

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

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**D.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Coppell, TX, Employer**

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**Docket No. 09-2088  
Issued: April 8, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 14, 2009 appellant filed a timely appeal from the April 3, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied her reconsideration request as untimely filed and failing to present clear evidence of error.<sup>1</sup> Because more than one year has elapsed since the underlying May 15, 2006 decision, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly determined that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

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<sup>1</sup> The most recent merit decision of the Office was the December 11, 2008 reduction of appellant's compensation benefits to zero. Because more than 180 days elapsed between the Office's last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim. See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On May 5, 1998 appellant, then a 26-year-old city carrier, filed an occupational disease claim alleging injuries to her right shoulder as a result of employment activities (File No. xxxxxx330). The Office accepted her claim for right shoulder strain. It subsequently accepted appellant's March 27, 2000 traumatic injury claim for right shoulder strain (File No xxxxxx703). On August 13, 2001 the Office combined File No. xxxxxx170 and File No. xxxxxx330, with File No. xxxxxx330 serving as the master file.

On May 15, 2006 the Office issued a formal loss of wage-earning capacity (LWEC) decision reducing appellant's compensation benefits based on her actual earnings of \$422.20 per week as a part-time modified clerk effective January 23, 2006. It found that the position fairly and reasonably represented her wage-earning capacity, as she had demonstrated the ability to perform the duties of the job for more than two months.<sup>2</sup>

Appellant accepted a position as a full-time modified clerk effective August 11, 2008. On December 11, 2008 the Office reduced her compensation to zero on the grounds that her actual wages exceeded the current wages of the position she held on the date of injury. It found that appellant's modified position fairly and reasonably represented her wage-earning capacity, as she had demonstrated the ability to perform the duties of the job for more than two months.

In an undated letter, received by the Office on January 9, 2009, appellant requested modification of the May 15, 2006 LWEC decision. Noting that she was "put off work" in October 2006 due to increasing problems with her neck and shoulder injury, she requested reimbursement for time lost since that time. Appellant allegedly experienced constant pain for 10 years. She referred to a December 16, 2008 report from Dr. Umar Burney, a treating physician, who stated that she continued to be disabled due to recurrent multidirectional instability of the right shoulder.

In support of her request to modify the May 15, 2006 LWEC decision, appellant submitted numerous medical reports from February 6, 2007 through January 16, 2009. On February 21 and March 22, 2007 she received cervical epidural steroid injections from Dr. Stanley Whisenant, a Board-certified anesthesiologist, who diagnosed shoulder impingement syndrome. In August 4 and September 3, 2008 reports, Dr. Sandra Bidner, a treating physician, diagnosed recurrent right shoulder dislocation and restricted appellant from repetitive lifting with the right arm or lifting more than 20 pounds. On October 23, 2008 Dr. Richard Buch, a Board-certified orthopedic surgeon, diagnosed multidirectional dislocation of the right shoulder. He stated that appellant had been put on leave from her job in October 2006 due to her work-related injury. On November 11, 2009 Dr. John Milan, a Board-certified orthopedic surgeon, stated that appellant had been placed off work in October 2006 due to a December 1997 work injury.

In a December 16, 2008 report, Dr. Burney provided a history of injury and right shoulder examination findings reflecting positive anterior and posterior drawer, gross deltoid

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<sup>2</sup> 5 U.S.C. § 8115(a) (the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity); Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.

atrophy, significant crepitus and asymmetrical rotator cuff strength. He diagnosed multidirectional instability with recurrent subluxation events to the right shoulder.

On April 3, 2009 the Office denied appellant's request for reconsideration of the May 15, 2006 decision on the grounds that the request was not timely filed and failed to 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 LWEC 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 considered appellant's correspondence, which was received on January 9, 2009, as a request for reconsideration of the Office's May 15, 2006 wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was untimely and that appellant did not establish clear evidence of error.

In the undated correspondence received by the Office on January 9, 2009, appellant specifically requested a modification of the May 15, 2006 wage-earning capacity determination. She alleged a material change in the nature and extent of the injury-related condition, which she contended warranted modification. Appellant submitted new medical evidence in support of her claim. Her letter constitutes a request for modification of the Office's May 15, 2006 wage-earning capacity determination, rather than a review of the decision under 5 U.S.C. § 8128(a). Therefore, the Office improperly characterized appellant's letter 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 May 15, 2006 wage-earning capacity determination based on a material change in the nature and extent of the injury-related condition.

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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 *W.W.*, 61 ECAB \_\_\_\_ (Docket No. 09-1934, issued February 24, 2010); *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004). In *W.W., Peoples and Taylor*, the Board determined that the claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification of the decision. In all cases, the Board set aside the Office's decision denying the claimant's reconsideration request as untimely and remanded the case for the Office to adjudicate the issue of modification of a LWEC determination.

On remand, the Office shall adjudicate her request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.<sup>6</sup>

**CONCLUSION**

The Board finds that appellant requested modification of the May 15, 2006 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 3, 2009 is set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 8, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>6</sup> See *Gary L. Moreland*, *supra* note 5. The Board notes that in its December 11, 2008 decision, the Office reduced appellant's compensation benefits to zero without evaluating whether a modification of the May 15, 2006 LWEC decision was warranted.