

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**W.S., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Arcadia, CA, Employer**

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**Docket No. 08-1702  
Issued: February 24, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 23, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 14, 2008 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's January 11, 2006 decision concerning appellant's wage-earning capacity. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

The Office accepted that on August 21, 1995 appellant, then a 47-year-old casual fire fighter, sustained a fractured left tibia and fibula, dislocation of his left knee, right rotator cuff

shoulder sprain and second-degree burns of his right hand due to fighting a fire. Appellant underwent a left cruciate ligament repair in August 1995 which was authorized by the Office. He received compensation for periods of disability. On June 16, 2003 Dr. Clarence Shields, an attending orthopedic surgeon, found that appellant could return to work with restrictions such as pushing and pulling up to 20 pounds for one hour per day and standing or walking for one hour per day.

In August 2003, appellant was referred to vocational rehabilitation services and his rehabilitation counselor determined that he was employable as a reception clerk. The physical demands of his position involved sedentary work with occasional fingering and frequent reaching, handing, talking and hearing. After appellant's unsuccessful attempt to secure work as a reception clerk, his rehabilitation counselor determined that the constructed position of reception clerk was reasonably available in his commuting area with an entry pay level of \$270.00 per week.

In a November 21, 2005 notice, the Office advised appellant of its proposed reduction of his compensation based on his ability to work in the constructed position of reception clerk. Appellant was provided 30 days to submit additional evidence or arguments regarding his capacity to earn wages as a reception clerk. He submitted a December 16, 2005 letter in which he argued that his disability was progressive and had increased with age. Appellant asserted that his injuries had deteriorated since the 2003 medical report from Dr. Shields. He also argued that reception clerk jobs were not reasonably available work in his commuting area.

In a January 11, 2006 decision, the Office adjusted appellant's compensation effective January 22, 2006 based on its determination that the constructed position of reception clerk represented his wage-earning capacity.

In an October 31, 2006 letter to appellant's congressional representative, which was received by the Office on November 7, 2006, appellant stated that he was waiting to request reconsideration of his claim until he received additional medical evidence from Dr. Shields. In a November 9, 2006 letter, an Office claims examiner advised that he would need to submit further evidence from Dr. Shields for further consideration to be made regarding his claim.<sup>1</sup>

In August 26 and September 6, 2007 letters, received by the Office on September 12, 2007, appellant indicated that he was requesting reconsideration of the Office's January 11, 2006 wage-earning capacity determination. Appellant argued that the medical evidence from 2006 and 2007 showed that he had been permanently totally disabled since at least the time the Office adjusted his compensation. He asserted that his medical condition had continued to deteriorate.

Appellant submitted an April 20, 2007 report in which Dr. Shields indicated that he had increased complaints of pain and a decrease in range of motion with overhead activities. Dr. Shields noted a positive right shoulder impingement test with moderate tenderness and moderate crepitation of the left knee. He concluded that appellant was permanently retired and

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<sup>1</sup> In a December 8, 2006 letter, appellant requested reconsideration in connection with two claims other than the current claim (file numbers xxxxxx084 and xxxxxx201).

disabled from his fire-fighter duties and indicated the progression of his disability over the last few years prevented him from being gainfully employed.

In a July 9, 2007 report, Dr. Shields noted that appellant's need for a total left knee replacement due to traumatic arthritis and suggested that his standing and walking tolerance was limited to 15 minutes at a time. He reported that examination showed limited right ankle motion and left knee crepitation. Dr. Shields concluded that appellant was permanently totally disabled and could not be gainfully employed because his standing and walking tolerance was decreased.

In an October 9, 2006 report, Dr. Cynthia Dillon, an attending family practitioner, noted treating appellant since May 12, 2000 for degenerative joint injuries of the right shoulder, left knee, right ankle and lumbar spine. She also indicated that appellant was unable to lift over 10 pounds and could not sit or stand longer than 30 minutes. Dr. Dillon indicated that she did not make disability evaluations, but found no reason to disagree that appellant was classified as permanently disabled by Dr. Shields.<sup>2</sup>

In a February 14, 2008 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. It found that the correspondence received on September 12, 2007 constituted an untimely request for reconsideration of the Office's January 11, 2006 wage-earning capacity determination. The Office found that the argument contained in the correspondence and the evidence submitted in support of the reconsideration request did not show clear evidence of error in the Office's January 11, 2006 decision.

### **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>3</sup> The burden of proof is on the party attempting to show modification.<sup>4</sup> There is no

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<sup>2</sup> Appellant submitted an undated report of Dr. Steven Johannsen, an attending chiropractor.

<sup>3</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>4</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>5</sup>

### ANALYSIS

The Office considered the correspondence received on September 12, 2007 to be a request for reconsideration of its January 11, 2006 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was untimely and that appellant did not submit relevant evidence or legal argument establishing clear evidence of error. In appellant's August 26 and September 6, 2007 letters, he used the term reconsideration. However, appellant contended that the Office erred in its January 11, 2006 wage-earning capacity determination as he was totally disabled for work on or before that date and that his condition had worsened since the loss of wage-earning capacity determination was made. His letters are a request for modification of the Office's January 11, 2006 wage-earning capacity determination.<sup>6</sup> This request for modification is not a request for a review of the January 11, 2006 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized appellant's letters, received on September 12, 2007, as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a).

The Board finds that appellant has requested modification of the Office's January 11, 2006 wage-earning capacity determination. Appellant is entitled to a merit review on that issue.<sup>7</sup> On remand, the Office shall adjudicate his request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.

### CONCLUSION

The Board finds that appellant requested modification of the Office's January 11, 2006 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to the Office for all necessary development and issuance of an appropriate decision.

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<sup>5</sup> *Gary L. Moreland*, 54 ECAB 638 (2003). See also *O.T.*, Docket No. 07-929 (issued May 9, 2008), *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005) and *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004). In the *O.T.*, *Peoples* and *Taylor* cases, the Board determined that the claimants' requests for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In these cases, the Board set aside the Office's decisions denying the claimants' reconsideration requests as untimely and remanded the cases for the Office to address the merits of their requests for modification of a loss of wage-earning capacity decision.

<sup>6</sup> See *Gary L. Moreland*, *supra* note 5.

<sup>7</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' February 14, 2008 decision is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: February 24, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board