



refused to reopen appellant's case for further merit review.<sup>1</sup> In a September 28, 2006 order, the Board granted the Director's motion to remand the case and cancel oral argument, as the Office did not properly deny appellant's request for reconsideration on the merits of his case.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

On October 25, 2004, appellant requested the Office change his compensation status from partially disabled to totally disabled.

In correspondence dated December 22, 2004, the Office responded to appellant's request for total disability compensation and a modification of his loss of wage-earning capacity determination. It advised appellant that, once a wage-earning capacity is determined, modification is not warranted unless there was a material change in the injury-related condition, the claimant has been retrained or otherwise rehabilitated or the original determination was in error and the burden is on the party attempting to show the award should be modified. The Office requested that appellant submit medical evidence supporting his work injury had materially worsened since the wage-earning capacity determination of December 2, 1993.

On January 26, 2005 the Office denied appellant's claim for a recurrence of disability finding that the medical evidence did not establish that his work injury precluded him from working in his vending machine business. On February 15, 2005 appellant requested reconsideration. He asserted that his wage-earning capacity was based on his earnings as a vending machine operator; however, such earnings were not a fair or reasonable representation of his wage-earning capacity because other factors were present that affected his ability to earn wages. In a January 14, 2005 report, Dr. Bruce Leonard, a psychologist, noted that he had treated appellant since 1992 for a work-related emotional condition. He opined that appellant was totally disabled from work. Appellant asserted this evidence was new and relevant. He contended that he did not sustain a recurrence of disability and referenced *Irwin E. Goldman*<sup>3</sup> to support his argument that there was an error in the determination of his wage-earning capacity.

In a letter dated April 1, 2005, the Office acknowledged receipt of appellant's request for reconsideration and determined that a merit review of his claim was appropriate.

In a decision dated June 24, 2005, the Office denied appellant's request for reconsideration without a merit review.

On July 13, 2005 appellant requested reconsideration. He asserted that he was entitled to a merit review as he showed the Office erroneously interpreted a specific point of law and advanced relevant legal arguments not previously considered. Appellant reiterated that his

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<sup>1</sup> Docket No. 02-893 (issued September 5, 2002). In 1988 appellant filed a claim for an emotional condition which was accepted by the Office for post-traumatic stress syndrome. The Office reduced appellant's compensation to reflect his wage-earning capacity based on his actual earnings in a vending machine business. It reaffirmed the wage-earning capacity determination on December 2, 1993.

<sup>2</sup> Docket No. 06-736 (issued September 28, 2006).

<sup>3</sup> 23 ECAB 46 (1971).

wage-earning capacity was based on earnings as a vending machine operator which was not a fair or reasonable representation of his capacity to earn wages. He explained that, after he lost his vending operator business in 1994, the employing establishment was unable to provide employment. Appellant referenced the January 14, 2005 report of Dr. Leonard. He argued that the Office was aware that several store managers requested he remove 30 of his vending machines from their premises but had not considered that, as a result, he would not be able to sustain his vending machine business over time.

In a decision dated September 12, 2005, the Office denied appellant's request for reconsideration without conducting a merit review.

On January 25, 2006 appellant requested reconsideration and submitted affidavits. He asserted that the Office abused its discretion as he met the criteria for obtaining a merit review. Appellant submitted evidence contending that the Office erroneously applied or interpreted a point of law and also contended his submissions constituted relevant and pertinent new medical evidence. He again contended that the Office did not properly interpret and apply *Goldman*. Appellant asserted that his earnings as a vending machine operator were not a fair or reasonable representation of his ability to earn wages. He further argued that the Office erred in not deducting the direct cost of his vending machine business, \$50,000.00, when calculating his actual earnings. Appellant cited *Mildred Alde-Johnson*<sup>4</sup> as support that it would be inequitable to calculate a loss of wage-earning capacity on the basis of a claimant's gross earnings from self-employment without allowing for the costs of conducting business. He asserted that his vending machine job was a makeshift position that was tailored to his needs and, pursuant to *Kathleen Weiseman*,<sup>5</sup> his actual earnings did not fairly and reasonably represent his wage-earning capacity.

