

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

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**P.C., Appellant**

**and**

**DEPARTMENT OF COMMERCE, BUREAU  
OF THE CENSUS, San Diego, CA, Employer**

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**Docket No. 07-2347  
Issued: April 7, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 26, 2007 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction only over the nonmerit denial of reconsideration.

**ISSUE**

The issue is whether the Office properly determined that appellant's May 13, 2007 request for a review of a prior wage-earning capacity determination constituted an untimely request for reconsideration.

**FACTUAL HISTORY**

This is the second appeal in the present case. In a March 9, 2005 decision, the Board affirmed an April 21, 2004 Office decision, which found that the constructed position of

customer service representative represented appellant's wage-earning capacity.<sup>1</sup> The facts and circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.<sup>2</sup>

Appellant submitted treatment notes from Dr. Don Edward Miller, a clinical psychologist, dated September 4, 2001 through October 15, 2005. Dr. Miller reviewed a history of the work-related injury and diagnosed generalized anxiety disorder, major depressive disorder, recurrent, severe without psychotic features and post-traumatic stress disorder. He referred appellant to Dr. Lawrence Saben, a Board-certified psychiatrist, who treated appellant from February 8, 2002 to September 21, 2004 for depression. Dr. Saben noted a history of appellant's work-related injury and subsequent treatment.

On March 1, 2007 appellant submitted a (Form CA-7), claim for compensation, for the period commencing of May 10, 2004.

In a letter dated March 16, 2007, the Office advised appellant that his claim for compensation could not be processed. The Office noted the April 21, 2004 decision determined that the constructed position of customer service representative represented appellant's wage-earning capacity and that he had no loss in wage-earning capacity. The Office further noted that the wage-earning determination was affirmed by the Board on March 9, 2005. Appellant was informed that he could not file a claim for compensation when the Office determined he had no loss in wage-earning capacity. In a letter dated March 26, 2007, the Office advised appellant to review his previous appeal rights.

In a letter dated May 13, 2007, appellant requested reconsideration. He indicated that he pursued training at Nordstrom Business Institute as a customer service representative; however, he was unable to obtain employment due to poor typing skills. Appellant subsequently started his own business as a curbside painter but was unable to generate clientele. He asserted that he was still disabled from his accepted emotional condition and was entitled to compensation since March 2004.

In a December 10, 2001 report, Dr. Miller noted a history of appellant's work-related injury and diagnosed generalized anxiety disorder, major depressive disorder, recurrent, severe without psychotic features and post-traumatic stress disorder. He advised that appellant was totally disabled from work. In the psychologist's report of June 4, 2002, he noted improvements in appellant's condition and recommended rehabilitation counseling. On July 15, 2003 Dr. Miller noted that appellant successfully completed computer training and was searching for a position. In a work capacity evaluation dated November 15, 2003, he advised that he reviewed the job description for an administrative assistant and customer service representative and could see no reason appellant could not perform either position. On October 25, 2005 the psychologist noted that appellant completed his training; however, he was unable to obtain employment.

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<sup>1</sup> On May 10, 2000 appellant, a 51-year-old temporary data census enumerator, sustained injury while attempting to obtain census information. The Office accepted acute reactions to stress, generalized anxiety disorder and prolonged depressive reaction.

<sup>2</sup> Docket No. 04-2293 (issued March 9, 2005).

Dr. Miller opined that appellant had residuals of his May 10, 2000 injury in that he experienced anxiety when he was close to obtaining a job. In work capacity evaluations dated October 26, 2005 and March 27, 2007, he advised that there was no reason appellant should not attempt to return to work for the census but there were no guarantees he could work full time. On March 27, 2007 the psychologist indicated that appellant pursued several avenues for employment including job training and a private painting business; however, he failed to commit to a long-term concerted job search and therefore was unable to find employment. Dr. Miller indicated that appellant's episodes of depression and anxiety interfered with his pursuit of work. Also submitted was a letter from Nordstrom Business Institute dated November 17, 2003, which noted appellant's typing scores.

By decision dated July 26, 2007, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that he did not present clear evidence of error by the Office.

### **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.<sup>3</sup> The burden of proof is on the party attempting to show modification.<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 adjudicated appellant's May 13, 2007 request for reconsideration of the April 21, 2004 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the request untimely and that appellant did not submit relevant evidence or legal argument establishing clear evidence of error.

In his May 13, 2007 correspondence, appellant used the term reconsideration. However, his letter asserts that the April 21, 2004 wage-earning capacity determination was made in error as he was totally disabled for work on or before that date and continued to be disabled after that

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

<sup>4</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>5</sup> *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 claimants' requests for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside the Offices' decisions denying appellants' reconsideration requests as untimely and remanded their cases for the Office to address the merits of their requests for modification of a loss of wage-earning capacity decision).

date. Appellant's May 13, 2007 letter is actually a request for modification of the Office's April 21, 2004 wage-earning capacity determination.<sup>6</sup> This request for modification is not a request for reconsideration of the April 21, 2004 decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized appellant's May 13, 2007 letter as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a).

The Board finds that appellant has requested modification of the April 21, 2004 wage-earning capacity determination. He is entitled to a merit review on that issue. On remand, the Office shall adjudicate appellant's request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.<sup>7</sup>

### **CONCLUSION**

The Board finds that appellant requested modification of the April 21, 2004 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to the Office for all necessary development and issuance of an appropriate decision.

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<sup>6</sup> See *supra* note 2.

<sup>7</sup> See Gary L. Moreland, *supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 26, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: April 7, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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