

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

_____)	
B.R., Appellant)	
)	
and)	Docket No. 17-0635
)	Issued: August 2, 2017
TENNESEE VALLEY AUTHORITY, BULL)	
RUN FOSSIL PLANT, Clinton, TN, Employer)	
_____)	

Appearances:
Appellant, prose
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 30, 2017 appellant filed a timely appeal from an October 20, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated December 1, 2011 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 an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant filed a timely request for oral argument, pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, the Board, by a May 9, 2017 order, denied his request noting that his arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0635 (issued May 9, 2017).

FACTUAL HISTORY

OWCP accepted that on November 10, 1980 appellant, then a 37-year-old boilermaker welder, slipped and fell on a piece of stainless sheet metal, causing a closed fracture of the neck of the left femur. He stopped work on the date of injury and did not return to the employing establishment. Appellant underwent surgical fixation of the fracture, superimposed on a prior left hip arthroplasty with displacement of prosthesis. OWCP issued wage-loss compensation for total disability. Appellant remained under continued medical treatment.

On February 5, 1982 appellant began work as a sales manager for a private sector vacuum cleaner company. By loss of wage-earning capacity (LWEC) determination dated May 12, 1982, OWCP adjusted appellant's continuing wage-loss compensation payments effective April 21, 1982, finding that his actual earnings as a private sector sales manager fairly and reasonably represented his wage-earning capacity.

Appellant became unemployed in 1984. He participated in vocational rehabilitation in 1987 and 1988, and was fully cooperative with placement efforts. Appellant began work on November 7, 1988 as a private sector route salesman.

OWCP authorized a revision of appellant's total left hip arthroplasty, performed on March 29, 1990. It resumed payment of wage-loss compensation for total disability. Appellant participated in vocational rehabilitation from October 1990 through April 1991. He resumed work on May 29, 1991 as an engineering aide in the human resources division of the Watts Bar Nuclear Plant. OWCP issued compensation for LWEC beginning May 29, 1991.

By decision dated June 20, 1991, OWCP determined that appellant's actual earnings as an engineering aide, effective May 29, 1991, fairly and reasonably represented his wage-earning capacity. It issued wage-loss compensation at the new rate.

On August 7, 1991 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing July 17, 1991. He described increased pain and swelling in the left femur which he attributed to walking and driving at work. Following a brief period of vocational rehabilitation, appellant returned to work on November 19, 1991 as a data entry clerk in a private sector supported employment program.

By decision dated March 13, 1992, OWCP determined that appellant's actual earnings as a data entry and document clerk fairly and reasonably represented his wage-earning capacity. It resumed payment of wage-loss compensation based on his actual earnings. Appellant continued to require medical care for the accepted left femur fracture. He underwent a revision left hip arthroplasty on February 23, 1998. Appellant remained off work.

Following additional vocational rehabilitation and development of the medical record, OWCP issued an LWEC decision on December 1, 2011, in which it reduced appellant's wage-

loss compensation benefits effective that day, based on his projected ability to earn wages in the constructed position of receptionist.³

On December 12, 2011 appellant checked lines on the appeal rights form of the December 1, 2011 decision, requesting an oral hearing before a representative of OWCP's Branch of Hearings and Review. The form was postmarked December 13, 2011.

In a December 30, 2011 letter, appellant withdrew his request for an oral hearing, explaining that the "procedure in which [he] was appealing" had been resolved. OWCP notified him by February 8, 2012 letter that it received his timely request for an oral hearing, and his second letter withdrawing the hearing request. It accepted appellant's withdrawal of his request for an oral hearing.

OWCP continued to pay appellant compensation under the December 1, 2011 LWEC determination through February 6, 2016. Appellant remained off work.

In a July 23, 2016 letter postmarked July 26, 2016, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the December 1, 2011 LWEC decision. In a September 5, 2016 letter, he contended that the selected receptionist position exceeded his medical restrictions and that he had not received the December 1, 2011 decision until the beginning of July 2016.

By decision dated October 20, 2016, OWCP denied appellant's oral hearing request, finding that his request was untimely filed within 30 days of its December 1, 2011 decision. It exercised its discretion and performed a limited, nonmerit review of the evidence following the issuance of the December 1, 2011 decision. OWCP further denied the hearing request as the issue in the case could equally well be addressed by submitting new, relevant evidence or argument accompanying a valid request for reconsideration.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.⁴ A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁵ A request for either an oral hearing or a review of the written record must be sent, in writing, within

³ By separate decision dated December 1, 2011, OWCP issued a schedule award for 75 percent permanent impairment of the left leg. The award ran for 216 weeks, from November 20, 2011 to January 9, 2016.

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. § 10.615.

30 days of the date of the decision for which the hearing is sought.⁶ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁷ OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.⁸

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.⁹ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰ Section 10.511 of OWCP regulations provide that, if a formal LWEC 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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹² In addition, Chapter 2.1501 of OWCP procedures contains provisions regarding the modification of a formal LWEC.¹³

ANALYSIS

OWCP issued an LWEC determination on December 1, 2011, finding that appellant's projected earnings in the constructed position of receptionist properly represented his wage-earning capacity. Appellant timely requested an oral hearing by letter postmarked December 13, 2011, but then withdrew that request by letter dated December 30, 2011. In a February 8, 2012 letter, OWCP accepted withdrawal of his request for an oral hearing.

In a letter dated and postmarked July 23, 2016, appellant again requested an oral hearing regarding OWCP's December 1, 2011 LWEC determination. He noted that he had not received

⁶ *James Smith*, 53 ECAB 188 (2001); 20 C.F.R. § 10.616(a).

⁷ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁸ *Teresa M. Valle*, 57 ECAB 542 (2006).

⁹ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

¹⁰ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹¹ 20 C.F.R. § 10.511.

¹² See *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹³ Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

a copy of the decision made by OWCP on December 1, 2011 or he would have appealed at that time. In a September 5, 2016 letter, appellant contended that the constructed receptionist position in the LWEC determination exceeded his medical restrictions and was, therefore, an erroneous basis for his wage-earning capacity. Because his request for oral hearing was made more than 30 days after the December 1, 2011 merit decision, OWCP found in its October 20, 2016 decision that the hearing request was untimely as a matter of right.¹⁴

It is well established that a claimant may establish that a modification of an LWEC determination 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.¹⁵ Although appellant indicated on his appeal request form that he was seeking an oral hearing regarding the December 1, 2011 decision, he specifically asserted that the decision was erroneous as it was based upon a position in excess of his vocational abilities due to his permanent work restrictions, and sought to contest the factual findings contained in the decision.

The Board therefore finds that the July 23, 2016 appeal request form constitutes a request for modification of the December 1, 2011 LWEC determination. The Board has held that when an LWEC determination has been issued and appellant provides a new legal argument or presents evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification of the wage-earning capacity is warranted.¹⁶ In its October 20, 2016 decision, OWCP improperly evaluated appellant's request under the legal standard for determining whether a request for oral hearing was timely filed. The Board consequently will remand the case to OWCP for proper adjudication, to be followed by a *de novo* decision.¹⁷

CONCLUSION

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

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

¹⁵ *Supra* note 11.

¹⁶ *See W.W.*, Docket No. 09-1934 (issued February 24, 2010).

¹⁷ *W.R.*, Docket No. 16-0098 (issued May 26, 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the above decision.

Issued: August 2, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board