

accepted condition. Appellant continued to work for the employing establishment until the shipyard closed on April 1, 1996. The Office subsequently placed appellant on the periodic compensation rolls. He also participated in vocational rehabilitation. In a decision dated May 23, 2002, the Office found that the selected position of personnel recruiter fairly and reasonably represented appellant's wage-earning capacity. Accordingly, the Office reduced appellant's wage-loss compensation to reflect his ability to earn wages as a personnel recruiter. Appellant elected to receive disability retirement through the Office of Personnel Management and his wage-loss compensation benefits ceased as of July 1, 2002. An Office hearing representative affirmed the wage-earning capacity determination in a decision dated May 27, 2003.

On May 7, 2004 appellant wrote to the Office requesting that his claim be reconsidered. Appellant explained that he had an extremely difficult time finding work and he was recently employed as an adjunct instructor with earnings of less than \$6,000.00 annually, which was considerably less than what the Office had determined to be his wage-earning capacity. He also advised the Office that his doctor had limited him to part-time work.

In a decision dated July 23, 2004, the Office found that appellant had not submitted sufficient evidence or argument to warrant merit review of the claim. Accordingly, the Office denied reconsideration.

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.¹

Once the wage-earning capacity of an injured employee 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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

¹ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

² *Tamra McCauley*, 51 ECAB 375, 377 (2000).

³ *Id.*

ANALYSIS

The Office determined that the issue presented was whether appellant submitted sufficient evidence or argument to warrant merit review under 5 U.S.C. § 8128.⁴ It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.⁵ Although appellant characterized his May 7, 2004 correspondence as a request for reconsideration, in this instance it is not a request for review of the hearing representative's May 27, 2003 decision under 5 U.S.C. § 8128. It is a request for additional compensation.

The Office should not have considered appellant's May 7, 2004 letter as a request for reconsideration subject to the limitations set forth in 20 C.F.R. §§ 10.606, 10.607 and 10.608. The Board finds that appellant requested modification of the May 23, 2002 wage-earning capacity determination and is entitled to a merit decision on that issue. On remand, the Office should develop the record as necessary and issue a *de novo* decision with regard to appellant's loss of wage-earning capacity.

CONCLUSION

The Board finds that appellant's May 7, 2004 claim for additional compensation raised the issue of whether modification of the Office's May 23, 2002 wage-earning capacity determination was warranted. As the Office did not properly identify the issue or apply the correct standard of review, the case will be remanded for an appropriate decision.

⁴ Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits. 5 U.S.C. § 8128(a). Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.606(b)(2) (1999). Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. § 10.608(b) (1999).

⁵ *Tamra McCauley*, *supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member