

radiculopathy. Appellant stopped work on August 21, 2003 and was placed on the periodic rolls. In a June 29, 2005 decision, OWCP terminated her monetary benefits, finding that she refused an offer of suitable work. By decision dated May 21, 2007, OWCP's hearing representative affirmed the June 29, 2005 decision. In an August 26, 2008 decision,¹ the Board reversed the finding that OWCP failed to consider all of the medical evidence of record. OWCP reinstated appellant's wage-loss benefits.

In an August 10, 2009 report, Dr. Robert Holladay, a Board-certified orthopedic surgeon, opined that appellant could return to full duty with restrictions of no stooping, twisting, bending, squatting, kneeling or climbing and no lifting, pulling or pushing more than 10 pounds.

On September 29, 2009 the employing establishment offered appellant a limited-duty position as a program support assistant based on Dr. Holladay's restrictions. The position was sedentary, but required walking. On October 29, 2009 appellant accepted the limited-duty position as a program support assistant. By decision dated January 20, 2010, OWCP reduced her compensation benefits effective November 22, 2009 based upon her actual earnings. It found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity.

On April 20, 2010 appellant submitted a notice of recurrence of total disability as of April 9, 2010. After her return to work, her pain increased and her function and motion decreased. In an April 19, 2010 report, Dr. John M. Burdine, Board-certified in pain medicine, diagnosed cervical syndrome; cervico-brachial neuralgia; facet arthropathy of the spine; lumbar spondylosis and lumbosacral radiculitis. He recommended that appellant undergo a functional capacity examination and outlined temporary work restrictions of no lifting, bending, prolonged activities, overhead activities; he also recommended that she take frequent breaks. Dr. Burdine stated that without surgery her prognosis was poor.

In an April 9, 2010 report, Dr. DeVinder Verma, a specialist in internal medicine, stated that appellant was unable to work as of April 7, 2010.

Appellant submitted an April 5, 2010 performance review from Fay C. Thrasher, Ph.D, her supervisor. She had both physical and cognitive difficulties which interfered with her ability to successfully perform the functions of her position. Ms. Thrasher noted that appellant had a hard time typing and focusing due to numerous medications taken for pain.

In a July 6, 2010 report, OWCP's medical adviser reviewed the medical record and noted that appellant experienced ongoing problems following her 2003 work injury. The record revealed stiffness and pain in the neck and intermittent left shoulder pain, which required injections. The medical adviser opined that the left shoulder condition should be considered consequential to the injury of August 21, 2003.

On July 9, 2010 OWCP accepted "other affections of the shoulder region" and authorized treatment of the left shoulder as consequential to the original August 21, 2003 injury.

¹ Docket No. 07-2103 (issued August 26, 2008).

By decision dated July 19, 2010, OWCP denied modification of the January 20, 2010 wage-earning capacity decision. It adjudicated appellant's recurrence claim as a request to modify the loss of wage-earning capacity determination. OWCP found that the medical evidence failed to establish a change in the nature and extent of her injury-related condition, that she had been retrained or vocationally rehabilitated or that the original determination was erroneous. By decision dated October 4, 2011, the Board set aside the January 20, 2010 wage-earning capacity decision.² It found that the medical evidence generally supported appellant's claim that her condition worsened following her return to work in the modified program support assistant position. Although, OWCP authorized treatment of the left shoulder as consequential to the original injury based on the medical adviser's report, it erred by failing to consider whether appellant's left shoulder condition constituted a worsening of her accepted injury warranting modification of the wage-earning capacity determination. The Board remanded the case to OWCP for further development of the medical evidence. The facts of the case as set forth in the Board's August 26, 2008 and October 4, 2011 decisions are incorporated by reference.

By decision dated December 5, 2011, OWCP denied modification of its January 20, 2010 wage-earning capacity decision.

By letter dated December 5, 2012, received by OWCP on December 13, 2012, appellant, through her attorney, requested reconsideration of OWCP's December 5, 2011 decision denying modification of the wage-earning capacity decision. Counsel noted that he was seeking modification of the January 20, 2010 wage-earning capacity decision on the grounds that there had been a material change in the nature and extent of her injury-related back, neck and left shoulder conditions.

By decision dated December 5, 2011, OWCP denied modification of the January 20, 2010 wage-earning capacity decision.

By letter dated December 5, 2012, received by OWCP on December 13, 2012, appellant through her attorney, requested reconsideration of the December 5, 2011 decision denying modification of the wage-earning capacity decision.

