

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

## **FACTUAL HISTORY**

On April 19, 2007 appellant, a 43-year-old mail processing clerk, filed a traumatic injury claim alleging that on April 16, 2007 she sustained injuries to her left shoulder and neck while moving a tray full of mail. OWCP accepted her claim for left rotator cuff rupture and left shoulder strain.<sup>2</sup> Appellant returned to work on July 18, 2009 as a modified mail processor. By decision dated September 23, 2009, OWCP terminated her compensation benefits on the grounds that her modified position fairly and reasonably represented her wage-earning capacity and her actual earnings met or exceeded the current wages of the job held when she was injured.

On July 10, 2010 appellant submitted a Form CA-2a claiming a recurrence of disability, due to the withdrawal of her modified position. By decision dated October 6, 2010, OWCP denied modification of the September 23, 2009 LWEC decision. In a decision dated January 12, 2011, an OWCP hearing representative affirmed the October 6, 2010 decision.

In a letter dated January 10, 2012, appellant, through her representative, requested reconsideration of the January 12, 2011 decision, arguing that the original LWEC decision was erroneous because the modified position on which it was based was tailored to conform to her unique physical restrictions. Therefore, it did not constitute a *bona fide* job for the purposes of determining wage-earning capacity.

By decision dated March 8, 2012, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>3</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>5</sup>

Modification of a standing wage-earning capacity 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

---

<sup>2</sup> OWCP accepted appellant's December 11, 2008 occupational disease claim for left carpal tunnel syndrome (CTS). (File No. xxxxxx263) Appellant's May 27, 2010 occupational disease claim was accepted for right CTS. (File No. xxxxxx049). The cases were combined with the instant case, with File No. xxxxxx285 serving as the master file.

<sup>3</sup> 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

<sup>4</sup> *K.R., id.*; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

<sup>5</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

erroneous.<sup>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>8</sup>

### **ANALYSIS**

OWCP considered appellant's counsel's January 10, 2012 correspondence as a request for reconsideration of the January 12, 2011 decision denying modification of the September 23, 2009 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was untimely and failed to establish clear evidence of error. The Board finds that this case is not in posture for a decision, as OWCP applied an improper standard of review.

In his January 10, 2012 correspondence, counsel used the term reconsideration. He, however, asserts that the original LWEC decision was erroneous because the modified position on which it was based was tailored to conform to appellant's unique physical restrictions and did not constitute a *bona fide* job for the purposes of determining wage-earning capacity. Counsel's January 10, 2012 letter constitutes a request for modification of OWCP's September 23, 2009 wage-earning capacity determination. Appellant's request for modification of the wage-earning determination is not a request for a review of the January 12, 2011 decision under 5 U.S.C. § 8128(a).<sup>9</sup> Therefore, OWCP improperly characterized the January 10, 2012 letter as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a).

Appellant has requested modification of the September 23, 2009 wage-earning capacity determination based on her argument that it was in error. On remand, OWCP shall adjudicate her request for modification of the wage-earning capacity determination and issue an appropriate decision, taking into consideration the provisions of FECA Bulletin No. 09-05.<sup>10</sup>

### **CONCLUSION**

The Board finds that appellant requested modification of the September 23, 2009 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.

---

<sup>6</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>7</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>8</sup> See *D.O.*, Docket No. 11-1607 (issued April 23, 2012); *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>9</sup> *Id.* In *D.O.*, *Peoples*, *Taylor* and *Morehead* 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 all cases, the Board set aside OWCP's decisions denying appellants reconsideration requests as untimely and remanded the cases for OWCP to address the merits of their requests for modification of an LWEC decision).

<sup>10</sup> FECA Bulletin No. 09-05 (issued August 18, 2009) outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to National Reassessment Program. If, as in the present case, a formal LWEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate. FECA Bulletin No. 09-05 (issued August 18, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 8, 2012 is set aside and the case remanded for further consideration consistent with this decision of the Board.

Issued: December 4, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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