

**United States Department of Labor
Employees' Compensation Appeals Board**

Y.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 14-1605
Issued: November 21, 2014**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 15, 2014 appellant, through her attorney, filed a timely appeal of the April 14, 2014 decision of the Office of Workers' Compensation Programs (OWCP) which denied her request for reconsideration without conducting a merit review. Because more than 180 days has elapsed since the most recent merit decision dated January 24, 2013 to the filing of this appeal on July 15, 2014, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In a January 24, 2013 decision, the Board affirmed an OWCP decision which denied modification of an August 15, 2011 wage-earning capacity determination.² The Board found that appellant has not established a basis to modify its finding that the selected accounting clerk position reflected her wage-earning capacity effective August 28, 2011. In a March 10, 2009 decision, the Board affirmed an April 14, 2006 OWCP decision denying appellant's claim for a schedule award.³ The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.⁴

Appellant was treated by Dr. Scott M. Fried, an osteopath, from February 14 to October 29, 2013. Dr. Fried diagnosed cervical strain/sprain with radiculopathy on the right, disc bulges at C5-6 and C6-7, radial and medial neuropathy on the right, brachial plexopathy/cervical radiculopathy on the right, thoracic neuritis, scapular winging, right rotator cuff strain and capsulitis of the shoulder. He noted that appellant could not return to regular work. An April 12, 2013 functional capacity evaluation, ordered by Dr. Fried, noted that she did not meet the full physical demands for sedentary work, including the accounting clerk position, or medium work as a letter carrier. Appellant was noted to be symptomatic throughout the evaluation and totally disabled. A May 15, 2013 report from Dr. Ghassen Kalani, a Board-certified physiatrist, treated appellant for neck and right shoulder pain which developed after a work accident on April 30, 2001. Dr. Kalani diagnosed chronic injuries secondary to her job activities involving the cervical spine and right shoulder with evidence of a full thickness tear of the supraspinatus tendon, degenerative disc bulge at multiple levels at the cervical spine, right C6 radiculopathy, anxiety disorder and bilateral C5-6 and C6-7 radiculopathy and bilateral brachial plexopathy.

Appellant was also treated by Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, from March 19 to July 23, 2013. Dr. Valentino noted positive findings on examination and diagnosed facet mediated pain, cervical degenerative disc disease, cervical radiculitis, and spinal stenosis. In a March 21, 2013 report, he reviewed his June 13, 2001 report which documented appellant's complaints of right shoulder pain. Dr. Valentino opined that the right shoulder injury and rotator cuff tear was work related.

OWCP referred appellant's case record to an OWCP medical adviser for a determination as to whether the accepted conditions should be accepted for a right shoulder rotator cuff tear. In a September 22, 2013 report, Dr. Arnold T. Berman, a medical adviser, opined that there was no medical evidence that supported a causal relationship of the right rotator cuff tear to the injury that occurred 11 years prior.

² Docket No. 12-1407 (issued January 24, 2013); *Order Denying Petition for Reconsideration* (issued August 13, 2013).

³ Docket No. 08-1545 (issued March 10, 2009).

⁴ Appellant, a letter carrier, alleged that on April 30, 2001 she experienced neck, shoulder and arm pain. OWCP accepted her claim for aggravation of degenerative disc disease of the cervical spine. Appellant stopped work on July 18, 2001, returned on September 26, 2002 and worked intermittently thereafter.

On September 25, 2013 appellant's attorney requested reconsideration.

In a December 20, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

On January 8, 2014 appellant, through her attorney, requested reconsideration. She asserted that the wage-earning capacity determination was erroneous as it was based solely on the accepted condition of aggravation of cervical disc disease when she sustained a right shoulder injury causally related to the April 30, 2001 work injury. Appellant asserted that because OWCP did not consider the right shoulder injury in the wage-earning capacity decision, the determination was not based on an accurate medical history. She referenced a November 8, 2012 magnetic resonance imaging (MRI) scan which revealed a right rotator cuff tear. Appellant noted that Dr. Valentino's reports dated June 13 and November 26, 2001 and March 20, 2013, referenced a right shoulder condition and opined that it was causally related to the work injury.

Appellant submitted the November 8, 2012 MRI scan of the right shoulder which revealed a full thickness supraspinatus tendon tear. In a July 18, 2013 report, Dr. Fried reviewed a June 10, 2013 functional capacity evaluation and advised that appellant could not perform very heavy work, heavy work, medium work, light work or sedentary work. He noted increased symptoms with actual work simulation activities and lifting and carrying consistent with the underlying injuries. Appellant was able to write for .75 minutes before exacerbating symptomology and keying was tolerated for .2 minutes. Dr. Fried recommended vocational rehabilitation and noted that he did not foresee appellant returning to her prior activity level. An April 11, 2012 ultrasound report of the brachial plexus revealed perineural scarring of the nerve and substantial swelling of the plexus. In reports dated April 11, 2012 to February 10, 2014, Dr. Fried noted that appellant was markedly symptomatic in her neck and right arm. He diagnosed cervical strain/sprain with radiculopathy on the right, disc bulges at C5-6 and C6-7, radial and medial neuropathy on the right, brachial plexopathy/cervical radiculopathy on the right, thoracic neuritis, scapular winging, right rotator cuff strain and capsulitis of the shoulder. Appellant also submitted physical therapy reports as well as medical evidence that was previously of record.

In an April 14, 2014 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity 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.⁵

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

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

ANALYSIS

OWCP considered appellant's January 8, 2014 correspondence as a request for reconsideration under 5 U.S.C. § 8128(a). It denied her reconsideration request on the grounds that the evidence was cumulative and insufficient to warrant review of its prior decision.

In the January 8, 2014 correspondence, appellant's attorney used the term reconsideration; however, the letter sought review of the August 25, 2011 wage-earning capacity determination which counsel contended was made in error as it was based solely on the accepted condition of aggravation of cervical disc disease. He contended she sustained a right shoulder injury causally related to the April 30, 2001 work injury. Because OWCP did not consider the right shoulder injury in the wage-earning capacity decision, the determination was not based on an accurate medical history. The January 8, 2014 letter is a request for modification of OWCP's August 25, 2011 wage-earning capacity determination. This request for modification is not a request for a review of the August 25, 2011 decision under 5 U.S.C. § 8128(a). OWCP adjudicated appellant's January 8, 2014 letter as a request for reconsideration under 5 U.S.C. § 8128(a) rather than as seeking modification of the wage-earning capacity determination.

Appellant has requested modification of the August 25, 2011 wage-earning capacity determination. She is entitled to a merit review on that issue. On remand, OWCP shall adjudicate appellant's request for modification of the wage-earning capacity determination and issue an appropriate merit decision.⁸

CONCLUSION

The Board finds that appellant requested modification of the August 25, 2011 wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.⁹

⁶ *Darletha Coleman*, 55 ECAB 143 (2003).

⁷ *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 claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification requiring a merit review. In both cases, the Board set aside OWCP's decision denying appellant's reconsideration request as untimely and remanded for OWCP to address the merits of his request for modification of a loss of wage-earning capacity decision).

⁸ *See Gary L. Moreland*, *supra* note 7.

⁹ With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: November 21, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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