Appellant submitted several reports from Dr. Burdine, a treating physician. In a February 13, 2012, Dr. Burdine noted that she had continued complaints of achy, burning, throbbing pain in her low back, neck and left shoulder, in addition to numbness and tingling. Appellant also had a limited range of motion in the left shoulder. Dr. Burdine noted that she had been scheduled for left shoulder surgery but had cancelled the procedure because her husband underwent heart surgery.

In an April 18, 2012 report, Dr. Burdine related that the pain in appellant's left arm had worsened in the previous two weeks. He rated it as an eight on a scale of 1 to 10. Appellant underwent a magnetic resonance imaging (MRI) scan on January 21, 2011 which showed some impingement, partial tears and fraying of the supraspinatus tendon, along with arthritic disease in the acromioclavicular (AC) and glenohumeral joints. On examination, she had limited range of motion and tenderness in the left shoulder, with a positive impingement sign -- impingement

² Docket No. 11-681 (issued October 4, 2011).

syndrome -- and uneven shoulders. Dr. Burdine advised that appellant had neuritis or radiculitis due to displacement of her lumbar intervertebral disc.

Dr. Burdine stated that appellant's overwhelming problem was her left shoulder pain. Appellant had not been able to have surgery to ameliorate her condition. Dr. Burdine prescribed conservative treatment until she was able to undergo left shoulder surgery.

In a July 11, 2012 report, Dr. Burdine reiterated that appellant's primary complaint involved her left shoulder. Appellant was also troubled by her neck condition. Dr. Burdine opined that her neck condition was not fixable, as she had bone spurs and herniations which were probably not repairable.

In a July 13, 2013 report, Dr. Kyle F. Dickson, Board-certified in orthopedic surgery, stated that appellant had a history of having left shoulder pain since the August 21, 2003 employment injury. A January 21, 2011 MRI scan showed arthritic changes in the glenohumeral and AC joints. On examination, there were signs that she might have a rotator cuff tear in the left shoulder, although the diagnostic reports indicated that there might be some inflammation but no complete tear. Dr. Dickson recommended that appellant return to her treating physician and make sure that there was nothing more that could be done for her spine, then have her left shoulder treated. He opined that she had constant pain which was occasionally severe. Dr. Dickson recommended that appellant have an "adjustment" otherwise she would become progressively worse as her body developed a tolerance to pain medication.

In an October 3, 2012 report, Dr. Burdine advised that appellant's left shoulder pain was worse. Medication patches did not ameliorate appellant's pain and she sought other forms of treatment for her left shoulder. She rated the pain in her left shoulder as a seven on a scale of 1 to 10.

In a November 13, 2012 report, Dr. Burdine reiterated that appellant's bilateral shoulder pain was worsening. He recommended that she be evaluated for left shoulder surgery as medication did not control her symptoms. Dr. Burdine had tried more conservative measures such as physical therapy but appellant's shoulder had not responded. He outlined work restrictions of no prolonged activity, which exacerbated her pain, no bending/lifting during normal activity, no lifting exceeding 10 to 15 pounds, no bending/squatting/stooping, no prolonged sitting, no prolonged standing, no prolonged walking and no overhead activities. Dr. Burdine stated that, without surgery, her prognosis was poor and she would most likely not be able to return to work.

By decision dated February 1, 2013, OWCP denied appellant's request for reconsideration without a merit review. It found that she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error.

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

ANALYSIS

OWCP adjudicated appellant's December 13, 2012 letter as a request for reconsideration of the December 5, 2011 decision denying modification of the January 20, 2010 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the request untimely and that she did not establish clear evidence of error. The Boards found that the December 5, 2012 letter constitutes a request for modification of OWCP's January 20, 2010 wage-earning capacity determination.⁶ A request for modification of the loss of wage-earning capacity is not a request for a review under 5 U.S.C. § 8128(a) even though the term reconsideration may be used. Therefore, OWCP improperly characterized the December 13, 2012 letter from appellant's attorney 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 January 20, 2010 wage-earning capacity determination. Appellant is entitled to a merit review on that issue.⁷ On remand, OWCP shall adjudicate her request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.

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

⁴ *Darletha Coleman*, 55 ECAB 143 (2003).

⁵ *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 claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside OWCP's decision denying appellant's reconsideration request as untimely and remanded for OWCP to address the merits of his request for modification of a loss of wage-earning capacity decision).

⁶ See *supra* note 4.

⁷ *Id.*

CONCLUSION

The Board finds that appellant requested modification of the January 20, 2010 wage-earning capacity determination. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2013 is set aside and the case remanded for further action consistent with this decision.

Issued: January 10, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board