

The effective date of the wage-earning capacity determination was February 5, 1976. In April 1980 the Office found that a conflict existed in the medical evidence, and appellant was referred to Dr. Wallace Holderman, a Board-certified orthopedic surgeon. In a report dated May 27, 1980, Dr. Holderman opined that appellant was currently able to perform the duties of a telephone solicitor. By decision dated June 18, 1984, the Office hearing representative affirmed the Office's January 25, 1980 decision. The hearing representative indicated that appellant had received compensation for temporary total disability through May 27, 1980, and the effective date of the wage-earning capacity determination was May 28, 1980.

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, 1980.¹ 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, 1985.² 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.³

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.⁴ 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.⁵ 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.⁶

In a decision dated July 21, 2004, the Board found that a correspondence dated December 6, 2002 from appellant was a request for modification of the January 25, 1980 wage-earning capacity determination.⁷ The Board remanded the case for a decision on the modification issue. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

¹ Docket No. 85-843 (issued July 22, 1985).

² Docket No. 87-811 (issued August 31, 1987).

³ Docket No. 92-1175 (issued April 12, 1993). By order dated August 26, 1993, the Board denied a petition for reconsideration.

⁴ Docket No. 95-612 (issued August 18, 1997).

⁵ Docket No. 98-1830 (issued July 6, 2000).

⁶ Docket No. 01-2218 (issued September 17, 2002).

⁷ Docket No. 03-1178 (issued July 21, 2004).

The medical evidence submitted by appellant included a June 4, 2003 report from Dr. Alan Albarracin, a family practitioner, who indicated that he had begun treating appellant in February 1988. He stated that appellant had been referred to Dr. Holderman, a Board-certified orthopedic surgeon, to resolve a conflict and Dr. Holderman had opined in a May 27, 1980 report that appellant could perform the telephone solicitor position. Dr. Albarracin stated that he disagreed with Dr. Holderman and could not understand how the impartial medical specialist found that appellant was not totally disabled from May 28, 1980 to November 29, 1985. He referred to a 1972 report stating that appellant would be disabled indefinitely, and opined that appellant was not capable of performing the telephone solicitor job “because it involves a certain amount of sitting, a certain amount of walking and standing is often necessary in carry[ing] out job duties.” Appellant also submitted reports from an attending orthopedic surgeon, Dr. Prince Chan, regarding his right shoulder treatment.

By decision dated August 27, 2004, the Office found appellant had not established that modification of the January 25, 1980 wage-earning capacity determination was warranted prior to November 29, 1985.

LEGAL PRECEDENT

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

In the present case the telephone solicitor wage-earning capacity determination, effective May 28, 1980, was modified as of November 29, 1985. Appellant seeks modification of the wage-earning capacity determination prior to November 29, 1985. As noted above, a wage-earning capacity determination may be modified if the original determination was erroneous. To the extent that appellant argues that the telephone solicitor wage-earning capacity determination was erroneous, he did not submit probative evidence establishing error. In a previous appeal, the Board affirmed a finding that the telephone solicitor position represented appellant’s wage-earning capacity from May 28, 1980 to November 29, 1985. The weight of the medical evidence was represented by Dr. Holderman, who found that appellant could perform the duties of a telephone solicitor. Appellant has not submitted probative evidence establishing error in the wage-earning capacity determination. In a June 4, 2003 report, Dr. Albarracin indicated that he disagreed with Dr. Holderman and opined that appellant could not perform the telephone solicitor position. Dr. Albarracin did not provide sufficient medical reasoning to support his opinion. He did not begin treating appellant until 1988 and he did not provide a detailed description of appellant’s condition as of May 28, 1980. There is reference to a 1972 report stating that appellant was disabled indefinitely, but the issue is whether appellant could perform

⁸ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁹ *Id.*

the telephone solicitor position as of May 28, 1980. Dr. Albarracin did not provide a reasoned medical opinion on this issue, nor did appellant submit any probative evidence sufficient to establish that the telephone solicitor wage-earning capacity determination was erroneous.

Appellant may also establish modification if the evidence shows a material change in his injury-related condition. There is no probative evidence showing a material change between May 28, 1980 and November 29, 1985. Dr. Albarracin briefly referred to medical reports from 1983 and 1984, but these reports do not discuss a material change in appellant's condition and Dr. Albarracin did not provide a reasoned opinion showing a material change at a specific time prior to November 29, 1985. Appellant did not submit probative medical evidence showing a material change in his injury-related condition.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that a modification of the telephone solicitor wage-earning capacity determination was warranted prior to November 29, 1985.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2004 is affirmed.

Issued: May 18, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member