

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly refused to reopen his 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.

On appeal appellant contends that the prior decisions were based on errors of law and inaccurate evidence concerning the suitability of the selected position.

FACTUAL HISTORY

This case has previously been before the Board. In a May 15, 2003 decision, the Board affirmed Office decisions dated October 29, 2001 and January 28, 2002 which reduced appellant's compensation benefits effective August 15, 1999.³ The Board found that the selected position of Cashier 2 represented his wage-earning capacity and that the position duties were not of a repetitive nature. The Board also found that appellant failed to meet his burden of proof in establishing a recurrence of disability on or after August 28, 2000 causally related to his accepted March 15, 1982 employment injury.⁴ In a December 14, 2004 decision, the Board affirmed the April 12, 2004 Office determination that modification of the wage-earning capacity was not warranted.⁵ The Board remanded the case, however, on the calculation of appellant's pay rate. In an October 24, 2006 decision, the Board affirmed an April 5, 2005 Office decision regarding appellant's pay rate.⁶ The Board also found that the Office properly denied appellant's request for further merit review in decisions dated June 2 and September 15, 2005. On July 30, 2007 the Board issued an order granting the Director's petition for reconsideration for correction and denying appellant's petition for reconsideration.⁷ The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.

In a September 13, 2007 letter, appellant requested reconsideration. He contended that the Office used an inaccurate and incorrect job description when it reduced his compensation effective August 15, 1999 based on its determination that the selected position of Cashier 2 represented his wage-earning capacity.

By decision dated September 19, 2007, the Office denied appellant's request for reconsideration of the merits.

³ Docket No. 02-2265 (issued May 15, 2003). The Office issued its initial decision reducing the rate of appellant's compensation benefits based on his wage-earning capacity as a Cashier 2 on July 16, 1999.

⁴ On March 15, 1982 appellant, then a molder, injured his right hand in the performance of duty. The Office accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery.

⁵ Docket No. 04-1438 (issued December 14, 2004).

⁶ Docket No. 06-40 (issued October 24, 2006).

⁷ Docket No. 06-40 (issued October 24, 2006), *order denying petition for recon., and correction and denying petition for recon.* Docket No. 06-40 (issued July 30, 2007).

Appellant requested reconsideration by letters dated September 22 and December 3, 2007. He contended that the decisions of the Office and the Board contained errors of law and that he was never provided with a decision based on an accurate job description for the Cashier 2 position or sent a notice of proposed reduction of compensation. Appellant also contended that the statement of accepted facts was incorrect.

By decision dated March 4, 2008, the Office denied appellant's requests for reconsideration of the merits.

In letters dated March 14 to April 9, 2008, appellant requested reconsideration of the March 4, 2008 nonmerit decision. He reiterated that the Office used an inaccurate description of Cashier 2 as the position was light duty rather than sedentary.

In a decision dated April 17, 2008, the Office denied appellant's request for a merit review.

On July 2 and 8, 2008 appellant requested reconsideration contending that the medical and vocational evidence was deficient in establishing his ability to perform the duties of Cashier 2. Specifically, he also argued that the medical opinions used by the Office violated Americans with Disability Act and that it failed to develop and implement affirmative actions for disabled employees as required by law.

In an August 6, 2008 decision, the Office denied appellant's request for reconsideration without merit review.

On August 11 and 19 and September 2, 2008 appellant again requested reconsideration and reiterated arguments that the Office violated the law when it made its determination regarding the selected position of Cashier 2. With his September 2, 2008 request appellant submitted two pages of 29 C.F.R. § 1614.101 in support of his contention that the Office failed to comply with federal regulations.

On September 17, 2008 appellant filed an appeal with the Board, requesting review of the September 19, 2007 nonmerit decision. By order dated December 19, 2008, the Board granted appellant's request to dismiss the appeal and cancel oral argument.⁸

On February 17, 2009 appellant requested reconsideration and reiterated his contentions regarding the inaccurate job description and that the Office failed to follow federal regulations.

On March 11, 2009 the Office denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT -- ISSUES 1 & 2

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

⁸ Docket No. 08-2515 (issued December 19, 2008).

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.⁹ The burden of proof is on the party attempting to show modification.¹⁰ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹¹

ANALYSIS -- ISSUE 1

The Office considered appellant's correspondence in 2008 and 2009 as requests for reconsideration of the prior wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the requests dated March 14 to July 8, 2008 were insufficient to warrant further merit review. The requests dated August 6, 2008 to February 17, 2009 were found untimely filed and that appellant did not establish clear evidence of error.

In his various correspondence to the Office, appellant used the term reconsideration. However, in each case he asserted that the July 16, 1999 wage-earning capacity determination was erroneously determined and that the constructed position of Cashier 2 was not suitable. Appellant contended that the original wage-earning capacity determination was made in error and warranted modification. He argued that the Office failed to properly interpret and apply relevant case precedent and the medical evidence. Appellant seeks modification of the Office's July 16, 1999 wage-earning capacity determination. The Office erroneously considered his contentions regarding the July 16, 1999 decision under 5 U.S.C. § 8128(a) rather than the legal standard applicable for modification of the wage-earning capacity determination.

Appellant has requested modification of the July 16, 1999 wage-earning capacity determination. The case will be remanded to the Office to 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 July 16, 1999 wage-earning capacity determination and that the Office applied an erroneous legal standard to his requests.

⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

¹⁰ *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ *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.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2009 and August 6, April 17 and March 4, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceeding consistent with this decision.

Issued: May 4, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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