

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES D. THOMPSON and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT AGENCY, Washington, DC

*Docket No. 03-126; Submitted on the Record;
Issued February 25, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's loss of wage-earning capacity determination.

This is the eighth appeal before the Board and the sixth appeal regarding the issue of appellant's wage-earning capacity. Initially, by decision dated January 20, 1983, the Board remanded the case to the Office for consideration of new evidence and a *de novo* decision on the issue of appellant's loss of wage-earning capacity.¹ By decision dated October 23, 1983, the Board affirmed an Office decision finalized on May 24, 1983 in which the Office determined that appellant had the wage-earning capacity of a personnel worker, which represented a 32 percent loss of wage-earning capacity.² Appellant requested reconsideration and by decision dated August 2, 1984, the Office denied his request. He timely appealed to the Board and in a November 30, 1984 decision, the Board affirmed the August 2, 1984 decision of the Office.³

On February 21, 1987 appellant requested reconsideration of the wage-earning capacity findings and submitted additional evidence. By decision dated March 16, 1987, the Office denied modification of the prior decision. On June 10, 1997 he filed a claim for a schedule award. On August 8, 1997 appellant again requested reconsideration and submitted additional evidence. In an August 11, 1997 decision, the Office denied modification, finding the evidence of record insufficient to establish a material change in his medical condition. On September 3, 1997 appellant filed an appeal with the Board. On September 23, 1997 he underwent transposition of the left ulnar nerve and was returned to total disability compensation.

¹ Docket No. 83-312.

² Docket No. 83-1384.

³ Docket No. 84-2066.

By decision dated August 5, 1998, the Office granted appellant a schedule award for a 30 percent loss of use of the left upper extremity for a total 46.8 weeks, to run from July 19, 1998 to June 11, 1999.⁴ On August 8, 1998 appellant requested a hearing regarding the schedule award, which was held on January 26, 1999. By decision dated March 3, 1999 and finalized March 4, 1999, an Office hearing representative affirmed the schedule award. At the conclusion of the schedule award, appellant was returned to the compensation rolls at the full compensation rate. On August 19, 1999 the Office proposed to reduce his compensation to reflect his wage-earning capacity as a personnel clerk. Appellant disagreed with the proposed reduction and submitted additional evidence.

In a November 8, 1999 decision, the Office finalized the wage-earning capacity determination and reduced appellant's compensation. On November 10, 1999 appellant requested a hearing and submitted additional evidence. On January 3, 2000 the Board affirmed the August 11, 1997 Office wage-earning capacity decision.⁵ On January 5, 2000 the Board issued a decision remanding appellant's schedule award claim to the Office because the record before the Board was incomplete. On remand the Office was to reassemble the case record and issue a *de novo* decision.⁶

On February 9, 2000 the Office issued a schedule award, finding that appellant had a 30 percent impairment of the left upper extremity. The Office further noted that he had been fully paid in this regard. A hearing was held on March 2, 2000 at which time appellant testified regarding both the wage-earning capacity finding and his schedule award claim. By decision dated July 26, 2000, an Office hearing representative affirmed the November 8, 1999 decision regarding appellant's wage-earning capacity. The hearing representative stated that, as the Office had not issued a new decision regarding appellant's schedule award, he could not address appellant's impairment rating.

On August 1, 2000 appellant filed an appeal with the Board and requested an oral argument that was held on September 20, 2001. In a decision dated November 26, 2001, the Board found that appellant had not established that the wage-earning capacity determination was in error. The Board further remanded the case to the Office for resolution of the issue of appellant's entitlement to an increased schedule award.⁷ On December 24, 2001 appellant filed a petition for reconsideration and submitted arguments he believed merited further consideration by the Board. In an order dated April 24, 2002, the Board denied appellant's petition for reconsideration. The law and facts as set forth in the previous decisions are incorporated herein by reference.

By decision dated December 20, 2001, an Office hearing representative affirmed the August 5, 1998 Office decision granting appellant a schedule award for a 30 percent loss of use

⁴ This award was in addition to 15 percent previously paid.

⁵ Docket No. 97-2683.

⁶ Docket No. 99-1274.

⁷ Docket No. 00-2551.

of the left upper extremity.⁸ On July 17, 2002 appellant requested reconsideration of the wage-earning capacity decision and submitted additional medical evidence. Appellant also forwarded to the Office the materials and argument he had submitted to the Board with his petition for reconsideration. By decision dated August 7, 2002, the Office denied modification of the prior wage-earning capacity decision. The instant appeal follows.

The Board finds that the Office properly denied modification of appellant's loss of wage-earning capacity determination.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is 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. The burden of proof is on the party attempting to show modification of the award.⁹

With his request for reconsideration, appellant submitted a treatment note dated May 16, 2002 in which Dr. A.M. Mick, a Board-certified family practitioner, advised that he was not qualified to assess appellant's disability status and was referring him to a neurosurgeon. Appellant further submitted a report dated June 28, 2002 from Dr. Moses Gallegos, an osteopathic general practitioner, who provided no opinion regarding appellant's disability status and advised him to seek legal counsel.¹⁰ Thus, with his request for reconsideration, appellant did not submit sufficient evidence to show that the Office's November 8, 1999 determination with regard to his wage-earning capacity should be modified. The medical evidence appellant submitted, regarding his condition in 2002, does not establish that his injury-related condition had materially changed. This evidence also does not establish that the 1999 wage-earning determination was in fact erroneous.

⁸ Appellant has not filed an appeal with the Board in regard to the December 20, 2001 schedule award decision. The record further reflects that by decision dated August 30, 2001, the Office approved an attorney's fee in the amount of \$1,350.00. On March 29, 2002 the Office administratively waived an overpayment in compensation in the amount of \$414.83. By decision dated June 12, 2002, the Office granted waiver of an overpayment in compensation in the amount of \$1,956.75.

⁹ See *Don J. Mazurek*, 46 ECAB 447 (1995).

¹⁰ Appellant also submitted a medical report previously of record.

The decision of the Office of Workers' Compensation Programs dated August 7, 2002 is hereby affirmed.

Dated, Washington, DC
February 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member