

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Spokane, WA, Employer**

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**Docket No. 15-4
Issued: February 5, 2015**

Appearances:
Stephen Larkin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 1, 2014 appellant, through her representative, filed a timely appeal from the May 1, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

FACTUAL HISTORY

On July 9, 1998 appellant, then a 42-year-old distribution clerk, sustained a left hand crush injury, left wrist abrasion, right hand laceration, and right hand abrasion when her hands were caught in a conveyor belt while clearing a mail jam. OWCP also accepted that she

¹ 5 U.S.C. §§ 8101-8193.

sustained an anxiety reaction, major depression, and post-traumatic stress syndrome due to the July 9, 1998 injury. Appellant stopped work on July 9, 1998 and returned to limited-duty work on July 20, 1998; she stopped work again on July 21, 1998.² She later claimed that she sustained a left shoulder condition and a neurological condition of the left upper extremity due to her July 9, 1998 employment injury. By decision dated February 4, 2002, OWCP denied appellant's claim due to her failure to submit sufficient medical evidence in support thereof. In a March 7, 2003 decision,³ the Board affirmed its February 4, 2002 decision.

On December 23, 2003 appellant returned to full-time work in the position of general clerk for the employing establishment. The position involved responding to customer telephone calls, engaging in general filing, gathering mail trays, and performing other clerical or administrative duties.

In a March 4, 2004 decision, OWCP reduced appellant's compensation effective December 28, 2003 based on its determination that her wage-earning capacity was represented by her actual wages as general clerk. It noted that she had recently been employed as a general clerk with wages of \$35,374.00 per year. Since appellant had demonstrated the ability to perform the duties of a general clerk for 60 days or more, the position was considered suitable to her partially disabled condition.⁴

By decision dated April 20, 2004, OWCP rescinded its March 4, 2004 wage-loss determination due to the fact that it used an incorrect pay rate in making this determination. It noted that it had improperly based the pay rate on wages of \$35,374.00 per year.

In an August 18, 2004 decision, OWCP reduced appellant's compensation to zero effective that date based on its determination that her wage-earning capacity was represented by her actual wages as general clerk. It noted that her actual earnings exceeded the current wages of the job she held when injured.⁵ Since appellant had demonstrated the ability to perform the duties of a general clerk for 60 days or more, the position was considered suitable to her partially disabled condition and it fairly and reasonably represented her wage-earning capacity. The decision did not affect coverage of her medical benefits.

In a September 8, 2010 Form CA-2, appellant claimed that she sustained a recurrence of disability due to her July 9, 1998 work injury. OWCP developed this claim as a request for modification of its August 18, 2004 wage-earning capacity determination. In a November 17, 2010 decision, it found that appellant had not met her burden of proof to modify its August 18, 2004 wage-earning capacity determination because she had not shown that there was a material change in the nature and extent of her injury-related condition, that she has been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous.

² Appellant began to receive compensation on the periodic rolls in June 2002.

³ Docket No. 02-874 (issued March 7, 2003).

⁴ OWCP indicated that appellant's new compensation payment would be \$79.00 every four weeks.

⁵ OWCP stated that appellant had wages of \$716.15 per week.

In a July 25, 2013 letter, postmarked August 30, 2013 and received by OWCP's Branch of Hearings and Review on September 6, 2013, appellant indicated that she was requesting modification of OWCP's August 18, 2004 wage-earning capacity determination. She argued that her request for modification was justified because OWCP's original wage-earning capacity determination was improperly based on an odd-lot or makeshift job. Appellant cited Board precedent and argued that the general clerk position she returned to in December 2003 was not a *bona fide* position. She asserted that the position was designed for her particular medical needs and was not a regular position of a type readily available to other postal workers.⁶ Appellant also submitted an undated priority for assignment worksheet and medical evidence dated between May and August 2013.

In a May 1, 2014 decision, OWCP denied appellant's claim by interpreting her July 25, 2013 letter as a request for a hearing under section 8124(b)(1) of FECA.⁷ It determined that her request was untimely because it was not filed within 30 days of its August 18, 2004 wage-earning capacity determination and therefore she was not entitled to a hearing as a matter of right. OWCP further considered appellant's request in its discretion and noted that her claim could be equally well addressed by requesting reconsideration and submitting evidence supporting modification of its August 18, 2004 wage-earning modification determination.

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.⁸ The burden of proof is on the party attempting to show modification.⁹ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁰

ANALYSIS

OWCP considered appellant's July 25, 2013 letter to be a request for a hearing under 5 U.S.C. § 8124(b)(1) in connection with its prior wage-earning capacity determination dated August 18, 2004. It determined that her request was untimely and therefore she was not entitled to a hearing as a matter of right.¹¹ In her July 25, 2013 letter, appellant clearly indicated that she

⁶ Appellant did not specifically indicate in the letter that she wished to have a hearing in connection with OWCP's August 18, 2004 wage-earning capacity determination.

⁷ See 5 U.S.C. § 8124(b)(1).

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁹ *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁰ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

¹¹ OWCP further considered appellant's request in its discretion and noted that her claim could equally well be addressed by requesting reconsideration and submitting evidence supporting modification of its August 18, 2004 wage-earning modification determination.

was requesting modification of OWCP's August 18, 2004 wage-earning capacity determination. She asserted in her letter that OWCP erred in its August 18, 2004 wage-earning capacity determination because the general clerk position she returned to in December 2003 could not provide a valid basis for rating her wage-earning capacity. Appellant argued that the general clerk position was not a *bona fide* position, but rather was an odd-lot or makeshift position designed for her specific needs.¹²

The Board finds that appellant's July 25, 2013 letter is sufficient to request modification of OWCP's August 18, 2004 wage-earning capacity determination. Appellant's July 25, 2013 letter was not a request for a hearing under section 8128(b)(1) of FECA and OWCP improperly failed to acknowledge the letter as a request for modification of its prior wage-earning capacity determination.¹³

As appellant has requested modification of OWCP's August 18, 2014 wage-earning capacity determination, the specific requirements of OWCP's regulations for requesting a hearing or reconsideration do not apply in this case and she is entitled to a merit review on the wage-earning capacity issue.¹⁴ The case will be remanded to OWCP in order to adjudicate appellant's request for modification of its August 18, 2004 wage-earning capacity determination and to issue an appropriate decision in this case.

CONCLUSION

The Board finds that OWCP improperly treated appellant's request for modification of OWCP's August 18, 2004 wage-earning capacity determination as a request for a hearing. Appellant is therefore 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.

¹² Appellant also submitted an undated priority for assignment worksheet and medical evidence dated between May and August 2013.

¹³ *D.E.*, Docket No. 12-8 (issued June 7, 2012); *F.B.*, Docket No. 10-99 (issued June 21, 2010); *M.J.*, Docket No. 08-2280 (issued July 7, 2009).

¹⁴ See 20 C.F.R. §§ 10.606, 10.616; *D.E.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: February 5, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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