

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

M.N., Appellant)

and)

DEPARTMENT OF AGRICULTURE, POTATO)
RESEARCH LABORATORY,)
East Grand Forks, MN, Employer)

**Docket No. 10-51
Issued: July 6, 2010**

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 March 2, 2009 appellant filed a timely appeal from the April 14, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied her reconsideration request as untimely filed and failing to present clear evidence of error. Pursuant to 20 C.F.R. § 501.2(c) and 501.3(e), the Board has jurisdiction over the nonmerit issue.¹

ISSUE

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

¹ The most recent merit decision was the Board's August 21, 2007 decision which affirmed denial to modify an August 13, 2002 Office determination of appellant's wage-earning capacity. Docket No. 07-215 (issued August 21, 2007). On July 17, 2008 the Board denied appellant's petition for reconsideration. Docket No. 07-215 (issued July 17, 2008).

FACTUAL HISTORY

This is the third appeal before the Board.² In a July 11, 2005 decision, the Board found that appellant's August 10, 2004 request for reconsideration raised the issue of whether modification of the Office's August 13, 2002 wage-earning capacity determination was warranted.³ In an August 21, 2007 decision, the Board affirmed a November 8, 2005 Office decision denying appellant's request for modification of the August 13, 2002 loss of wage-earning capacity determination.⁴ The Board also affirmed an Office's April 14, 2006 nonmerit decision denying her request for a hearing. The facts of the case contained in the prior decisions are incorporated by reference.

On February 19, 2009 appellant requested reconsideration. She asserted that the August 13, 2002 loss of wage-earning capacity determination was based on an inaccurate job description. Appellant contended that the offered position was not part time and did not include the restrictions noted by her physician.

By decision dated April 14, 2009, the Office denied appellant's request for reconsideration on the grounds that the request was not timely and that she did not present clear evidence of error.

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.⁵ The burden of proof is on the party attempting to show modification.⁶ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁷

² Docket No. 05-428 (issued July 11, 2005). On September 21, 1984 appellant injured her neck while in the performance of duty. The Office accepted the claim for cervical strain and temporary aggravation of thyroid which resolved by November 15, 1984. The Office subsequently accepted the conditions of fibrositis and fibromyalgia.

³ The Office found that appellant had been working 32 hours per week as an engineering technician with a weekly wage of \$609.72. It found that her actual earnings fairly and reasonably represented her wage-earning capacity. Appellant retired from the employing establishment on January 3, 2005.

⁴ Docket No. 07-215 (issued August 21, 2007).

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

⁶ *Darletha Coleman*, 55 ECAB 143 (2003).

⁷ *W.W.*, 61 ECAB ____ (Docket No. 09-1934, issued February 24, 2010); *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 February 19, 2009 correspondence as a request for reconsideration of the Office's August 13, 2002 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was untimely and that she did not establish clear evidence of error.

Although appellant's February 19, 2009 correspondence used the term reconsideration, she contended that the August 13, 2002 wage-earning capacity determination was erroneous as the position on which the Office based its determination was a full-time position, not part time, and was not based on her physical restrictions. Appellant contended that the original wage-earning capacity determination was in error and warranted modification. The Board finds that her February 19, 2009 letter constitutes a request for modification of the Office's August 13, 2002 wage-earning capacity determination and not a request for reconsideration under 5 U.S.C. § 8128(a). Therefore, the Office improperly adjudicated her February 19, 2009 correspondence as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a). The case will be remanded for the Office to adjudicate her request for modification of the wage-earning capacity determination and issue an appropriate decision

CONCLUSION

The Board finds that appellant requested modification of the August 13, 2002 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2009 be set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: July 6, 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