

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

A.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Boise, ID, Employer**

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**Docket No. 15-710
Issued: June 5, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 23, 2015 appellant filed a timely appeal from a July 28, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision dated May 6, 2013 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. 501.3(e)-(f). One hundred and eighty days from July 28, 2014, the date of OWCP's last decision was January 24, 2015. As this was a Saturday, the appeal would be timely if received on the next business day, Monday, January 26, 2015. Since using February 3, 2015, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 23, 2015, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. On August 25, 1999 appellant, then a 46-year-old mail processor, filed a traumatic injury claim alleging that on August 22, 1999 he injured his back when he tried to grab a tray of mail that slipped from his hand.

By decision dated June 5, 2001, the Board set aside November 1, 1999 and February 16, 2000 OWCP decisions denying appellant's traumatic injury claim.³ The Board remanded the case for further development of the medical evidence. On remand, OWCP accepted appellant's claim for a herniated disc at L4-5 and L5-S1 and authorized a November 15, 1999 discectomy.

On appeal to the Board for the second time, on February 7, 2005 the Board reversed a December 24, 2003 decision terminating appellant's compensation effective September 9, 2002.⁴ The Board found that he established a recurrence of total disability beginning September 9, 2002 and was entitled to compensation for four hours of wage loss from that date until he resumed limited-duty employment on April 9, 2003. In a decision filed May 15, 2008, the Board reversed a March 9, 2007 decision terminating appellant's authorization for medical benefits effective March 14, 2006.⁵ The Board found that the opinion of the impartial medical specialist was not based on an accurate statement of accepted facts and thus was insufficient to resolve the conflict in medical opinion. In an order dated March 5, 2010, the Board dismissed a purported appeal of an April 7, 2009 decision after finding that there was no appealable decision within its jurisdiction.⁶ The facts and the circumstances from the prior decisions and order are hereby incorporated by reference.

In a decision dated May 6, 2013, OWCP reduced appellant's compensation effective May 10, 2013 after finding that he had the capacity to earn wages of \$539.60 per week in the selected position of general clerk.

By letter dated February 25, 2014, appellant advised OWCP that he would be requesting reconsideration and asked for a copy of a March 12, 2013 letter from the employing establishment. He also requested copies of all letters from the employing establishment regarding his claim.

³ Docket No. 00-2072 (issued June 5, 2001).

⁴ Docket No. 04-1283 (issued February 17, 2005).

⁵ Docket No. 07-2423 (issued May 15, 2008).

⁶ *Order Dismissing Appeal*, Docket No. 09-1668 (issued March 5, 2010).

In a response dated March 5, 2014, OWCP informed appellant that it was treating his February 25, 2014 letter as a request for a copy of the case record rather than a reconsideration request. On March 11, 2014 it provided him with a copy of the case record.

By letter dated May 10, 2014, appellant questioned why OWCP provided him with the entire case record when he only asked for specific documents. He asserted that his request for reconsideration was timely because the envelope accompanying the May 6, 2013 decision was dated May 13, 2013. Appellant related that the size of the imaged record delayed his reconsideration request.

On May 10, 2014 appellant requested reconsideration. He argued that OWCP based its determination, that the position of general clerk was not medically suitable, on medical evidence from 2010 rather than on contemporaneous medical evidence. Appellant asserted that the medical evidence documented that his condition had worsened prior to the wage-earning capacity determination. He also argued that the position of general clerk was not vocationally suitable because he lacked the necessary proficiency with computers. Finally, appellant contended that OWCP should have calculated his earning capacity based on entry level wages rather than average wages.

In progress reports dated April 17 and May 16, 2014, Dr. James H. Bates, a Board-certified physiatrist, diagnosed lumbosacral radiculopathy and back pain.

By decision dated July 28, 2014, OWCP denied appellant's request for reconsideration after finding that it was not timely filed and did not establish clear evidence of error.

On appeal appellant asserts that he cited specific errors in OWCP's loss of wage-earning capacity determination finding that he could work as a general clerk. He maintains that the position was not vocationally appropriate, that OWCP did not obtain a current medical opinion, and that OWCP used inaccurate wage information. Appellant indicates that his request was untimely because OWCP sent him too much information in response to his request for a copy of a letter from the employing establishment.

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.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸ 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

⁷ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁸ *Sharon C. Clement*, 55 ECAB 552 (2004).

determination was, in fact, erroneous.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰ In addition, Chapter 2.1501 of OWCP procedures contains provisions regarding the modification of a formal loss of wage-earning capacity.¹¹

ANALYSIS

The Board finds that the case is not in posture for decision. In a decision dated May 6, 2013, OWCP reduced appellant's compensation effective May 10, 2013 based on its finding that he had the capacity to work in the selected position of general clerk earning wages of \$539.60 per week. On May 10, 2014 appellant requested reconsideration, arguing that the position was not vocationally suitable, that OWCP should have obtained a more recent medical opinion, and that it incorrectly determined the weekly wages he could earn in the position.

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.¹² Although appellant used the term reconsideration in his May 10, 2014 correspondence, he contended that OWCP committed error in its wage-earning capacity. The Board finds that the May 10, 2014 letter from appellant constitutes a request for modification of the May 6, 2013 loss of wage-earning capacity determination.¹³ The Board has held that, when a loss of wage-earning capacity determination has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.¹⁴ In its July 28, 2014 decision, however OWCP evaluated his request under the clear evidence of error standard applicable to untimely requests for reconsideration. The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.

CONCLUSION

The Board finds that OWCP should have adjudicated appellant's May 10, 2014 request for reconsideration under the modification of loss of wage-earning capacity standard.

⁹ 20 C.F.R. § 10.511.

¹⁰ See *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹¹ Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

¹² 20 C.F.R. § 10.511; see *P.C.*, 58 ECAB 405 (2007).

¹³ See *E.L.*, Docket No. 14-1434 (issued March 18, 2015); *M.N.*, Docket No. 10-51 (issued July 8, 2010).

¹⁴ See *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 5, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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