

FACTUAL HISTORY

The case was before the Board on prior appeals. By decision dated July 12, 2001, the Board affirmed an August 20, 1998 wage-earning capacity determination based on the selected position of automobile salesperson.² In a decision dated May 31, 2007, the Board affirmed a July 12, 2006 Office decision, finding that appellant's reconsideration request was insufficient to warrant merit review of the claim.³ The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

Following the Board's May 31, 2007 decision, the Office issued decisions dated July 6 and September 4, 2007, denying merit review of the claim. In a decision dated May 19, 2009, it found that appellant's May 3, 2009 application for reconsideration was untimely and failed to show clear evidence of error.

On August 4, 2009 appellant filed a July 28, 2009 request for reconsideration. He argued that the medical evidence had not been properly considered by the Office. Appellant stated that a September 14, 2006 report from Dr. Clancey McKenzie, a psychiatrist, had not been properly reviewed. He argued that an August 12, 1992 report from Dr. Lynn Storie established that "fear" was a direct and natural consequence of the employment injury.⁴ Appellant submitted a copy of the September 14, 2006 report from Dr. McKenzie, who stated that the job of car salesman required "work outside in the elements" and would not be an appropriate position because working outside had caused the worsening of his arthritic conditions. Dr. McKenzie further stated that appellant had post-traumatic stress disorder (PTSD) and could not work with the general public in a sales position. He concluded that appellant was totally disabled at that time.

In a decision dated October 1, 2009, the Office found that appellant's application for reconsideration was untimely filed. It further found that he had not established clear evidence of error and was not entitled to a merit review.

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 pursuant to 5 U.S.C. § 8115, 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 a

² Docket No. 99-1799 (issued July 12, 2001).

³ Docket No. 06-1928 (issued May 31, 2007).

⁴ The accepted conditions in the case were bilateral mild distal peripheral neuropathy and left mild sensory ulnar neuropathy.

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

modification of the wage-earning capacity determination.⁶ There is no time limit for a claimant to submit a request for modification of a wage-earning capacity determination.⁷

ANALYSIS

The October 1, 2009 Office decision found that appellant had submitted an application for reconsideration of a wage-earning capacity determination, and that such application was untimely and failed to show clear evidence of error. Although appellant's July 28, 2009 letter used the term reconsideration, he argued that the wage-earning capacity determination was erroneous as the Office did not properly consider the medical evidence.

The July 28, 2009 letter constitutes a request for modification of the wage-earning capacity determination. Appellant argued that the original determination was in error, as well as discussing new medical evidence regarding his condition. The Board finds that the July 28, 2009 letter was improperly characterized as an application for reconsideration. It is a request for modification of a wage-earning capacity determination, and therefore the Office should have issued an appropriate merit decision on the issue.⁸ The case will be remanded to the Office for an appropriate decision with respect to modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant requested modification of the August 20, 1998 wage-earning capacity determination and the case is remanded for an appropriate decision on that issue.

⁶ *Id.*

⁷ *Gary W. Moreland*, 54 ECAB 638 (2003).

⁸ *See W.W.*, 61 ECAB ____ (Docket No. 09-1934, issued February 24, 2010) (claimant used the term reconsideration, but argued the wage-earning capacity determination was in error. The case was remanded for an appropriate decision on the issue of modification of the wage-earning capacity determination).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2009 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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