did not return. He received appropriate compensation and was placed on the periodic compensation rolls.

In July 2008 appellant was referred for vocational rehabilitation. By letter dated April 15, 2009, OWCP proposed to reduce his compensation benefits, based on his capacity to earn wages as a general clerk. The only response received was an April 7, 2009 report in which Dr. Hampton J. Jackson, Jr., an attending Board-certified orthopedic surgeon, advised that appellant should avoid all activities that could aggravate his lumbar condition.

By decision dated June 12, 2009, OWCP reduced appellant's compensation benefits based on his capacity to earn wages as a general clerk, effective July 5, 2009. Appellant thereafter received compensation based on the wage-earning capacity rate.

By decision dated March 3, 2010, OWCP suspended appellant's monetary compensation because he had not timely completed an OWCP CA-1032 form. Appellant submitted the form that day and his compensation was resumed.

Dr. Jackson continued to submit reports. On October 19, 2011 he advised that appellant was not fit for employment because work activities would increase his pain and aggravate his condition. In November 2012 appellant came under the care of Dr. George H. Drakes and Dr. Ai Huong Phu, Board-certified physiatrists, for pain management.

In correspondence dated September 3, 2013, appellant stated that he was under duress when the April 15, 2009 decision was issued and asked that his compensation be returned to the previous, full compensation rate. He stated that he was depressed and in constant pain. On November 21, 2013 OWCP informed appellant to follow his appeal rights. On January 15 and July 17, 2014 appellant requested a hearing. He stated that he was in and out of mental health wards from 2009 to 2012 and asked that his full compensation be restored.

Appellant submitted copious medical evidence. This included an October 30, 2013 thoracic spine x-ray that demonstrated multilevel spondylosis degenerative changes. A functional capacity evaluation on December 24, 2013 advised that it was not appropriate for appellant to return to mail handler duties and it would not be appropriate for him to attend a work hardening program. In treatment notes dated November 19, 2012 to April 4, 2014, Drs. Drakes and Phu, and their associate Dr. Nathan Yokel,³ described physical examination findings, pain management therapies, and diagnosed lumbago, degenerative disc disease, thoracic or lumbosacral neuritis or radiculitis, and chronic pain syndrome. A June 4, 2014 x-ray of the lumbar spine demonstrated bridging osteophytes at multiple levels. Southern Maryland Hospital

³ Dr. Yokel's credentials could not be ascertained.

Center records indicated that appellant was admitted from April 16 to 22, 2009, January 5 to 11, 2010, and June 14 to 24, 2011, for diagnoses of bipolar disorder with psychotic features.

In an August 7, 2014 decision, OWCP denied appellant's request for a hearing on the grounds that it was untimely filed. It noted that his request was postmarked January 15, 2014, more than 30 days after issuance of the March 3, 2010 OWCP decision. OWCP also advised appellant that the issue in the case could equally be addressed by requesting reconsideration with OWCP.

On September 12 and November 7, 2014 appellant requested reconsideration with OWCP. In an August 27, 2014 report, Dr. Bothwell G. Lee, a Board-certified neurosurgeon, noted the history of injury and appellant's mental health history. He described appellant's complaints of low back pain and physical examination findings. Dr. Lee diagnosed lumbar or lumbosacral disc degeneration and obesity and recommended conservative treatment.

By decision dated December 22, 2014, OWCP denied appellant's reconsideration request on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error.

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 and it remains undisturbed until properly modified.⁴ Section 10.511 of OWCP regulations provide that if a formal loss of wage-earning capacity decision has been issued, the rating is left in place until that determination is modified by OWCP. Modification is only warranted where the party seeking modification establishes 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 a modification of the wage-earning capacity determination.⁶ In addition, Chapter 2.1501 of OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.⁷

ANALYSIS

The Board finds that this case is not in posture for decision. By decision dated June 12, 2009, OWCP found that appellant had the capacity to earn wages as a general clerk and reduced his compensation accordingly. On September 12 and November 7, 2014 appellant requested

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ 20 C.F.R. § 10.511.

⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

reconsideration and in a December 22, 2014 decision OWCP denied the request because he failed to demonstrate clear evidence of error. In support of his request, he submitted medical evidence describing both his mental and orthopedic conditions.

As noted above, OWCP issued a formal decision on appellant's wage-earning capacity on June 12, 2009. It is well established that a claimant may establish that a modification of a wage-earning capacity is warranted if there is a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.⁸ Although appellant's September 12 and November 7, 2014 correspondence used the term "reconsideration," he requested that full compensation be restored and alleged that he was incapacitated when the June 12, 2009 decision was issued.

The Board finds that appellant's September 12 and November 7, 2014 proffers constitute requests for modification of the June 12, 2009 wage-earning capacity determination.⁹ 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 modification of wage-earning capacity is warranted.¹⁰ When a claimant requests resumption of compensation for total wage loss, OWCP must evaluate the request in accordance with the customary criteria for modifying a formal loss of wage-earning capacity.¹¹

In this case, appellant asserted that he was incapacitated at the time the wage-earning capacity determination was issued in June 2009 and requested a resumption of compensation for total wage loss. In its December 22, 2014 decision, rather than evaluating whether appellant established modification of the wage-earning capacity, OWCP evaluated appellant's requests under the clear evidence of error standard.

The Board finds that OWCP should have adjudicated appellant's September 12 and November 7, 2014 requests, in which he requested resumption of total wage-loss compensation as requests for modification of the wage-earning capacity determination.¹² The Board will therefore remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.¹³

⁸ *P.C.*, 58 ECAB 405 (2007).

⁹ *See M.N.*, Docket No. 10-51 (issued July 8, 2010).

¹⁰ *Supra* note 3.

¹¹ *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹² *F.B.*, Docket No. 09-99 (issued July 21, 2010); *see also M.D.*, Docket No. 12-1317 (issued December 21, 2012).

¹³ As to any arguments made by appellant regarding the March 3, 2010 decision which suspended his compensation for failure to submit an OWCP CA-1032 form, the record reflects that compensation was restored at the wage-earning capacity rate.

CONCLUSION

The Board finds that OWCP should have adjudicated appellant's September 12 and November 7, 2014 applications under the modification of wage-earning capacity standard.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: June 12, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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