

FACTUAL HISTORY

On June 1, 1992 appellant, then a 39-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on May 27, 1992 she sustained back and leg injuries when she was struck by a cart while in the performance of duty. OWCP accepted a low back strain and a herniated L4-5 disc. By decision dated April 25, 1996, it determined that actual earnings in a part-time mail handler position effective January 20, 1996 represented appellant's wage-earning capacity. Appellant's compensation was reduced to reflect her wage-earning capacity.

In a decision dated July 9, 1996, OWCP denied appellant's claim for a recurrence of disability commencing March 31, 1996. By decision dated December 31, 1998, it denied her claim for a recurrence of disability commencing May 16, 1998. In a decision dated May 19, 1999, OWCP denied modification of the December 31, 1998 decision. By decision dated February 25, 2000, it denied merit review of the claim. The record also contains an August 26, 2008 decision denying a claim for a hearing.

According to the evidence of record, appellant continued to receive compensation based on a loss of wage-earning capacity through January 29, 2009. She then began to receive compensation on the periodic rolls for total disability.

By letter dated September 13, 2011, appellant indicated that she was confused as to how her wage-earning capacity had been calculated. She stated that her condition had worsened since 1997 and she continued to have problems in the back, legs, neck, shoulders and arms. Appellant asked for assistance in retracing her work history, comparing it with the physician's notes and being reimbursed for time she did not receive proper compensation. By letter dated April 19, 2012, OWCP advised her that the April 25, 1996 wage-earning capacity determination explained the reduction in compensation.

In a letter to OWCP dated June 18, 2012, appellant again discussed her claim and stated that from 2000 to 2007 her case was "in limbo" with OWCP. She stated that she did not understand how her compensation was computed. Appellant discussed the medical evidence with respect to disability for work. In a CA-110 (memorandum of telephone call) dated October 19, 2012, OWCP indicated that she was trying to appeal the April 25, 1996 decision. By letter dated February 18, 2013, appellant again discussed her claim and stated that she had not been properly compensated from 2000 to 2007. A CA-110 from an April 9, 2013 telephone call stated that appellant was "appealing the loss of wage-earning capacity decision."

By letter dated April 17, 2013, appellant stated, "I am appealing the decision from 1996."

In a decision dated June 18, 2013, OWCP found that appellant had submitted an untimely application for reconsideration of either the April 25 or July 9, 1996 OWCP decisions. It found that her statement failed to indicate which decision she was appealing and failed to show how OWCP's decisions were incorrect.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination. A request for modification of the loss of wage-earning capacity is not a request for a review under 5 U.S.C. § 8128(a), even if the term reconsideration may be used.³ There is no time limitation to request a modification of a wage-earning capacity determination.⁴

ANALYSIS

In the present case, appellant submitted a letter dated April 17, 2013 stating that she was appealing a 1996 decision. Although the June 18, 2013 OWCP decision refers to a failure to indicate which 1996 decision, it is evident from the record that she was referring to the April 25, 1996 wage-earning capacity decision. The record contains correspondence from appellant as well as telephone memorandum that specifically indicated that OWCP was aware that she intended to pursue the wage-earning capacity issue.

Since the April 25, 1996 decision was a wage-earning capacity determination, the issue is whether appellant was requesting modification of the determination. As noted above, a request for a modification of a wage-earning capacity determination is not subject to a one-year time limitation. In reviewing appellant's correspondence since September 13, 2011, the Board finds that she was requesting modification of the April 25, 1996 wage-earning capacity determination.⁵ In letters dated September 13, 2011, June 18, 2012, and February 18, 2013, appellant discussed the medical evidence prior to 2009 and referred to the medical evidence and periods of total disability. This represents new argument on the issue of modification that requires OWCP to issue a proper decision on the merits of the modification issue.⁶

The Board finds the evidence of record establishes that appellant had requested modification of an April 25, 1996 OWCP wage-earning capacity determination. OWCP improperly characterized her request for modification as an untimely application for reconsideration. The case will be remanded for a proper merit decision on the modification issue.

³ *M.M.*, Docket No. 13-1832 (issued January 10, 2014); *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004).

⁴ *Id.*

⁵ The wage-earning capacity decision was modified in January 2009, but appellant may seek modification prior to that date.

⁶ If a claimant simply reiterates prior arguments considered in a previous merit decision on modification of a wage-earning capacity determination, then OWCP may properly determine that an untimely application for reconsideration has been submitted. *See E.T.*, Docket No. 13-1299 (issued October 29, 2013).

CONCLUSION

The Board finds that appellant has requested modification of the April 25, 1996 decision prior to January 2009, and the case is remanded for an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 2, 2014
Washington, DC

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

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

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