



compensation to reflect his wage-earning capacity as a telephone solicitor. By decision dated June 18, 1984, the Office hearing representative affirmed the Office's January 25, 1980 decision.

In a July 22, 1985 decision, the Board adopted the Office hearing representative's June 18, 1984 decision finding that the position of telephone solicitor represented appellant's wage-earning capacity as of May 28, 1980.<sup>1</sup> By decision dated August 31, 1987, the Board affirmed the Office's decision dated December 18, 1986, finding that the position of telephone solicitor represented appellant's wage-earning capacity from May 28, 1980 to November 29, 1985.<sup>2</sup> By decision dated April 12, 1993, the Board reversed the Office's decision dated January 30, 1992, finding that the Office did not meet its burden in establishing that the position of merchandise deliverer represented appellant's wage-earning capacity.<sup>3</sup>

By decision dated August 18, 1997, the Board affirmed the Office's September 21, 1994 decision, finding that the Office properly determined that appellant's letter dated August 31, 1994 requesting reconsideration of the decision dated August 31, 1987, was untimely and he failed to establish clear evidence of error.<sup>4</sup> By decision dated July 6, 2000, the Board affirmed the Office's nonmerit decision dated March 13, 1998, denying appellant's request for reconsideration and affirmed the Office's April 24, 1998 decision denying appellant's request for a hearing.<sup>5</sup> By decision dated September 17, 2002, the Board affirmed the Office's decision dated May 25, 2001, in which the Office found that appellant's letter requesting reconsideration dated February 20, 2001 filed more than a year after the last merit decision dated August 31, 1997, was untimely and failed to establish clear evidence of error.<sup>6</sup>

By letter dated October 11, 2002, appellant requested reconsideration of the Office's decision and submitted additional evidence.

In a nonmerit decision dated October 31, 2002, the Office denied appellant's request for reconsideration.

By letter dated December 6, 2002, appellant requested reconsideration of the Office's decision. He challenged the Office's finding that he had the wage-earning capacity to perform the position of telephone solicitor in 1980, stating that the medical evidence established that he was totally disabled prior to November 29, 1985. Appellant submitted progress notes dated May 12, 2002 and December 27, 2002 from the office of Dr. Alan G. Albarracin, a family practitioner, which addressed pain to appellant's left hand and low back.

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<sup>1</sup> Docket No. 85-843 (issued July 22, 1985).

<sup>2</sup> Docket No. 87-811 (issued August 31, 1987).

<sup>3</sup> Docket No. 92-1175 (issued April 12, 1993). On August 26, 1993 the Board denied appellant's petition for reconsideration.

<sup>4</sup> Docket No. 95-612 (issued August 18, 1997).

<sup>5</sup> Docket No. 98-1830 (issued July 6, 2000).

<sup>6</sup> Docket No. 01-2218 (issued September 17, 2002). The facts and history surrounding the prior appeals are set forth in prior decisions and are hereby incorporated by reference.

Appellant submitted a letter dated November 7, 2002 from his attorney stating that in 1984 he and his wife settled an automobile accident which occurred on April 19, 2001. During the discovery process, the attorney obtained x-rays dated January 5, 1979, showing that appellant had a cracked fusion in his back prior to the automobile accident.

Appellant also requested that the Office review several documents, including letters from the District Office in Kansas City, Missouri, dated December 18, 1986 and March 9, 1989, a medical report from the Wichita Clinic dated April 28, 1972, an “original” medical report with no reference to the date or author of the report and a letter dated November 7, 1972 from Dr. Eugene A. Kaufman, a Board-certified orthopedic surgeon. Appellant requested that the Office review a letter dated August 25, 1982 from his treating physician, Dr. Neonilo A. Tejano, an orthopedic surgeon, a report from Dr. Robert A. Worsing dated March 9, 1989 and “Dr. Albarracin’s report on [p]ermanent and [t]otal [d]isability.” Appellant contended that the Office erred in describing how his back injury occurred in its February 1978, June 23, 1981 and January 21, 1986 statements. He contended that his present back condition resulted from the failure of the fusion surgery he underwent for the January 13, 1972 employment injury.

In a nonmerit decision dated January 3, 2003, the Office denied appellant’s request for reconsideration pursuant to 5 U.S.C. § 8128(a), finding that he did not submit new and relevant evidence or present legal contentions not previously considered.

### **LEGAL PRECEDENT**

It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination. 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.<sup>7</sup> The burden of proof is on the party attempting to show modification. There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>8</sup>

### **ANALYSIS**

The Office considered appellant’s December 6, 2002 correspondence a request for reconsideration pursuant to 5 U.S.C. § 8128(a) and found that he did not submit new, relevant evidence or raise legal contentions not previously considered. However, since appellant’s main contention in his December 6, 2002 request was that he was totally disabled prior to 1985 and, therefore, was unable to work as a telephone solicitor, in effect, he is requesting modification of the Office’s January 25, 1980 wage-earning capacity decision. The request for modification in this case is not a request for review of the October 31, 2002 decision under 5 U.S.C. § 8128(a). It is a request for additional compensation.

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<sup>7</sup> See *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>8</sup> See *Gary L. Moreland*, 54 ECAB \_\_\_\_ (Docket No. 03-1063, June 20, 2003).

The Office improperly characterized appellant's December 6, 2002 letter as a request for reconsideration subject to the limited review set forth in 20 C.F.R. § 10.606.

**CONCLUSION**

The Board finds that appellant's requested modification of the January 25, 1980 loss of wage-earning capacity determination and is entitled to a merit decision on that issue. The case will be remanded for the Office to address the merits of appellant's request for modification. On remand, the Office should develop the record as necessary and issue a moot decision with regard to appellant's loss of wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: July 21, 2004  
Washington, D.C.

Alec J. Koromilas  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member