

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

J.J., Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD BUREAU, Sacramento, CA, Employer**

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**Docket No. 10-1379
Issued: March 4, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 22, 2010 appellant filed a timely appeal from the November 9, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year elapsed between the most recent merit decision of April 8, 2004 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3; but has jurisdiction over the nonmerit decision.¹

ISSUE

The issue is whether the Office properly determined that appellant's June 16, 2009 letter requesting "administrative reversal of compensation reduction" constituted an untimely request for reconsideration.

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 8, 2004, the Board affirmed the Office's June 24, 2003 merit decision which reduced appellant's compensation to reflect that the constructed position of budget officer represented his wage-earning capacity. The Board also affirmed that he failed to meet his burden of proof to establish that his migraine headaches were caused or aggravated by his April 7, 1999 employment injury.² The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.

The Office received medical reports from Dr. F. Karl Gregorius, a Board-certified neurosurgeon, who noted intermittent exacerbations of pain as a result of the employment injury, together with physical therapy reports.

In a letter dated June 16, 2009, appellant requested an "administrative reversal of compensation reduction" of the Office's July 2, 2002 wage-earning capacity decision based on an error in facts. He stated that he was required to maintain concurrent military membership in the National Guard and that failure to hold military membership would cause separation from the Federal Civil Service. The record indicates that appellant stopped work on May 12, 1999 due to increasing pain. Because of his work-related medical condition, he was honorably discharged by the Army National Guard on July 11, 2000 and discharged from the employing establishment effective September 29, 2000. Appellant asserted that the Office's July 2, 2002 decision was in error as it failed to consider the facts of his medical condition; specifically, the results of the May 11, 2000 Medical Duty Review Board and medical evidence from Colonel Philip Siegel regarding his migraine headaches. He alleged that the case file contained errors of fact and inaccurate opinions in his vocational rehabilitation program. Appellant also alleged that the statement of accepted facts lacked both factual and medical evidence from the May 11, 2000 Medical Duty Review Board results.

In a nonmerit decision dated November 9, 2009, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to establish clear evidence of error in the July 2, 2002 merit decision.

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.³ The burden of proof is on the party attempting to show modification.⁴ There is no

² Docket No. 03-2281 (issued April 8, 2004), *order denying petition for recon.* (issued August 2, 2004).

³ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

⁴ *Darletha Coleman*, 55 ECAB 143 (2003).

time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁵

ANALYSIS

The Office adjudicated appellant's June 16, 2009 request for review as a request for reconsideration of the July 2, 2002 wage-earning capacity determination. It found the June 16, 2009 request untimely filed and that he did not establish clear evidence of error.

Appellant's June 16, 2009 letter referred to evidence of error in the factual and medical evidence with respect to his ability to perform the constructed position of budget officer. The Office determined on July 2, 2002 that the constructed position of budget officer represented his wage-earning capacity. In his June 16, 2009 letter, appellant claimed there was evidence of error in the Office's determination regarding his ability to perform the constructed position. The medical reports of Dr. Gregorius noted that appellant experienced intermittent exacerbations causally related to the employment injury subsequent to the Office's July 2, 2002 wage-earning capacity determination.

The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine whether modification of the wage-earning capacity is warranted.⁶ The Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests a resumption of compensation for total wage loss.⁷ This section of the procedure manual covers the situation when a claimant has stopped working, as in this case. The Board finds that the Office should have adjudicated the issue of modification of the wage-earning capacity determination. The case will be remanded for an appropriate decision on this issue.

CONCLUSION

The Board finds that appellant requested modification of the July 2, 2002 loss of wage-earning capacity determination and is entitled to a merit decision on that issue.

⁵ *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. The Board set aside the Office's decision denying the claimant's reconsideration request as untimely and remanded both cases for the Office to adjudicate the issue of modification of a loss of wage-earning capacity determination.

⁶ *Katherine T. Kreger*, *supra* note 3.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); see *Katherine T. Kreger*, *supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 4, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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