

FACTUAL HISTORY

This case has previously been before the Board. In an August 25, 1997 decision, the Board set aside decisions of OWCP dated February 15, April 14 and August 19, 1994.² The Board found the evidence of record sufficient to warrant further development as to whether appellant sustained a recurrence of disability beginning November 29, 1993 causally related to her accepted April 13, 1992 employment injury.³ On July 24, 2001 the Board found an unresolved conflict in the medical opinion evidence as to whether appellant sustained a recurrence of disability beginning November 29, 2003.⁴ The Board set aside OWCP's February 1, 1999 decision and remanded the case for further development. In a decision of July 16, 2009, the Board affirmed a January 17, 2008 overpayment decision.⁵ On June 10, 2010 the Board issued an order remanding the case and setting aside a June 30, 2009 nonmerit decision.⁶ The Board found that OWCP erred in denying further merit review of appellant's request for modification of a November 22, 2006 loss of wage-earning capacity decision. On November 9, 2011 the Board affirmed a November 29, 2010 decision denying modification of a loss of wage-earning capacity decision.⁷ The Board also reversed a September 10, 2009 OWCP decision terminating appellant's compensation benefits under 5 U.S.C. § 8106(c). The Board found that OWCP failed to meet its burden of proof to establish that appellant refused an offer of suitable work. The history of the case as provided in the Board's prior decisions is incorporated herein by reference.

On September 12, 2012 appellant's counsel requested modification of the November 22, 2006 loss of wage-earning capacity decision, contending that the original determination was in error. He argued that OWCP erred in relying upon the opinion of an impartial medical examiner as his opinion was speculative and failed to consider preexisting and nonwork-related impairments in determining her work capability. Appellant also submitted medical evidence that she contended showed a material change in her condition.

In a February 6, 2013 letter, counsel again requested modification of the November 22, 2006 loss of wage-earning capacity decision.

By decision dated May 3, 2013, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

² Docket No. 95-619 (issued August 25, 1997).

³ On April 24, 1992 appellant, then a 26-year-old respiratory therapist, filed a traumatic injury claim alleging that she injured her back while lifting a patient on April 13, 1992. OWCP accepted the claim for cervical and lumbosacral sprains and herniated disc at L3-4 and L4-5.

⁴ Docket No. 99-1516 (issued July 24, 2001).

⁵ Docket No. 08-1157 (issued June 16, 2009).

⁶ Docket No. 09-1977 (issued June 10, 2010).

⁷ Docket Nos. 11-514 & 11-654 (issued November 9, 2011).

LEGAL PRECEDENT

It is well established that either a claimant or OWCP 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.⁸ The burden of proof is on the party attempting to show a modification.⁹ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁰

ANALYSIS

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

OWCP erred in considering appellant's September 12, 2012 letter as a request for reconsideration of the November 22, 2006 loss of wage-earning capacity determination under 5 U.S.C. § 8128(a). It found the request untimely and that she did not submit evidence or legal argument to establish clear evidence of error. The Board notes that appellant sought modification of the November 22, 2006 loss of wage-earning capacity determination. Appellant submitted argument and medical evidence in support of her contention that OWCP erred in its November 22, 2006 wage-earning capacity determination and that her condition had worsened since the decision was issued. The Board finds that appellant's September 12, 2012 letter is a request for modification of OWCP's November 22, 2006 wage-earning capacity determination.¹¹ OWCP improperly characterized the November 12, 2012 letter as a request for reconsideration subject to the one-year time limitation set forth at 20 C.F.R. § 10.607(a). Appellant is entitled to a merit review on that issue.¹² On remand, OWCP shall adjudicate her request for modification of the loss of wage-earning capacity determination and issue an appropriate decision.

CONCLUSION

The Board finds that appellant requested modification of the November 22, 2006 loss of wage-earning capacity determination and is entitled to a merit review of that issue. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.

⁸ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁹ *Id.*

¹⁰ *Gary L. Moreland*, 54 ECAB 638 (2003). See also *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005), *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004) (in *Peoples* and *Taylor*, the Board determined that the claimants' requests for reconsideration of a loss of wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside OWCP's decisions denying appellant's reconsideration requests as untimely and failing to establish clear evidence of error and remanded the cases for OWCP to address the merits of their requests for modification of an LWEC decision).

¹¹ See *Gary L. Moreland, id.*

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2013 is set aside and the case remanded for further consideration consistent with the above decision of the Board.

Issued: October 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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