

FACTUAL HISTORY

OWCP accepted that on or before July 27, 1989 appellant, then a 25-year-old manual distribution clerk, sustained an aggravation of bilateral carpal tunnel syndrome due to repetitive upper extremity motion while casing mail. Beginning in 1996, she was followed by Dr. Mathias Masem, a Board-certified orthopedic surgeon, who performed a right median nerve decompression on September 27, 1996 and a left median nerve decompression on February 3, 1997. Appellant remained off work following surgery. On July 28, 1997 Dr. Masem provided permanent work restrictions against sorting, repetitive work, prohibited lifting more than five pounds, and limited grasping and fine manipulation.

Following a vocational rehabilitation effort, appellant returned to work in a part-time, modified position in July 1998. OWCP accepted that she sustained right elbow and ankle strains in a July 18, 1998 fall at work.

On April 23, 1999 appellant began work as a nixie/rewrap clerk, within Dr. Masem's restrictions. Her earnings were at a retained pay rate.² The position involved rewrapping damaged mail weighing no more than five pounds. The job description stated that the position did not require repetitive grasping or fine manipulation.

By decision dated August 20, 2001, OWCP reduced appellant's compensation based on the loss of wage-earning capacity (LWEC) demonstrated by her actual earnings in the position of nixie/rewrap clerk. On July 26, 2007 appellant accepted a full-time position as a modified mail processing clerk, which required lifting and carrying up to 10 pounds. The job encompassed her previous duties. The employing establishment renewed the position on June 9, 2008. On August 13, 2009 Dr. Alisha Wren, an attending physician Board-certified in emergency medicine, found appellant permanently disabled for work due to carpal tunnel syndrome.

Effective November 21, 2009, appellant's modified position was exceeded by the National Reassessment Process (NRP).

In a February 4, 2010 letter, appellant requested modification of the August 20, 2001 wage-earning capacity determination. She asserted that the nixie/rewrap clerk job was not a bona fide position, but nonbid, makeshift, and sheltered work for injured employees.

By decision dated February 17, 2010, OWCP affirmed its August 20, 2001 LWEC determination, rejecting appellant's argument that the original determination was in error as a nixie/rewrap clerk was a makeshift assignment. It found that there was no evidence that the initial determination was in error, that she was vocationally rehabilitated or that the accepted condition had worsened such that she could no longer perform the job.

In an April 23, 2010 letter, appellant again requested modification of the August 20, 2011 wage-earning capacity determination. She provided employing establishment job classification listings that did not include "[n]ixie/[r]ewrap [c]lerk" among the positions available for open

² By decision dated June 25, 1999, OWCP issued appellant a schedule award for a 20 percent permanent impairment of each upper extremity.

bidding. Appellant submitted reports from her physician finding her permanently disabled for work.

By decision dated July 7, 2010, OWCP denied modification of the August 20, 2001 wage-earning capacity decision, finding that the additional evidence submitted did not establish that the nixie/rewrap clerk position was makeshift or sheltered work. It further found that appellant did not establish a worsening of the accepted conditions or that she had been vocationally rehabilitated. OWCP noted that she would still be working had her job not been eliminated under NRP. It therefore found that the medical evidence asserting disability was not relevant to the claim.

In an August 21, 2010 letter, appellant requested modification of the August 20, 2001 wage-earning capacity determination. She asserted that the original determination was in error and OWCP did not adhere to its procedures in verifying that the nixie/rewrap clerk position was a bona fide job.³ By decision dated November 29, 2010, OWCP denied modification on the grounds that appellant had not established that the original determination was in error, that the accepted condition had materially worsened or that she had been vocationally rehabilitated.

In a March 3, 2011 letter, appellant again requested modification of the August 20, 2011 wage-earning capacity decision. She asserted that her job was eliminated on November 21, 2009 as NRP determined that it was not operationally necessary. Appellant provided a January 20, 2011 letter from an employing establishment supervisor, stating that appellant's job duties beginning in 1998 "were odd[-]lot duties that belong(ed) to other job classifications and other bid assignments, but were specifically provided to [appellant] for her personal needs based on her medical restrictions. These odd[-]lot duties do not constitute a job that is available in the Postal Service or 'regular employment.' But rather comprised a makeshift job." The supervisor recommended that the nixie/rewrap clerk job not be used to determine appellant's wage-earning capacity as it was "noncompetitive, odd[-]lot duties and deemed no longer necessary by the [employing establishment]." In an April 19, 2011 letter, a second employing establishment supervisor noted that, from 2000 to 2009, appellant's primary duty was counting mail, work "given to light or limited[-]duty employees if those employees have nothing to do." The supervisor explained that "[t]his work was given to [appellant] because of her work injury and allow her to remain working for the [employing establishment.]"

