

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

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**F.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
DeSoto, MO, Employer**

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**Docket No. 10-99  
Issued: July 21, 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  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 3, 2009 decision denying her request for further review of the merits of her 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 June 9, 2008 decision regarding her wage-earning capacity. Because more than one year has elapsed between the last merit decision and the filing of this appeal on October 13, 2009, the Board lacks jurisdiction to review the merits of this case.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

This case was previously before the Board. In a January 24, 2006 decision, the Board reversed the Office's August 18, 2004 and February 22, 2005 decisions which reduced appellant's compensation to zero on the basis that she refused to participate in vocational rehabilitation.<sup>2</sup> The facts of the case as set forth in the Board's prior decision is incorporated herein by reference.<sup>3</sup>

In a June 9, 2008 decision, the Office reduced appellant's compensation effective June 10, 2008 on the basis that the selected position of cashier/checker (retail trade) represented her wage-earning capacity. It found the position was medically and vocationally suitable and reasonably available in her commuting area. The Office found the physical requirements of this position allowed her to change positions and was within her medical restrictions.

In a May 14, 2009 letter, appellant requested reconsideration. She stated that she had a difficult time finding work in a cashier position. Appellant explained she could not find work because of her medical restrictions as well as the economy. She indicated that the manager of a local store told her it did not hire people for a cashier position who needed to "sit, walk and stand every 15 minutes."

In a June 3, 2009 decision, the Office denied appellant's request for merit review. It found she had not submitted sufficient evidence or argument to warrant merit review of the claim.

## **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>4</sup> The burden of proof is on the party attempting to show modification.<sup>5</sup> There is no

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<sup>2</sup> Docket No. 05-1315 (issued January 24, 2006).

<sup>3</sup> The Office accepted that appellant sustained: closed sacrum/coccyx fracture; closed pubis fracture; closed spleen hematoma; closed four rib fractures; closed lumbar vertebra fracture; posthemorrhage anemia; forehead open wound; and foot/toe abrasion as a result of a November 15, 1995 motor vehicle accident. Following 45 days of continuation of pay, it began paying compensation for temporary total disability on December 31, 1995. Appellant was retained on the periodic compensation rolls. The employing establishment terminated her employment in February 1996.

<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>5</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>6</sup>

### ANALYSIS

The Office considered appellant's May 14, 2009 letter as a request for reconsideration of the prior wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was insufficient to warrant further merit review.

While appellant used the term reconsideration, she asserted that the June 9, 2008 wage-earning capacity determination was erroneously determined as the constructed position of cashier/checker was not suitable. Appellant contends that her medical restrictions were not compatible with a cashier/checker position as no one would hire her. She stated that she had looked for work as a cashier but no one was hiring. Appellant reiterated her position on appeal. The Board finds that her May 14, 2009 letter is a request for modification of the Office's June 9, 2008 wage-earning capacity determination. This request for modification is not a request for a review of the Office's June 9, 2008 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly adjudicated her May 14, 2009 letter as a request for reconsideration.<sup>7</sup>

As appellant has requested modification of the June 9, 2008 wage-earning capacity determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) do not apply. The case will be remanded to the Office to adjudicate her request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.<sup>8</sup>

### CONCLUSION

The Board finds the Office improperly denied appellant's requested modification of the June 9, 2008 wage-earning capacity determination.

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<sup>6</sup> *W.W.*, 61 ECAB \_\_\_\_ (Docket No. 09-1934, issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>7</sup> *See M.J.*, Docket No. 08-2280 (issued July 7, 2009). *See also Gary L. Moreland, id.*

<sup>8</sup> Appellant submitted evidence with her appeal. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 3, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceedings consistent with this decision.

Issued: July 21, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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