

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

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D.O., Appellant )

and )

DEPARTMENT OF THE ARMY, CORPS OF )  
ENGINEERS, RESERVOIR REGULATION & )  
WATER QUALITY SECTION, Portland, OR, )  
Employer )

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**Docket No. 11-1607  
Issued: April 23, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 28, 2011 appellant filed an appeal from a February 8, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was untimely filed and did not establish clear evidence of error. Because more than 180 days has elapsed between the issuance of the last merit decision on January 4, 2010 and the filing of this appeal on June 28, 2011, the Board lacks jurisdiction to review the merits of the case. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit issue in this case.<sup>2</sup>

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

<sup>2</sup> The Board further notes that it does not have jurisdiction over the issue of whether OWCP properly denied review of the written record as OWCP's decision denying such review was issued on March 21, 2010, more than 180 days prior to June 28, 2011, when appellant filed this appeal. Accordingly, the Board does not have jurisdiction to review this decision. 20 C.F.R. § 501.3(e).

## **ISSUE**

The issue is whether appellant's request for reconsideration of the merits was untimely filed and failed to present clear evidence of error.

On appeal, appellant contends that OWCP's August 21, 2006 loss of wage-earning capacity (LWEC) determination is erroneous because the position exceeded her restrictions as set by her physician and asked the Board to reverse OWCP's decision denying modification of this LWEC decision. She objected to the medical report upon which OWCP based its decision as she argued that it was grossly inconsistent. Appellant further alleged that denial of her request for review of the written record was improper.

## **FACTUAL HISTORY**

On July 26, 1991 appellant, then a 37-year-old hydrological technician, filed an occupational disease claim alleging that while working the keyboard with her right hand she suffered numbness and tingling sensation in her right hand and pain in her neck. OWCP initially accepted her claim for cervical strain and bilateral carpal tunnel syndrome. Subsequently, it accepted the claim for cervical spondylosis with myelopathy. OWCP paid medical and compensation benefits.

On July 17, 2006 OWCP proposed reducing appellant's compensation as it found that appellant was no longer totally disabled but rather partially disabled, and had the capacity to earn wages as an information clerk. By decision dated August 21, 2006, it finalized its proposed reduction of her compensation effective that date.

By letter dated July 29, 2007 and received by OWCP on February 25, 2008, appellant filed a request for hearing before OWCP's Branch of Hearings and Review. OWCP denied appellant's request for hearing, by decision of March 25, 2008, finding it was untimely filed and that it could equally be handled through the reconsideration process.

By oral request, appellant requested information on how to appeal or set aside her August 21, 2006 wage-earning capacity decision. OWCP forwarded that information to her on November 26, 2008. Appellant filed a letter with OWCP, received on December 22, 2008, which discusses her capacity to work.

On February 12, 2009 OWCP denied appellant's request to set aside the wage-earning capacity decision of August 21, 2006 as she had not established any of the criteria for modification. Following appellant's March 11, 2009 request for an oral hearing before an OWCP hearing representative, by decision dated September 22, 2009, the hearing representative remanded the case. The hearing representative found that although the selected position was within appellant's medical restrictions and vocational abilities and that there was no evidence that the original decision was erroneous, the case was remanded for further development on the issue of whether there had been a material worsening of appellant's accepted condition warranting a modification of the wage-earning capacity.

By decision dated January 4, 2010, OWCP again denied modification of the August 21, 2006 LWEC determination. Appellant requested review of the written record by request postmarked February 4, 2010. By decision dated March 1, 2010, OWCP denied her request as it was not filed within 30 days.

Appellant submitted additional medical reports by her treating physician, Dr. E.W. Long, a Board-certified physiatrist. In a February 1, 2010 report, Dr. Long opined that her cervical condition worsened from 1999 to 2003, from 2003 to 2006 and from 2006 to 2008. He opined that appellant did not have sitting tolerance to function full time on a reasonably regular basis as an information clerk. Dr. Long further noted that she had substantial bilateral sensorineural hearing loss that compromised her ability to function in a job where frequent communication with the public was a primary requirement. In an August 18, 2010 report, he noted that appellant's symptoms were persisting and that she was noticing neck pain along with aching in the right posterior shoulder and posterolateral arm. Dr. Long also noted cramping in her right arm and tingling in her right hand and foot.

By letter dated January 26, 2011, received by OWCP on February 10, 2011, appellant requested reconsideration "of my reduced benefits" stating that she was not able to work as an information clerk. She noted that she provided OWCP additional facts from her doctor and also documentation of her hearing loss which would make it problematic to perform duties of an information clerk. On February 10, 2011 appellant also submitted a January 26, 2011 form she completed requesting assistance from her congressional representative, wherein she indicated that she was disabled due to an employment-related injury and that she was "trying to reverse decision of reduced benefits" by OWCP as she was not able to return to work.

By decision dated February 8, 2011, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to establish 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. Compensation payments are based on the wage-earning capacity determination.<sup>3</sup>

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>4</sup> OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requested resumption of compensation for total wage loss. In this instance the claims examiner will need to evaluate the request according to the

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<sup>3</sup> S.C., Docket No. 10-2327 (issued August 5, 2011); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

customary criteria for modifying a formal loss of wage-earning capacity.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for cervical strain, bilateral carpal tunnel syndrome and cervical spondylosis with myelopathy. By decision dated August 21, 2006, it found that she had the capacity to earn wages as an information clerk and reduced appellant's compensation. On January 4, 2010 OWCP denied modification of the LWEC determination. On January 26, 2011 appellant requested reconsideration. However, as OWCP issued a formal decision on LWEC on August 21, 2006, Board precedent and OWCP's procedures direct the claims examiner to consider the criteria for modification when a claimant requests a resumption of compensation for total wage loss.<sup>7</sup> While appellant used the term reconsideration in her January 26, 2011 request, she implicitly asserted that the medical evidence established that her employment-related condition had worsened.<sup>8</sup> The Board notes that in support of her request, appellant submitted further medical evidence by Dr. Long wherein he opined that her medical condition had worsened and that she could not tolerate a position as information clerk.

In its February 8, 2011 decision, OWCP failed to address the wage-earning capacity issue. Rather, it adjudicated the timeliness of the request for reconsideration and noted that appellant had not established clear evidence of error. Under the circumstances of this case, however, the Board finds that the issue presented was whether the August 21, 2006 wage-earning capacity determination should be modified.<sup>9</sup> The case will be remanded for adjudication of the wage-earning capacity issue. Following such development as OWCP deems necessary, it shall issue an appropriate decision in the case.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>6</sup> *Sue A. Sedgwick*, *supra* note 4.

<sup>7</sup> *Katherine T. Kreger*, *supra* note 4; *Sharon C. Clement*, *supra* note 3.

<sup>8</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>9</sup> *S.C.*, *supra* note 3.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 8, 2011 is set aside. The case is remanded to OWCP for further development consistent with this decision.

Issued: April 23, 2012  
Washington, D.C.

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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