

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

K.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Russell, KS, Employer**

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**Docket No. 17-0242
Issued: May 9, 2017**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 14, 2016 appellant filed a timely appeal from a May 23, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between the final merit decision dated June 25, 2015 to the date 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.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before July 30, 2013 appellant, then a 48-year-old letter carrier, sustained thoracic spondylosis without myelopathy from T7-8 through T11-12, aggravation of lumbar spondylosis, and aggravation of lumbar stenosis from L2 through S1.

In a September 26, 2013 report, Dr. Denise K. Weiss, an attending osteopath Board-certified in anesthesiology, noted that appellant had been administered a series of thoracic and lumbar epidural steroid injections beginning on June 25, 2013. She noted that a July 3, 2013 magnetic resonance imaging (MRI) scan demonstrated significant degenerative disc disease from T7 through T11, mild degenerative disc disease at T12, thoracic facet joint arthropathy at multiple levels, and degeneration and severe disc narrowing with neuroforaminal involvement from L1 to L4. Dr. Weiss opined that “carrying mailbags for extended periods of time definitely contribute[d] to her problem and certainly would worsen her pain.”

Dr. Ali B. Manguoglu, an attending Board-certified neurosurgeon, restricted appellant to light duty in November 2013. Appellant remained under care for thoracic and lumbar conditions, and received additional thoracic facet joint injections on January 20, February 26, and May 15, 2014.

On September 23, 2014 appellant accepted a permanent position at retained pay as a modified city carrier, working eight hours a day, five days a week, with Sundays and Wednesdays off. The activities of pulling, pushing, and lifting were limited to 20 pounds, and she was allowed a 5-minute break every 20 minutes. Appellant began work on September 23, 2014 and remained in the modified position. She continued under medical treatment.²

By decision dated June 25, 2015, OWCP found that appellant’s actual earnings of \$1,055.73 a week as a modified city carrier fairly and reasonably represented her wage-earning capacity. As these earnings equaled those of her date-of-injury position, it determined that she had no loss of wage-earning capacity.

On July 6, 2015 appellant underwent radiofrequency ablation of the left medial branches of L3, L4, and the dorsal ramus of L5. Later, on November 10, 2015 she underwent radiofrequency ablation of the right medial branches of L2, L3, L4, and the dorsal ramus of L5. On December 15, 2015 appellant underwent radiofrequency ablation of the left medial branches of L3 and L4, and the dorsal ramus of L5. On January 12, 2016 she underwent radiofrequency ablation of the left medial branches of T8, T9, and T10. On February 2, 2016 appellant underwent radiofrequency ablation of the right medial branches of T8, T9, and T10.

In a February 10, 2016 report, Dr. Manguoglu decreased appellant’s lifting limitation to 10 pounds due to increased thoracic symptoms despite radiofrequency ablation. Appellant underwent a left piriformis injection on March 23, 2016.

² A February 19, 2015 lumbar MRI scan showed moderate-to-severe disc narrowing from L2 through L4, and severe disc narrowing from L4 to S1. On April 16, 2015 appellant underwent radiofrequency ablation of the right medial branches of L2, L3, L4, and the dorsal ramus of L5. On June 2, 2015 she underwent radiofrequency ablation of the right medial branches of T8, T9, and T10.

In an April 19, 2016 report, Dr. Matthew N. Henry, an attending Board-certified neurosurgeon, opined that imaging studies revealed significant thoracic and lumbar degeneration. As there was no indication for surgery, he recommended “long-term prescription management.”

On May 10, 2016 Dr. Sambhundh Panichabhongse, an attending Board-certified surgeon and family practitioner, restricted appellant to lifting no more than five pounds.

On May 16, 2016 appellant requested reconsideration of the June 25, 2015 decision. She asserted that she was no longer able to perform the permanent modified carrier position as her physicians decreased her lifting limitation. In a narrative history, appellant described exacerbations of back pain when bending to deliver mail on May 4, 2016, and reaching for a bundle of flats on May 9, 2016. Additionally, she asserted new work restrictions from whom she referred to as “Dr. Sam.” Appellant then went to see Dr. Panichabhongse, who decreased her lifting capacity to five pounds.

By decision dated May 23, 2016, OWCP denied reconsideration, finding that appellant’s request and the evidence in support thereof did not demonstrate legal error in OWCP’s June 25, 2015 decision. It found her work restrictions inadequate as they were not signed by an identifiable physician. OWCP noted that, as appellant alleged intervening injuries on May 4 and 9, 2016, she was precluded from meeting the criteria for modifying the loss of wage-earning capacity determination. It suggested that appellant filed a traumatic injury claim for the intervening injuries. Therefore, OWCP did not review the medical evidence submitted following issuance of the June 25, 2015 loss of wage-earning capacity determination.

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.³ 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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵ In addition, Chapter 2.1501 of OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.⁶

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ 20 C.F.R. § 10.511.

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

ANALYSIS

The Board finds this case is not in posture for decision. By decision dated June 25, 2015, OWCP found appellant's actual earnings as a modified city carrier fairly and reasonably represented her wage-earning capacity. The position required lifting up to 20 pounds. Following OWCP's June 25, 2015 decision, appellant submitted medical evidence, which included neurosurgical reports chronicling five procedures performed subsequent to the loss of wage-earning capacity determination, and updated work restrictions from two attending physicians. She filed a request for reconsideration on May 16, 2016. In a nonmerit decision dated May 23, 2016, OWCP denied appellant's request for reconsideration under the criteria of 5 U.S.C. § 8128(a), finding that her request did not present evidence sufficient to warrant a merit review.

It is well established that a claimant may establish that a modification of a loss of wage-earning capacity 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.⁷ Although appellant requested reconsideration, she contended that her medical condition had worsened such that he could no longer perform the position on which OWCP based the loss of wage-earning capacity determination. The Board finds that this request should have been considered a request for modification of the June 25, 2015 loss of wage-earning capacity determination.⁸ 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 the loss of wage-earning capacity determination is warranted.⁹ In this case, appellant asserted that her medical condition had changed, and medical evidence was submitted to support this assertion.

The Board finds that OWCP should have adjudicated appellant's request as a request for modification of the June 25, 2015 loss of wage-earning capacity determination. This adjudication should have included a merit review of the evidence submitted in support of the request.¹⁰ The Board will, therefore, remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve her appeal rights.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

⁷ *P.C.*, 58 ECAB 405 (2007).

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

⁹ *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

¹⁰ *B.W.*, Docket No. 15-0222 (issued April 8, 2015); *F.B.*, Docket No. 09-99 (issued July 21, 2010); *see also M.D.*, Docket No. 12-1317 (issued December 21, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Worker's Compensation Programs dated May 23, 2016 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: May 9, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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