



## **FACTUAL HISTORY**

This case has previously been before the Board. In the prior appeal,<sup>2</sup> the Board found that OWCP had correctly determined appellant's percentage loss of wage-earning capacity by comparing the post injury wages she was capable of earning in the selected position of administrative secretary to the pay rate at that time for the position she held on March 15, 2004, the date of injury. The Board found, however, that OWCP had improperly applied the pay rate. As there was no evidence, however, that appellant ever resumed regular full-time employment following her May 16, 2004 right shoulder surgery, the Board found that OWCP should have applied her pay rate when disability began (March 16, 2004) rather than the pay rate when disability recurred (May 18, 2009). The Board set aside OWCP's December 5, 2012 decision and remanded the case for a proper calculation of appellant's compensation for partial disability. The facts of this case as set forth in the Board's prior decision are incorporated herein by reference.<sup>3</sup>

In a decision dated August 6, 2013, OWCP determined appellant's loss of wage-earning capacity in accordance with the Board's recent decision.

On January 12, 2015 OWCP received a reconsideration request from appellant, through her representative. Appellant noted that she had earlier raised the issue of her right carpal tunnel syndrome, but a hearing representative ruled this information immaterial because the condition was diagnosed after the accepted condition in the present case.<sup>4</sup> She argued on reconsideration that OWCP had accepted right carpal tunnel syndrome and neck sprain under another file, OWCP File No. xxxxxx214. Further, the date of injury for that claim was March 6, 2003, which was prior to the date of injury in the present claim. It was therefore appellant's contention that OWCP had failed to consider her preexisting conditions when it determined her loss of wage-earning capacity.

By decision dated February 19, 2015, OWCP found that appellant's reconsideration request was untimely and failed to present clear evidence of error.

On appeal, appellant's representative contends that the employing establishment failed to consider the degree of physical impairment from both injury-related and preexisting conditions in determining appellant's loss of wage-earning capacity.

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<sup>2</sup> Docket No. 13-0770 (issued July 9, 2013).

<sup>3</sup> OWCP accepted that appellant, a clerk had sustained an occupational disease or illness in the performance of duty while keying and reaching for parcels. It accepted her claim for right shoulder impingement syndrome, for which she underwent surgery on March 16, 2004 and again on July 13, 2009. OWCP accepted a right shoulder ganglion cyst. Effective January 15, 2012, it reduced appellant's wage-loss compensation based on her capacity to earn wages in the selected position of administrative secretary.

<sup>4</sup> In an August 9, 2012 decision, an OWCP hearing representative noted that a second-opinion physician found no existing conditions. Although appellant's representative argued that OWCP did not consider carpal tunnel syndrome in determining loss of wage-earning capacity, the hearing representative found that this condition was not diagnosed until 2007 and did not prohibit appellant from working in the selected position. There was no medical documentation that she was restricted in the use of her hands such that her ability to perform the administrative secretary's sedentary requirements would be questionable.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>5</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>6</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>7</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>8</sup>

## ANALYSIS

There are circumstances where a claimant may submit new evidence or argument with respect to modification of a wage-earning capacity determination, and receive a merit review by OWCP. In such a case, the application for reconsideration is properly considered a request for modification of the wage-earning capacity and is not subject to the one-year time limitation.<sup>9</sup> However, if appellant simply reiterates a previous argument and does not present any new

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

<sup>8</sup> *Id.*, at Chapter 2.1602.5.b.

<sup>9</sup> See *C.S.*, Docket No. 12-1834 (issued December 4, 2012); *L.C.*, Docket No. 10-827 (issued March 4, 2011). As the Board noted, a modification of a wage-earning capacity determination may be based on a material change in the nature and extent of the injury-related condition, evidence that the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.

evidence or argument that would require reopening the case for merit review, the application for reconsideration is considered untimely and subject to the clear evidence of error standard.<sup>10</sup>

Appellant did not submit new evidence in support of her request for reconsideration, nor did she submit new argument. Rather, she merely reiterated an argument previously made. Therefore, the question of timeliness arises.

OWCP received appellant's reconsideration request on January 12, 2015. As this was more than one calendar year after the most recent merit decision in her case, namely, OWCP's August 6, 2013 decision, the Board finds that her request was untimely. Therefore, the question for determination is whether this untimely request demonstrated clear evidence of error in OWCP's loss of wage-earning capacity determination.

In her request for reconsideration, appellant argued that her carpal tunnel syndrome preexisted her accepted right shoulder condition. However, her request did not document that this was the case. Furthermore, the request did not, on its face, establish preexisting carpal tunnel syndrome as a matter of fact.

The mere fact that a medical condition preexisted appellant's accepted shoulder condition is not sufficient to establish that the selected position was medically unsuitable. The question is whether the preexisting condition caused incapacity to perform the duties of the selected position.<sup>11</sup> As the hearing representative found in his August 9, 2012 decision, the record established that appellant's carpal tunnel syndrome did not prohibit her from working as an administrative secretary. He noted no medical documentation of record that she was restricted in the use of her hands, prior to the loss of wage-earning determination, such that her ability to perform the administrative secretary's sedentary requirements would be questionable.

The Board finds that appellant's untimely reconsideration request failed to demonstrate clear evidence of error in OWCP's loss of wage-earning capacity determination. Appellant is, therefore, not entitled to a merit review of her case. Accordingly, the Board affirms OWCP's February 19, 2015 decision.

### **CONCLUSION**

The Board finds that appellant is not entitled to a merit review of her case. Appellant's untimely reconsideration request did not demonstrate clear evidence of error in OWCP's August 6, 2013 merit decision.

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<sup>10</sup> *E.T.*, Docket No. 13-1299 (October 29, 2013). In a similar case wherein appellant had untimely requested reconsideration of a loss of wage-earning capacity determination, the Board determined that to establish clear evidence of error she must submit evidence relevant to the issue that was decided by OWCP. *A.S.*, Docket No. 09-553 (August 21, 2009).

<sup>11</sup> See *Edward Holland, Jr.*, Docket No. 06-96 (issued June 6, 2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board