In a January 31, 2006 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to merit warrant review.

On February 7, 2006 appellant appealed to the Board. As noted, the Board granted the Director's motion to remand the case.

In a merit decision dated January 16, 2007, the Office denied modification of the January 25, 2005 decision.

On February 1, 2007 appellant requested reconsideration. He asserted that the Office did not properly review the merits of his claim and did not address his allegation that his wage-earning capacity was improperly determined or the Board precedent cited in support of his contentions. Appellant reiterated his arguments and advised that the Office misinterpreted the definition of wage-earning capacity as defined in *Hattie Drummond*.<sup>6</sup>

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<sup>4</sup> 50 ECAB 474 (1999).

<sup>5</sup> 50 ECAB 416 (1999).

<sup>6</sup> 39 ECAB 904 (1988).

In a May 1, 2007 decision, the Office denied modification of the January 16, 2007 decision.

On April 30, 2008 appellant requested reconsideration. He submitted a brief reasserting that his wage-earning capacity was not properly determined and should not have been based on his actual earnings of his vending machine business. Appellant contended that the original wage-earning capacity determination was erroneous and the Office miscalculated his actual earnings. He reiterated that he was permanently disabled.

By decision dated July 24, 2008, the Office denied appellant's request for reconsideration on the grounds that the request was not timely and that he did not present clear evidence of error by the Office.

On March 23, 2009 appellant requested reconsideration. He filed an amended reconsideration request on March 30, 2009. Appellant again asserted that his wage-earning capacity was erroneous and warranted modification. He restated his arguments that the wage-earning capacity was improperly determined and that the Office did not properly interpret and apply controlling Board precedent. On May 18 and June 4, 2008 appellant contended that he had timely filed the April 30, 2008 request for reconsideration and submitted a page from his request which was date-stamped by the Office "4-30-08."

On June 22, 2009 the Office denied appellant's request for reconsideration on the grounds that the request was not timely and that he did not present clear evidence of error by the Office.

### **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.<sup>8</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>9</sup>

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<sup>7</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>8</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>9</sup> *Gary L. Moreland*, 54 ECAB 638 (2003). See also *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004). In *Peoples* and *Taylor*, the Board determined that the claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification of the decision. In both cases, the Board set aside the Office's decision denying the claimant's reconsideration request as untimely and remanded for the Office to adjudicate the issue of modification of a loss of wage-earning capacity determination.

### ANALYSIS

The Office considered appellant's April 30, 2008 and March 30, 2009 correspondence as requests for reconsideration of the May 1, 2007 Office decision denying modification of the January 16, 2007 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the requests untimely and that appellant did not establish clear evidence of error.

In his April 30, 2008 and March 30, 2009 correspondence, appellant used the term reconsideration. However, his letter asserts that the December 2, 1993 wage-earning capacity determination was not properly determined and should not have been based on his actual earnings of his vending machine business. Appellant contended that the original wage-earning capacity determination was made in error and warranted modification as the Office failed to properly interpret and apply relevant case precedent. His April 30, 2008 and March 30, 2009 letters constitute requests for modification of the Office's December 2, 1993 wage-earning capacity determination. Appellant's request for modification of the wage-earning determination is not a request for a review of the December 2, 1993 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized his April 30, 2008 and March 30, 2009 letters as requests for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a).

Appellant has requested modification of the December 2, 1993 wage-earning capacity determination based on his argument that it was in error. On remand, the Office shall adjudicate his request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.<sup>10</sup>

### CONCLUSION

The Board finds that appellant requested modification of the December 2, 1993 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>10</sup> See Gary L. Moreland, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 22, 2009 and July 24, 2008 are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 24, 2010  
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