

FACTUAL HISTORY

This case has been before the Board three times before. The facts of this case are presented in the previous Board decisions and are hereby incorporated by reference.¹ The facts relevant to the current issue are set forth below.

The Office accepted appellant's April 6, 1980 traumatic injury claim for mild instability of the left knee in the performance of his duties as a painter and approved compensation benefits through March 10, 1981, after which he returned to regular duty. On January 24, 1984 it accepted a November 14, 1983 traumatic injury claim for low back sprain and pain syndrome. Appellant stopped work and received compensation for total disability. By decision dated September 30, 2002, the Office reduced appellant's compensation based upon his ability to earn wages as a telephone solicitor. This decision was affirmed by an Office hearing representative on June 23, 2003 and by the Board on March 11, 2004 in Docket No. 03-2283. In a decision dated February 17, 2005 in Docket No. 04-2159, the Board affirmed the Office's denial of appellant's request for reconsideration. In a decision dated April 20, 2006 in Docket No. 05-1882, the Board affirmed the Office's June 9, 2005 decision, denying modification of a loss of wage-earning capacity determination for the position of a telephone solicitor.

Dr. Randall N. Smith, appellant's treating Board-certified orthopedic surgeon continued to submit updates on appellant's condition. In an October 3, 2005 report, he indicated that appellant had "pain all over." Dr. Smith noted specifically pain in appellant's neck and head, which radiated onto the shoulders as well as lower back pain. He opined that appellant had "gait dysfunction, myofascial pain syndrome, psoriasis, headaches, cervical and lumbar myofascial and discogenic problems, sciatica, metatarsalgia and a rotator cuff tendonopathy and impingement of the left shoulder." In a report dated January 25, 2006, Dr. Smith noted that appellant had been diagnosed with chronic low back pain as a result of a November 14, 1983 injury. He also noted that appellant had been diagnosed with post-traumatic stress disorder and aggravation of his psoriasis as a direct result of this injury. Dr. Smith noted that appellant was significantly disabled as a result of his post-traumatic stress disorder. He also noted that appellant's psoriasis is worse and that he was also complaining about a locking of the left knee. Dr. Smith opined that appellant had low back pain secondary to underlying myofascial and discogenic problems. He indicated that he was pessimistic about appellant's prognosis and indicated that he was permanently disabled. In a February 5, 2007 report, Dr. Smith noted that appellant continued to have residuals from his November 14, 1983 work-related accident. He noted that appellant had chronic myofascial pain syndrome with multiple arthralgia, post-traumatic stress disorder, psoriasis and chronic low back pain caused or aggravated by the 1983 work injury.

By letter dated March 14, 2007, appellant, through his attorney, requested reconsideration. In this letter, his attorney also requested a new examination to determine if appellant is still able to perform the duties of a telephone solicitor. Appellant's attorney also

¹ Docket No. 05-1882 (issued April 20, 2006); Docket No. 04-2159 (issued February 17, 2005); and Docket No. 03-2283 (issued March 11, 2004).

requested a reevaluation to determine whether the position of telephone solicitor is still a viable position given the “no call” law.

By decision dated March 27, 2007, the Office denied appellant’s request for reconsideration without merit review as it found that the evidence submitted to be repetitious and not relevant and pertinent to the case.

On February 4, 2008 appellant, through his attorney, requested reconsideration. In support thereof, appellant submitted a January 21, 2008 report wherein Dr. Smith noted that he continued to have pain in his head, neck and lower back. Dr. Smith noted his impression was that appellant had a rotator cuff tendonopathy and impingement of the right shoulder and a chronic cervical and low back discogenic and myofascial pain syndrome. He believed that appellant’s leg problems were most likely coming from a sciatic nerve irritation. Dr. Smith noted that appellant has not recovered from his work injury and has a chronic and permanent problem, which restricted his ability to find any employment or do a lot of normal activities.

By decision dated March 25, 2008, the Office denied appellant’s request for reconsideration as it was not timely filed and did not show clear evidence of error.

On appeal, appellant, through his attorney, argues that there has been a change in his condition that significantly interferes with his ability to work as a telephone solicitor.

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.² The burden of proof is on the party attempting to show modification.³ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁴

ANALYSIS

The Office considered appellant’s attorney’s February 4, 2008 letter to be a request for reconsideration of its wage-earning capacity determination. It found that the request was

² *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

³ *Darletha Coleman*, 55 ECAB 143 (2003).

⁴ *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. 03-1178 (issued July 21, 2004). In the *O.T.*, *Peoples* and *Taylor* cases, the Board determined that the claimant’s requests for reconsideration of wage-earning capacity determination constituted a request for modification requiring a merit review. In these cases, the Board set aside the Office’s decision, denying the claimant’s 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.

untimely and that appellant did not submit relevant evidence or argument establishing clear evidence of error. However, along with this letter, appellant submitted the January 21, 2008 report of Dr. Smith. In his report, Dr. Smith opined that appellant had not recovered from his work injury and had permanent problems which restricted his ability to find any employment or do many normal activities. Accordingly, the Board finds that appellant is actually requesting modification of the Office's September 30, 2002 decision reducing his compensation based upon his ability to earn wages as a telephone solicitor. Therefore, the Office improperly treated this as a request for reconsideration when the letter was actually a request for modification of a wage-earning capacity determination.

The Board finds that appellant is entitled to merit review on the issue of wage-earning capacity. On remand, the Office shall adjudicate appellant's 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 wage-earning capacity determination and is entitled to a merit review on the wage-earning capacity issue. The case will be remanded to the Office for all necessary development and issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 25, 2008 is set aside and the case remanded to the Office for all necessary development and issuance of an appropriate decision.

Issued: July 1, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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