In a June 2, 2011 decision, OWCP denied modification of the August 20, 2001 wage-earning capacity determination, finding that the supervisory statements were insufficient to establish that nixie/rewrap clerk was not a legitimate job. It further found that appellant had not established that the accepted condition had materially worsened or that she had been vocationally rehabilitated.

In a June 1, 2012 letter, appellant requested modification of the August 20, 2001 wage-earning capacity determination. She enclosed a May 25, 2012 letter from her supervisor in 1999 to 2000. The supervisor stated that appellant was "assigned to nixie clerk operation" due to her

³ By decision dated November 3, 2010, OWCP denied appellant's claim for an increased schedule award on the grounds that clinical findings and electrodiagnostic tests did not demonstrate a worsening of the accepted bilateral carpal tunnel syndrome.

“physical limitation.” He emphasized that the “assignment was given to [appellant] to meet her physical limitation. The assignment was not a bid assignment nor of operation necessity and was provide[d] only to accommodate her work restrictions.”

By decision dated August 31, 2012, OWCP denied modification of the August 20, 2001 wage-earning capacity determination, finding that the additional supervisory statement was insufficient to establish that the initial determination was in error. It found that appellant had not established that the nixie/rewrap clerk position was not a bona fide position.

In an August 27, 2013 letter received by OWCP on September 13, 2013, appellant again requested modification of the August 20, 2001 wage-earning capacity determination. She asserted that Dr. David Wren, Jr., an attending orthopedic surgeon, opined that her accepted bilateral carpal tunnel syndrome had worsened. Appellant submitted reports from Dr. Wren dated from December 20, 2012 to October 23, 2013, noting increasing stiffness and pain in the cervical spine and both hands. Dr. Wren requested authorization for additional imaging studies.

By decision dated November 29, 2013, OWCP denied appellant’s September 13, 2013 request for LWEC modification as an untimely request for reconsideration that did not present clear evidence of error.

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.⁴ The burden of proof is on the party attempting to show modification.⁵ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁶

ANALYSIS

OWCP issued a formal decision on appellant’s wage-earning capacity on August 20, 2001. Board precedent and OWCP procedures direct the claims examiner to consider the criteria for modification of an LWEC determination when a claimant requests resumption of compensation for total wage loss.⁷

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

⁵ *Darletha Coleman*, 55 ECAB 143 (2003).

⁶ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁷ *Katherine T. Kreger*, *supra* note 4; *Sharon C. Clement*, *supra* note 4; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.5(a) (June 2013) (if a claim for wage loss is received, OWCP should review the file to determine whether a formal LWEC is in place, and, if so, the claim should be developed, if necessary, as a request for modification of the LWEC).

OWCP considered appellant's August 27, 2013 letter as a request for reconsideration of the prior wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was untimely and did not present clear evidence of error.

While appellant used the term "reconsideration" in her August 27, 2013 request, she argued that the August 20, 2001 LWEC determination was in error. She submitted additional medical evidence, which she asserted showed a material worsening of the accepted condition. A material change in the nature and extent of the accepted condition is one of the grounds on which a claimant may seek modification of a wage-earning capacity determination.⁸ This request for modification is not a request for a review of OWCP's August 31, 2012 decision under 5 U.S.C. § 8128(a). The Board finds that OWCP should have adjudicated the issue of modification of the LWEC determination.⁹ OWCP improperly adjudicated her August 27, 2013 letter as a request for reconsideration.¹⁰

As appellant has requested modification of the August 20, 2001 wage-earning capacity determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) do not apply. The case will be remanded to OWCP to adjudicate her request for modification of the wage-earning capacity determination, to be followed by a *de novo* decision to preserve appellant's appeal rights. This decision shall be based on the three customary criteria for modifying a wage-earning capacity determination: a material change in the accepted condition; whether appellant has been vocationally rehabilitated; and, whether the initial wage-earning capacity was in error.

On appeal, appellant asserts that the nixie/rewrap clerk position on which OWCP based the August 20, 2001 wage-earning capacity determination was makeshift and formulated to fit her restrictions. She contends that the job would not exist but for her injury. As stated above, the case will be remanded to OWCP for further development.

CONCLUSION

The Board finds that OWCP improperly denied appellant's requested modification of the August 20, 2001 wage-earning capacity determination.

⁸ 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. *Stanley B. Plotkin*, 51 ECAB 700 (2000); *see also* Federal (FECA) Procedure Manual, *id.* at Chapter 2.1501.2(b) (June 2013).

⁹ *G.E.*, Docket No. 13-649 (issued October 21, 2013); *F.B.*, Docket No. 10-99 (issued July 21, 2010).

¹⁰ *F.B.*, *id.* *See M.J.*, Docket No. 08-2280 (issued July 7, 2009). *See also Gary L. Moreland*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision and order of the Board.

Issued: December 9, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board