

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

R.Z., Appellant)	
)	
and)	Docket No. 17-1455
)	Issued: February 15, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Fort Lauderdale, FL, Employer)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

On June 16, 2017 appellant filed a timely appeal from a June 7, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). The appeal was docketed as number 17-1455.

On May 31, 2005 appellant, then a 46-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that repetitive lifting caused an injury to his lower back and left side in the performance of duty beginning May 17, 2005. On August 3, 2005 OWCP accepted the claim for sprain/strain of the lumbar region and paid compensation. On September 23, 2008 it expanded acceptance of the claim to include herniated nucleus pulposus (HNP) at L2-3 and L4-5. Appellant stopped work and received appropriate wage-loss compensation on the periodic rolls beginning June 6, 2010.¹

Appellant was unable to return to his date-of-injury position as a mail processing clerk as the employing establishment was unable to accommodate his restrictions. He sought treatment with his attending physician, Dr. Lance Lehmann, a Board-certified anesthesiologist, who reported

¹ On November 5, 2012 appellant filed another Form CA-2 alleging that he suffered from hip, back, and leg pain as a result of his federal employment duties beginning July 7, 2010 under OWCP File No. xxxxxx776. That claim remains in denied status. See Docket No. 13-1911 (issued September 15, 2014).

that he was capable of performing sedentary work with restrictions of no lifting over 25 pounds and no climbing. Appellant was referred to vocational rehabilitation services and was advised that the position of data entry clerk was vocationally and medically suitable and considered sedentary by the Department of Labor, *Dictionary of Occupational Titles*.

On January 9, 2014 OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages of \$390.00 per week as a data entry clerk.² It found that wage-loss compensation should be reduced as he was no longer totally disabled and the position of data entry clerk was medically and vocationally suitable, and fairly and reasonably represented his wage-earning capacity. Appellant was provided 30 days to submit evidence and argument challenging the proposed action.

By decision dated February 25, 2014, OWCP finalized the reduction of appellant's wage-loss compensation, effective March 9, 2014, based on the constructed position of data entry clerk with the ability to earn \$390.00 a week. It noted that his hip injury occurred subsequent to his work-related injury and need not be considered in determining the medical suitability of the selected position.

On March 1, 2014 appellant requested an oral hearing before an OWCP hearing representative and submitted additional medical evidence in support of his claim. By decision dated January 2, 2015, an OWCP hearing representative denied modification of its February 25, 2014 loss of wage-earning capacity (LWEC) determination.

Appellant thereafter continued to request modification of the LWEC determination by filing requests for reconsideration.³

On March 10, 2017 appellant, through his representative, again requested reconsideration. Appellant's representative argued that OWCP should have considered his consequential hip diagnosis in its suitable work determination by referring him to a district medical adviser or second opinion physician.

Numerous new medical reports dated from June 7, 2016 through April 14, 2017 were submitted to OWCP in support of the March 10, 2017 reconsideration request.

By decision dated June 7, 2017, OWCP reviewed the merits of the case, but denied modification of the March 10, 2016 decision.

² 5 U.S.C. § 8115.

³ On December 21, 2015 appellant, through his representative, requested reconsideration of the January 2, 2015 hearing representative's decision. By decision dated March 10, 2016, OWCP denied modification. On April 1, 2016 appellant again requested reconsideration. By decision dated June 14, 2016, OWCP denied appellant's request for reconsideration, finding that the evidence submitted on reconsideration was insufficient to warrant a merit review of the case.

The Board, having duly considered the matter, concludes that the case is not in posture for decision.⁴

On February 25, 2014 OWCP finalized the reduction of appellant's wage-loss compensation, effective March 9, 2014, based on the constructed position of data entry clerk with the ability to earn \$390.00 a week.

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.⁵ Although appellant used the term reconsideration in his March 10, 2017 correspondence, he contended that OWCP committed error in its wage-earning capacity because he was incapacitated at the time the determination was issued and requested a resumption of compensation for total wage loss.⁶

The Board finds that the March 10, 2017 letter from appellant's representative constituted a request for modification of the February 24, 2015 LWEC determination.⁷ The Board has held that, when an LWEC 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.⁸

In the June 7, 2017 decision, OWCP improperly reviewed the case under the standard for reconsideration requests.⁹ The case must therefore be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met his burden of proof to establish modification of his wage-earning capacity determination. The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.¹⁰

⁴ *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

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

⁶ *J.J.*, Docket No. 11-1958 (issued June 27, 2012).

⁷ *See E.L.*, Docket No. 14-1434 (issued March 18, 2015); *M.N.*, Docket No. 10-0051 (issued July 8, 2010).

⁸ *See W.W.*, Docket No. 09-1934 (issued February 24, 2010).

⁹ *A.C.*, Docket No. 15-0710 (issued June 5, 2015). *See also K.J.*, Docket No. 14-1874 (issued February 26, 2015).

¹⁰ *W.R.*, Docket No. 16-0098 (issued May 26, 2016).

IT IS HEREBY ORDERED THAT the June 7, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order.

Issued: February 15, 2019
Washington, DC

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

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

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