

FACTUAL HISTORY

On December 17, 1992 appellant, then a 49-year-old service representative, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and left ganglion cyst. It authorized left carpal tunnel syndrome performed on June 25, 1993. The Office entered appellant on the periodic rolls on July 16, 1993.

Dr. Richard M. Braun, a Board-certified orthopedic surgeon, submitted reports on appellant's behalf on March 13 and July 22, 1994 and diagnosed bilateral carpal tunnel syndrome. He found that she was not totally disabled. Dr. Braun completed a work restriction evaluation as requested by the Office on August 29, 1994 and stated that appellant could perform typing or other repetitive fine hand motions for two hours in the morning and two hours in the afternoon with a two-hour break. He stated that she could work eight hours a day and could not perform repetitive lifting over 10 pounds.

The Office referred appellant for vocational rehabilitation services on January 9, 1995. Appellant submitted a report dated September 2, 1994 from Dr. Roy A. Kaplan, a Board-certified rheumatologist, diagnosing fibromyalgia which he attributed to a nonemployment-related motor vehicle accident. Dr. Kaplan found that appellant was totally disabled due to this condition.

On April 4, 2005 the Office requested that the vocational rehabilitation counselor submit selected positions within appellant's physical limitations based on Dr. Braun's August 19, 2004 form report. The vocational rehabilitation counselor selected the positions of general office clerk and order clerk as within appellant's abilities and reasonably available within her commuting area based on a survey of 14 businesses for each position. The counselor noted that the position of general office clerk included writing, typing and entering information into a computer, using a keyboard, preparing correspondence, bills, statements receipts, check or other documents, copying information as well as addressing and stuffing envelopes. The position also entailed answering the telephone, conveying messages, running errands and stamping or numbers forms by hand as well as photocopying. The vocational rehabilitation counselor noted that based on her survey of 14 businesses computer work constituted less than 50 percent of the workday. The salary was \$296.40 per week. The duties of a general clerk were classified as light work, with lifting 20 pounds occasionally and 10 pounds frequently along with frequent reaching, handling and fingering.

In a letter dated July 5, 1995, the Office proposed to reduce appellant's compensation based on her capacity to earn wages as a general clerk. Appellant disagreed with this proposed reduction on July 31, 1995. By decision dated August 7, 1995, the Office reduced appellant's compensation based on her capacity to earn wages as a general clerk.

Appellant requested an oral hearing on August 24, 1995. She withdrew this request on November 12, 1997.

On August 22, 2006 appellant requested that the Office modify the formal wage-earning capacity determination on the grounds that the “*original rating was in error.*” (Emphasis in the original.) She stated that she was totally disabled at the time of the August 7, 1995 decision and that the decision was not based on reasonably current medical evidence.

By decision dated November 8, 2006, the Office declined to reopen appellant’s claim for review of the merits finding that her request for review was not timely filed and failed to demonstrate clear evidence of error.

In a letter dated November 19, 2006, entitled “Modification of [loss of wage-earning capacity] decision” appellant alleged that the Office failed to consider her preexisting conditions in reaching the constructed loss of wage-earning capacity determination. She submitted medical reports in support of her allegation. On December 22, 2006 appellant stated that she was requesting “reconsideration and subsequent merit review” on the grounds that the August 7, 1995 wage-earning capacity decision was in error.

By decision dated February 9, 2007, the Office again declined to reopen appellant’s claim for consideration of the merits. The Office stated that appellant’s request for reconsideration and the evidence submitted did not establish clear evidence of error in the August 7, 1995 decision.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition, or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.¹

ANALYSIS

In appellant’s August 22, 2006 letter to the Office, she indicated that she was requesting review of the loss of wage-earning capacity determination. She stated that the specific reason for her request was that the “*original rating was in error.*” (Emphasis in the original.) Appellant alleged that the August 7, 1995 wage-earning capacity determination based on the constructed position of general clerk was erroneous as it was not based on current medical evidence, as Dr. Braun’s August 29, 1994 report was nearly one-year old at the time of the decision. She also alleged that the Office failed to consider her disabling preexisting conditions.

As noted, the Office considered appellant’s August 22, 2006 correspondence an untimely request for reconsideration and found that she failed to present clear evidence that the Office’s final merit decision was erroneous. It is evident from appellant’s letter that she was seeking modification of the August 7, 1995 loss of wage-earning capacity determination. The request for modification in this case is not a request for review of the August 7, 1995 decision under 5 U.S.C. § 8128 and is not subject to those requirements.² Appellant did not previously request

¹ See *Sue A. Sedgwick*, 45 ECAB 211 (1993).

² *But see L.C.*, 58 ECAB ___ (Docket No. 06-1928, issued May 31, 2007).

and receive review from the Office or the Board on the issue of modification of the August 7, 1995 decision. She has not previously raised arguments on reconsideration. Appellant's August 22, 2006 correspondence is a request for additional compensation.³

CONCLUSION

The Board finds that the Office improperly characterized appellant's August 22, 2006 letter as a request for reconsideration subject to the one-year time limitation set forth in 20 C.F.R. § 10.607(a). Appellant has requested modification of the August 7, 1995 loss of wage-earning capacity determination and is entitled to a merit decision on that issue. On remand, the Office should develop the record as necessary and issue a *de novo* decision with regard to appellant's loss of wage-earning capacity.⁴

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2007 and November 8, 2006 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: September 19, 2007
Washington, DC

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

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

³ Gary L. Moreland, 54 ECAB 638, 640 (2003).

⁴ Due to the disposition of this issue, it is not necessary for the Board to address the December 22, 2006 request.