

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

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D.O., Appellant )

and )

DEPARTMENT OF TRANSPORTATION, )  
FEDERAL AVIATION ADMINISTRATION, )  
Hampton, GA, Employer )

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**Docket No. 10-1727  
Issued: March 7, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 15, 2010 appellant filed a timely appeal from the May 12, 2010 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the appeal.

**ISSUE**

The issue is whether the Office abused its discretion in denying appellant's request for reconsideration.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>1</sup> In a November 23, 2009 order remanding case, the Board found that the Office had not properly adjudicated appellant's request for modification of the 1999 wage-earning capacity determination.<sup>2</sup> The Office did not evaluate appellant's request according to the criteria for modification of a formal wage-earning capacity determination. The facts of the case as set forth in the Board's prior decisions and order are hereby incorporated by reference.

On remand, the Office issued a December 7, 2009 decision denying appellant's request for modification of the 1999 wage-earning capacity determination. It found that he had been self-employed and worked in the capacity of a photographer for over 60 days. The Office denied appellant's request, finding that he did not establish that he was not self-employed or that the wage-earning capacity was in error.

On March 8, 2010 appellant filed a request for reconsideration contending that the 1999 wage-earning capacity decision should be modified. With his request, he submitted the December 24, 2009 and February 23, 2010 reports of Dr. William H. Biggers, an attending psychiatrist, and a January 20, 2010 report of Dr. Roger A. Morrero, an attending family practitioner. Appellant contended that he had never been self-employed as a photographer and that the medical evidence established a material change in his accepted conditions.

In a May 12, 2010 decision, the Office denied appellant's request for reconsideration without merit review. The decision noted that the three medical reports presented on reconsideration were of limited probative value to show that his medical condition had changed. The Office also found that appellant's arguments and the medical evidence was not new or supported a review of the prior 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 decision 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,

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<sup>1</sup> Appellant, a former air traffic controller, alleged occupational disease due to his federal employment. His claim has been accepted for recurrent major depression, malignant hypertension, hypertensive retinopathy, an unspecified anxiety state, post-traumatic stress disorder, coronary atherosclerosis, atrial fibrillation and erectile dysfunction. On July 30, 1999 the Office reduced appellant's wage-loss compensation to reflect his capacity to earn wages as a studio cameraman. In Docket No. 02-506 (issued July 7, 2003) the Board found that he forfeited compensation for specific periods by failing to report his self-employment as a photographer. The case was remanded to the Office to reconsider the amount of the overpayment. In Docket No. 04-379 (issued February 11, 2005) the Board affirmed the amount of the overpayment for the periods of the forfeiture.

<sup>2</sup> Docket No. 09-966 (issued November 23, 2009).

erroneous.<sup>3</sup> The burden of proof is on the party attempting to show modification is warranted.<sup>4</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>5</sup>

### ANALYSIS

The Office considered appellant's March 8, 2010 letter as a request for reconsideration under section 8128(a) and found that he did not submit sufficient evidence or argument to warrant further merit review. The Board finds that this was error.

Appellant asserted that the 1999 wage-earning capacity decision was erroneously determined as he did not perform work as a photographer and did not have the ability to do such employment. He also contended that his accepted conditions have materially changed such that he was again totally disabled. In support of his contention, appellant submitted medical evidence from his attending physicians, Dr. Biggers and Dr. Morrero. The May 12, 2010 decision of the Office addressed the medical evidence submitted by appellant noting that the reports each stated that he was not capable of performing any work. The claims examiner erred by weighing the probative value of the medical reports as limited and then finding that appellant failed to meet any of the three requirements of section 10.606 of the implementing regulations that pertain to reconsideration.<sup>6</sup> As appellant sought review of the 1999 wage-earning capacity and argued that his accepted conditions had materially changed, his request is not one under 5 U.S.C. § 8128(a). The Office improperly adjudicated his request as one for reconsideration rather than modification of the exiting wage-earning capacity determination.

The case will be remanded to the Office for adjudication of appellant's request under the appropriate standard of review relevant to modification of a wage-earning capacity. After such further development as it deems necessary, it shall issue an appropriate decision.<sup>7</sup>

### CONCLUSION

The Board finds that the Office improperly adjudicated appellant's request for modification of the 1999 wage-earning capacity as a request for reconsideration.

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<sup>3</sup> See *F.B.*, 61 ECAB \_\_\_\_ (Docket No. 10-99, issued July 21, 2010). See also *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>4</sup> See *Darletha Coleman*, 55 ECAB 142 (2003).

<sup>5</sup> See *W.W.*, 61 ECAB \_\_\_\_ (Docket No. 09-1937, issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>6</sup> See 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> On appeal, appellant submitted the medical reports referenced herein. The Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 12, 2010 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 7, 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