

FACTUAL HISTORY

On June 6, 2001 appellant, then a 35-year-old rural carrier, filed a traumatic injury claim alleging that on June 4, 2001 she sustained a fracture of her lower arm during the performance of her federal duties. OWCP accepted her claim for closed fracture of the upper end radius and ulna and right shoulder sprain. On November 10, 2005 appellant returned to work as a modified rural carrier for the employing establishment.

By decision dated March 16, 2006, OWCP issued a decision finding that appellant's position as a modified rural carrier represented her loss of wage-earning capacity (LWEC), and since the wages in this position met or exceeded her earnings, her compensation payments were reduced to zero. On December 3, 2010 appellant filed a claim for intermittent periods of compensation. She indicated that she was sent home on several dates as there was no work available. Appellant filed subsequent forms noting additional time loss from work.

By decision dated February 8, 2011, OWCP noted that the employing establishment made a determination that no work was available as part of the National Reassessment Process (NRP). It found that appellant did not submit evidence sufficient to warrant modification of the LWEC decision of March 16, 2006 and denied her claim for compensation starting November 29, 2010.

Appellant requested reconsideration on February 22, 2011. On March 3, 2011 OWCP denied modification of the February 8, 2011 decision.

On March 14, 2012 appellant again requested reconsideration. By decision dated June 12, 2012, OWCP denied her request as it found that it was untimely filed and failed to demonstrate 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.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴

Modification of a standing loss of wage-earning capacity 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

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing that they do not fairly and reasonably represent the employee's wage-earning capacity).

³ *K.R.*, *id.*; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

⁴ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

was erroneous.⁵ The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.⁶ There is no time limit for appellant to submit a request for modification of a loss of wage-earning capacity determination.⁷

ANALYSIS

In the instant case, on March 16, 2006 OWCP issued a decision finding that appellant had no loss of wage-earning capacity and reduced appellant's compensation benefits to zero. On February 8, 2011 it noted that, although the employing establishment indicated that no work was available under NRP, appellant had not submitted evidence sufficient to warrant modification of the LWEC determination. OWCP reviewed this decision on reconsideration, but denied modification on March 3, 2011. Appellant filed a request for reconsideration on March 14, 2012 and, by decision dated June 12, 2012, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that this case is not in posture for decision, as OWCP applied an improper standard of review. OWCP erred when it denied appellant's claim under the clear evidence of error standard. When, as in this case, appellant files a claim for compensation after a loss of wage-earning capacity decision has been issued and her hours have been reduced under NRP, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.⁸ On remand, OWCP shall further adjudicate appellant's request for modification of the loss of wage-earning capacity determination and issue an appropriate decision in the case, taking into consideration the provisions of FECA Bulletin No. 09-05.⁹

CONCLUSION

The Board finds that appellant is entitled to a merit review of the loss of wage-earning capacity determination. The case will be remanded to OWCP for all necessary development and issuance of a *de novo* decision on this issue.

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993).

⁶ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁷ *See D.O.*, Docket No. 11-1607 (issued April 23, 2012); *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmitt Taylor*, Docket No. 03-1780 (issued July 21, 2004); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁸ *D.T.*, Docket No. 12-217 (issued October 16, 2012).

⁹ FECA Bulletin No. 09-05 outlines procedures when limited-duty positions are withdrawn or hours reduced pursuant to NRP. If, as in the present case, a formal loss of wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate. FECA Bulletin No. 09-05 (issued August 18, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 12, 2012 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 24, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board