

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

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R.R., Appellant )

and )

**DEPARTMENT OF THE NAVY,** )  
**PHILADELPHIA NAVAL SHIPYARD,** )  
**Philadelphia, PA, Employer** )

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**Docket No. 11-2120**  
**Issued: September 11, 2012**

*Appearances:*  
*David C. Harrison, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On September 21, 2011 appellant, through counsel, filed a timely appeal from the May 5, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for further review of his claim. As more than 180 days elapsed from the last merit decision of February 24, 2010 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant, through counsel, argues that the medical records reflect a substantial change in his condition making it clear that he is not capable of gainful employment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts of the prior decision are hereby incorporated by reference.<sup>2</sup> OWCP reduced appellant's compensation on November 1, 2001 as it determined that he had the ability to perform the duties of a telephone solicitor and this determination was affirmed by the Board. Appellant requested modification of his wage-earning capacity by request dated March 14, 2007 and OWCP denied a review on the merits. The Board remanded this case<sup>3</sup> to OWCP to consider the merits of the case. After reviewing the medical evidence, OWCP by decision dated July 21, 2009 found that modification of the 2001 wage-earning capacity decision was not warranted. Appellant requested a hearing before an OWCP hearing representative, which was held on November 16, 2009. He also submitted new medical evidence. By decision dated February 24, 2010, the hearing representative affirmed OWCP's denial of appellant's request for modification by decision dated July 21, 2009.

On June 14, 2010 appellant, through counsel, again requested reinstatement of benefits, alleging that new medical evidence showed there had been a material change in his condition. In support of his reconsideration request, he submitted a May 12, 2010 report wherein Dr. Randall N. Smith, a Board-certified orthopedic surgeon, stated that he had treated appellant continuously since 2001 and that there had been a material change in his condition for the worse since that time as appellant could do substantially less than he could back in 2001. Dr. Smith opined that even if appellant had been able to perform the job of telephone solicitor back in 2001, he could not do it now as his pain had substantially increased and therefore his need for pain medication was also increased. He noted that these conditions together prevented appellant from concentrating and, specifically, noted that the medication left him drowsy and unable to concentrate. Dr. Smith opined that appellant would be unable to follow a script that is required by a telephone solicitor nor could he respond to questions that may be asked by the contact. He further noted that it was his professional opinion that this pain and required medications were directly related to the accident of November 14, 1983.

By decision dated May 5, 2011, OWCP denied reconsideration of appellant's claim without reviewing the case on the merits.

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<sup>2</sup> Docket No. 08-1590 (issued July 1, 2009) (the Board remanded the case as appellant was entitled to merit review on the issue of wage-earning capacity); Docket No. 05-1882 (issued April 20, 2006) (the Board found that OWCP properly denied modification of its determination that the constructed position of telephone solicitor represented appellant's wage-earning capacity); Docket No. 04-2159 (issued February 17, 2005) (the Board found that OWCP properly refused to reopen appellant's claim for merit review); Docket No. 03-2283 (issued March 11, 2004) (the Board found that OWCP properly determined that the constructed position of telephone solicitor represented appellant's wage-earning capacity and properly reduced appellant's compensation). OWCP had accepted appellant's April 6, 1980 traumatic injury claim for mild instability of the left knee in the performance of his duties as a painter. On January 24, 1984 it accepted a November 14, 1983 traumatic injury claim for low back sprain and pain syndrome.

<sup>3</sup> Docket No. 08-1590 (issued July 1, 2009).

## LEGAL PRECEDENT

It is well established that either a claimant or OWCP 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 time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>6</sup>

## ANALYSIS

OWCP issued a decision on November 1, 2001 finding that appellant had the capacity to earn wages as a telephone solicitor and reduced appellant's compensation benefits accordingly. The Board affirmed this decision on March 11, 2004.<sup>7</sup> OWCP most recently denied modification of appellant's loss of wage-earning capacity determination on July 21, 2009 and this decision was affirmed by a hearing representative on February 24, 2010.

On June 14, 2010 appellant requested reinstatement of benefits, alleging that his loss of wage-earning capacity determination should be modified due to a change in the nature and extent of his injury-related condition. In support thereof, he submitted a May 12, 2010 report by Dr. Smith wherein he indicated that there had been a material change in appellant's medical condition since 2001. Dr. Smith noted that, due to increased pain and appellant's pain medication, he could not perform the position of telephone solicitor. He opined that the increase in pain was directly related to the residuals of his November 13, 1983 injury. By decision dated May 5, 2011, OWCP denied reconsideration of the February 24, 2010 decision.

Appellant asserted that the loss of wage-earning capacity determination should be modified. He contended that his injury-related condition had worsened and submitted medical evidence in support of that assertion. This request for modification was not a request for review of the February 24, 2010 decision under 5 U.S.C. § 8128(a). Therefore, OWCP improperly adjudicated appellant's June 14, 2010 letter as a request for reconsideration.<sup>8</sup>

Appellant requested modification of the November 1, 2001 loss of wage-earning capacity determination. The specific requirements of OWCP's regulations at section 10.606 do not

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<sup>4</sup> *D.E.*, Docket No. 12-8 (issued June 7, 2012); *Katherine T. Creeger*, 55 ECAB 633 (2004).

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

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

<sup>7</sup> Docket No. 03-2283.

<sup>8</sup> See *D.E.*, *supra* note 5; *F.B.*, Docket No. 10-99 (issued June 21, 2010); *M.J.*, Docket No. 08-2280 (issued July 7, 2009).

apply.<sup>9</sup> The case will be remanded to OWCP to adjudicate appellant's request for modification and issue an appropriate decision in this case.

**CONCLUSION**

The Board finds that OWCP improperly treated appellant's request for modification of the November 1, 2001 loss of wage-earning capacity determination as a request for reconsideration pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 5, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision.

Issued: September 11, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>9</sup> 20 C.F.R. § 10.606.