

FACTUAL HISTORY

On February 3, 2003 appellant, then a 41-year-old rural mail carrier, filed an occupational disease claim for a right shoulder condition, which she attributed to her rural carrier duties. OWCP accepted the claim for right shoulder strain and paid periods of compensation when limited duty within her restrictions was not available. It also accepted a March 1, 2008 recurrence of disability due to a right shoulder strain and impingement and a consequential left shoulder adhesive capsulitis. Compensation was paid for total disability until November 24, 2008, when appellant returned to a limited-duty position for four hours a day. OWCP thereafter paid wage-loss compensation for partial disability. From August 3, 2009 to February 20, 2010, appellant was on a detail assignment as an examiner. She returned to a limited-duty rural carrier position on March 8, 2010, working four hours a day. Appellant stopped work on December 8, 2010 as no work within her restrictions was available.

On December 30, 2010 the employing establishment offered appellant a modified assignment of limited-duty rural carrier, at the Independence employing establishment, which she accepted under protest. The position required her to case mail along with associated office duties of city aux route 1, with an average time spent of 1:15 and deliver walk out route 1, approximately four to five miles, with an average time spent of four hours. The physical requirements of the position included reaching up to the shoulder level and push/pull/lift up to 20 pounds. Appellant returned to work on January 8, 2011, but refused to perform the deliver portion of the position, asserting that the use of a utility cart exceeded her work restrictions. She filed Forms CA-7 claiming time lost from work from January 15, 2011 and continuing. Appellant noted on the CA-7 forms the intermittent hours she had worked and she also noted that work was unavailable for the remaining hours or that the work that was available was not within her medical restrictions.

In a March 8, 2011 letter, OWCP advised appellant that the position of limited-duty rural carrier position was suitable to her work capabilities and was available to her. It informed her that upon performance of the position in its entirety, she would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of her date-of-injury position. OWCP noted that appellant submitted documentation to support her contention that the physical requirements of the job offer exceeded her physician's restrictions; however, the employing establishment submitted sufficient documentation refuting her contentions that the push cart requirements were not within her permanent restrictions. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work and afforded 30 days to either accept and perform the position or provide an explanation for refusal.

By decision dated March 8, 2011, OWCP denied payment of additional wage-loss compensation from January 15 to 28, 2011 and ongoing. It accorded probative weight to the ergonomic assessment research findings provided by the employing establishment, which verified that while a utility cart weighed significantly more than a push cart, only eight to nine pounds of inertial force and five pounds of sustained force were required, which was within her restrictions. OWCP further found that appellant failed to establish that she was medically unable to work during the additional hours claimed due to her accepted work injury or failed to provide evidence that the duties exceeded her physical restrictions.

On March 14, 2011 appellant began performing the full duties of her limited-duty position, but continued to assert that such duties exceeded her work restrictions.

In a Form CA-7 dated April 18, 2011, appellant noted that an employing establishment representative from the National Reassessment Program (NRP) team inspected her work duties regarding the push cart. She related that she was told that she would be given a new cart and tools to help her deliver mail above her shoulder level. Appellant had not yet received these tools.

By decision dated May 19, 2011, OWCP found appellant's employment as a limited-duty rural carrier as of January 8, 2011 fairly and reasonably represented her wage-earning capacity. It also determined her compensation based on the wage-earning capacity determination.

On June 2, 2011 appellant requested a review of the written record of the May 19, 2011 decision. She alleged that the modified rural carrier position was temporary and that she had been told that the job offer would be reassessed pursuant to NRP process. Appellant also alleged that the position was not a reasonable accommodation and that it was not within her medical restrictions. In support of her request, she submitted a statement and several supporting documents.

By decision dated October 3, 2011, OWCP's hearing representative affirmed the May 19, 2011 wage-earning capacity decision. The hearing representative found that, while appellant contended that the position was temporary, the employing establishment stated that the position was part of the NRP process and was indefinite in duration. The hearing representative also stated the fact that the employing establishment was continuing to work with appellant on the issue of reasonable accommodation did not establish that the job was not suitable.

On March 5, 2012 appellant requested reconsideration of the March 8, 2011 decision, which had denied her compensation for intermittent periods of time during the period January 15 through 28, 2011 and ongoing. In her letter, she argued that her limited-duty position was not suitable and exceeded her work restrictions. Appellant stated that she was required to reach above her shoulder many times a day and that she was restricted to pushing, pulling and lifting no more than 20 pounds, but the push cart weighed 38 pounds. She further argued that the on-site test regarding the push cart force data, was not conducted on her route or on an incline or took into effect the counterforce needed on windy days. Appellant stated that some push force measurements were taken on her route on March 30, 2011, but did not include her entire route or measure the deliveries in various situations. She was told the employing establishment would provide her with a new cart and a reaching tool, along with training on how to properly use the cart. Appellant stated that she was not provided with any training and that the District Reasonable Accommodation Committee stated that they would supply her with a new cart and a reaching tool. She indicated that, while she received a new cart, it was the same style cart as the old one and it also broke. Appellant argued that she had no choice but to report for duty and perform the job in its entirety, even though it was outside her physical restrictions. She stated that the position is aggravating her hip condition, which was noted by her physician in September 2011. Appellant submitted unclear pictures allegedly of a full load of mail, both in and out of the cart, a publication from Liberty Mutual entitled Manual Materials Handling Guidelines, a copy of her Equal Employment Opportunity precomplaint form, an April 12, 2011

letter from the United States Postal Service District Reasonable Accommodation Committee, which determined that she was a person with a disability and approved her request for a new grabber and a new cart.

In a September 27, 2011 report, Dr. Christopher J. Rae, a Board-certified family practitioner, advised appellant's current job assignment aggravates a right hip condition. He requested that she be accommodated with a position that does not require repetitive bending at the waist.

By decision dated May 31, 2012, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted was either previously considered or not relevant.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings in a constructed position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ OWCP's procedure manual provides that after a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for greater disability. In this instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁴

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition or the employee has been retrained or otherwise vocationally rehabilitated.⁵

A request for reconsideration of a wage-earning capacity determination, if accompanied by new evidence is not a request for review under 5 U.S.C. § 8128(a), but is rather a request for modification of the wage-earning capacity determination and requires a merit review.⁶ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁷

³ *Katherine T. Kreger*, 55 ECAB 633, 635 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ See *D.M.*, 59 ECAB 164 (2007); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁶ See *C.S.*, Docket No. 12-1834 (issued December 4, 2012).

⁷ See *D.O.*, Docket No. 11-1607 (issued April 23, 2012); *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Gary L. Moreland*, 54 ECAB 638 (2003).

ANALYSIS

OWCP considered appellant's March 5, 2012 request for reconsideration as a request for reconsideration under 5 U.S.C. § 8128(a).

A request for modification of a wage-earning capacity determination must be distinguished from a request for reconsideration of a prior decision. It is a request for an increase in the disability rating. A request for modification of a wage-earning capacity determination, supported by new and relevant evidence, requires a merit review and is not subject to a time limitation.⁸

As appellant submitted new evidence in support of her argument that the modified limited-duty rural carrier position was not within her medical restrictions and she submitted a new medical report dated September 27, 2011 from Dr. Rae in support of her allegation of a worsening of her medical condition, OWCP should have treated her request for reconsideration as a request for modification of the wage-earning capacity determination and conducted a merit review.

CONCLUSION

The Board finds that OWCP improperly denied appellant's application for reconsideration without merit review of the claim.

⁸ See *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004); *Gary Moreland*, 54 ECAB 638 (2008).

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2012 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further development consistent with this decision.

Issued: July 1, 2013
Washington, DC

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