

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WARREN WEXLER and DEPARTMENT OF THE INTERIOR,  
BUREAU OF RECLAMATION, Denver, CO

*Docket No. 02-893; Submitted on the Record;  
Issued September 5, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied modification of appellant's wage-earning capacity; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

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

Appellant in this case, was an electrical engineer that in 1988 was placed on total temporary disability for a work-related emotional condition after his claim was accepted for post-traumatic stress syndrome.

In a December 2, 1993 decision, the Office reduced appellant's wage-loss compensation based on his actual earnings as self-employed in a vending machine business.

In a May 16, 2001 letter to the Office, appellant requested his compensation be raised because wage-earning capacity had diminished due to the failure of his vending business in 1994.

In an August 2, 2001 decision, the Office denied his request.

In a September 7, 2001 letter, appellant requested reconsideration. In support of his request, appellant submitted a medical report from Dr. Bruce Leonard. In his August 29, 2001 report, Dr. Leonard wrote:

"I have been [appellant's] psychiatrist since 1992, the time of his original award. He continues in therapy.... Since 1989 [appellant] has been unable to cope with the stress of routine contact with people. This is due solely to his reaction to the compensable situations as described in December 1991 by senior claims examiner

... secondary to this trauma[-]induced anxiety and anger he could not maintain any employment even in 1991. At the time of his determination [appellant] was unable to maintain any income; he could not manage his vending business because of the anxiety and anger induced by the compensable situations. [Appellant] also feels he never obtained justice for the abuse and humiliation he suffered at the U.S. Department of Labor. This has been compounded by the subsequent loss [o]f his family and home, both the result of the behavioral changes induced by his maltreatment. [Appellant] cannot interact in a socially acceptable manner with any supervisor or figure in authority or the general public. [He] focuses only on the details of his maltreatment and on obtaining justice for his injuries. [Appellant] has no hope for a better life.”

In my opinion, appellant is 100 percent permanently disabled from employment. His original rating was in error and his condition has worsened as a result of lack of justice and losses.

In a Decision dated October 25, 2001, the Office denied appellant’s request for a merit review.

In a November 15, 2001 letter, appellant requested reconsideration. In support of his request, appellant submitted a personal statement explaining why his business failed and statements, which reviewed previously submitted medical reports. Included in the reasons, the business failed were the fact that business owners were pressured by larger vending companies to not deal with his business and the effects of his accepted medical condition precluded him from seeking new contracts. Appellant reasoned in his statement, that his accepted condition caused his business to fail because, at least some, of his competitors have succeeded while he did not.

In a December 4, 2001 decision, the Office denied appellant a merit review.

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

Once a loss of wage-earning capacity is determined, a modification of such a 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.<sup>1</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>2</sup>

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<sup>1</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>2</sup> *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

Appellant did not submit any evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In the present case, the Office based appellant's loss of wage-earning capacity on a determination that his actual earnings as a self-employed vending machine operator represented his wage-earning capacity.<sup>3</sup> This determination was consistent with section 8115(a) of the Federal Employees' Compensation Act, which provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."<sup>4</sup> The Board has stated: "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."<sup>5</sup>

The evidence does not establish that appellant's actual earnings as a vending machine operator did not fairly and reasonably represent his wage-earning capacity and the Office properly adjusted his compensation based on this wage-earning capacity determination.<sup>6</sup> Therefore, appellant has not shown that the Office's original determination with regard to his wage-earning capacity was erroneous.

Appellant alleged that there was a material change in the nature and extent of his employment-related condition. In support of his claim he submitted the August 29, 2001 report from Dr. Leonard. However, this evidence does not contain a rationalized medical opinion explaining why an employment-related emotional condition worsened to such a degree that appellant was no longer able to work as a vending machine operator. Nor does Dr. Leonard explain why appellant's post-traumatic stress syndrome prevented him from working or otherwise establish that the Office improperly determined appellant's wage-earning capacity.<sup>7</sup>

Dr. Leonard's report also has diminished probative value because he stated that appellant was never capable of operating the vending machine business, yet the record indicates that appellant operated the business from 1988 through 1994. Moreover, his own statement was that at least part of the reason the business failed was that larger vending operators were pressuring his clients to not do business with small operators, including him.

For these reasons, appellant has not shown that it was improper for the Office to deny modification of its determination of his wage-earning capacity.

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<sup>3</sup> Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(a)(17). The Office applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

<sup>4</sup> 5 U.S.C. § 8115(a).

<sup>5</sup> *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

<sup>6</sup> *See Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

<sup>7</sup> *See Norman F. Bligh*, 41 ECAB 230, 237-38 (1989). Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that his work as a would not be representative of his wage-earning capacity.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>8</sup> the Office's regulations provide that a claimant must:

“(1) Show that the Office erroneously applied or interpreted a specific point of law;

“(2) Advance a relevant legal argument not previously considered by the Office; or

“(3) Submit relevant and pertinent new evidence not previously considered by the Office.<sup>9</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.”<sup>10</sup>

When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>11</sup>

In the present case, appellant has not established that the Office abused its discretion in its October 25 and December 4, 2001 decisions, by denying his requests for a review on the merits of its August 2, 2001 decision under section 8128(a) of the Act. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

In his September 7, 2001 reconsideration request, appellant submitted an August 29, 2001 medical report from Dr. Leonard. While the report was new the argument point made by Dr. Leonard was duplicative of his earlier reports.

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>12</sup>

In his November 15, 2001 request, appellant submitted no new medical evidence but instead submitted a lengthy personal statement explaining why his business failed. The critical

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<sup>8</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.” 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. §§ 10.606(b)(2).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>12</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

issue appellant must establish to meet his burden of proof to have his wage-earning capacity modified was that either the original determination was in error or his medical condition had changed. Because he did not address these issues with new and relevant evidence the Office did not abuse its discretion in denying appellant merit review.

The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</sup>

The decisions of the Office of Workers' Compensation Programs dated December 4, October 25 and August 2, 2001 are hereby affirmed.

Dated, Washington, DC  
September 5, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>13</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).