

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM T. GALUCCI, SR. and DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTE OF HEALTH, Bethesda, MD

*Docket No. 00-2341; Submitted on the Record;  
Issued April 1, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

The Office accepted that appellant sustained depression, psychological factors affecting physical condition and aggravation of post-traumatic stress syndrome (PTSD) causally related to his federal employment. By decision dated October 30, 1996, the Office determined that appellant's actual earnings as a readjustment counseling therapist from December 1992 through December 1993 fairly and reasonably represented his wage-earning capacity. The Office found that appellant had no loss of wage-earning capacity. This decision was affirmed by an Office hearing representative in a decision dated February 28, 1998. In a decision dated January 26, 1999, the Office denied modification of its prior decisions.

By decision dated April 20, 2000, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.<sup>1</sup> As appellant filed his appeal on June 28, 2000, the only decision over which the Board has jurisdiction on this appeal is the April 20, 2000 decision denying his request for reconsideration.

The Board finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provides that a claimant may

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<sup>1</sup> See 20 C.F.R. § 501.3(d).

<sup>2</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>4</sup>

In the present case, appellant submitted a January 20, 2000 request for reconsideration providing arguments as to why the wage-earning capacity determination in this case was in error. He contended that the Office erroneously placed the burden of proof on appellant with respect to the reasons for his removal and he submitted copies of SF-50 forms (notification of personnel action). The Office has the burden of proof to reduce compensation;<sup>5</sup> in this case the Office found that the weight of the evidence established that actual wages fairly and reasonably represented wage-earning capacity. It is well established that wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup> If appellant is arguing that the reasons for his removal support a conclusion that the wages he earned did not represent his wage-earning capacity, then appellant must support this argument with relevant evidence. There is no indication that the Office erred with respect to the burden of proof in this case. Where the legal arguments presented have no reasonable color of validity, the Office is not required to reopen the case for merit review.<sup>7</sup>

In his request for reconsideration, appellant argued that he was a "whistle blower" when he alleged improper conduct by his supervisor. He did not provide new and relevant evidence or argument with respect to the underlying wage-earning capacity determination in this case.

Appellant also reiterated his argument that he was not qualified to work as a readjustment counseling therapist. He did not, however, submit any new and relevant evidence to the wage-earning capacity issues in this case. There is, for example, a January 23, 2000 statement from a Mr. Hansen, registered nurse, stating that he was unaware of any formal training by the employing establishment for readjustment counseling and also opining that a person lacking education or experience in certain areas would not be qualified to work as a readjustment counseling therapist with the employing establishment. The record indicates that appellant did work for the employing establishment in that position and therefore did have experience as a readjustment counseling therapist. The underlying relevant issue is whether the wages earned in the position fairly and reasonably represented wage-earning capacity.

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<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>5</sup> *Gregory A. Compton*, 45 ECAB 154 (1993).

<sup>6</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>7</sup> *Norman W. Hanson*, 40 ECAB 1160 (1989).

With respect to medical evidence, appellant submitted a report dated February 5, 2000 from Dr. Thomas Goldman, a psychiatrist. The underlying medical issue is whether appellant stopped working due to his employment injuries<sup>8</sup> and Dr. Goldman does not provide any new and relevant evidence on this issue.

In the January 20, 2000 reconsideration request, appellant argued that the position he worked was a temporary or makeshift position, but he did not submit any new and relevant evidence to support this argument.

The Board finds that appellant did not show that the Office erroneously applied or interpreted a point of law or advance a relevant legal argument not previously considered. The evidence submitted does not constitute new evidence pertinent to the underlying wage-earning capacity determination. Accordingly, he did not meet any of the requirements of section 10.606(b)(2), and the Office properly denied the request for reconsideration without merit review of the claim.

The decision of the Office of Workers' Compensation Programs dated April 20, 2000 is affirmed.

Dated, Washington, DC  
April 1, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>8</sup> A retroactive wage-earning capacity determination is not appropriate when the work stoppage occurred because of a change in the employment-related condition. See *Mary Jo Colvert*, 45 ECAB 575 (1994).