



## **FACTUAL HISTORY**

This case has previously been before the Board. In an August 23, 2011 decision, the Board found that OWCP did not sufficiently explain its calculation of appellant's pay rate for compensation purposes that was used to determine her wage-earning capacity.<sup>2</sup> The law and the facts of the previous Board decision are incorporated herein by reference.

Subsequent to the Board's August 23, 2011 decision, following an OWCP request, the employing establishment forwarded information regarding appellant's pay rate, advising that at the time her claim was processed, to determine the hourly rate for part-time flexible employees, the appropriate annual rate was divided by 2,000 hours. In a December 29, 2011 decision, OWCP modified appellant's wage-earning capacity to reflect that her pay rate for computation purposes was based on actual earnings, with an 85 percent wage-earning capacity. It found that it was proper to use the 2,000-hour method in calculating her pay rate for compensation purposes,<sup>3</sup> applied the *Shadrick* formula, and modified appellant's compensation accordingly.<sup>4</sup>

Appellant requested reconsideration on March 19, 2012. She continued to assert that she was compensated based on an incorrect pay rate because OWCP did not properly calculate the number of hours she worked each week.<sup>5</sup> By decision dated July 8, 2013, OWCP denied the request on the grounds that it was untimely and failed to demonstrate clear evidence of error.

On October 29, 2013 appellant again requested reconsideration, asserting that she worked more than 40 hours per week and therefore, her pay rate for compensation purposes was incorrect. She attached pay stubs for selected pay periods beginning with pay period 4 in 1997 to

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<sup>2</sup> Docket No. 10-1946 (issued August 23, 2011). On January 22, 2000 appellant, a Grade 5 Step B part-time flexible clerk, filed an occupational disease claim, alleging that work factors caused plantar fibromatosis and seronegative arthritis. She was terminated effective February 1, 2000. OWCP accepted permanent aggravation of preexisting plantar fasciitis. Appellant returned to work with the Department of Veterans Affairs (VA). By decision dated April 26, 2007, it found that her actual earnings of \$648.23 per week as a VA claims clerk fairly and reasonably represented her wage-earning capacity, with zero loss. On May 1, 2008 OWCP modified its previous decisions to find entitlement to wage-loss compensation from January 2, 2002 to January 10, 2004. On June 2, 2010 it found that the computation of wage-earning capacity in the April 26, 2007 decision was in error, and modified the April 26, 2007 wage-earning capacity decision to reflect that appellant's correct wage-earning capacity was based on her actual VA earnings as a claims clerk. OWCP reviewed her claim and payment history and found that the pay rate in effect on the date disability began on July 20, 1999 was the effective pay rate for compensation purposes. It found that appellant's pay rate as of January 11, 2004 was \$16.44 per hour, and that, as the employing establishment indicated that her earnings for the year prior to her injury were not available, the correct pay rate formula to be used in calculating her pay rate was based on 2,000 hours, the maximum number of regular hours a part-time flexible clerk could work annually.

<sup>3</sup> *Id.*

<sup>4</sup> Application of the principles set forth in *Albert C. Shadrick*, as codified in section 10.403 of OWCP's regulations, will result in the percentage of the employee's loss of wage-earning capacity. 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

<sup>5</sup> On September 24, 2012 OWCP suspended appellant's wage-loss compensation because she failed to submit a complete CA-1032 form. Benefits were restored on January 13, 2013.

pay period 22 in 1998. By decision dated January 15, 2014, OWCP denied appellant's request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup> Section 10.511 of OWCP regulations provide that if a formal loss of wage-earning capacity decision has been issued, the rating is left in place until that determination is modified by OWCP. Modification is only warranted where the party seeking modification establishes 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.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup> In addition, Chapter 2.1501 of OWCP procedures contains provisions regarding the modification of a formal loss of wage-earning capacity.<sup>9</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision. By decision dated April 26, 2007, modified on May 1, 2008 and December 29, 2011, OWCP found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. Following OWCP's December 29, 2011 decision, appellant first requested reconsideration on March 19, 2012. In a July 8, 2013 decision, OWCP denied that request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Appellant again requested reconsideration on October 29, 2013, asserting that OWCP committed error in determining her pay rate for compensation purposes. In support of her request, she submitted various pay stubs from 1997 and 1998. In a nonmerit decision dated January 15, 2014, OWCP denied appellant's request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

As noted above, OWCP issued a formal merit decision on appellant's wage-earning capacity on April 26, 2007, modified most recently on December 29, 2011. It is well established that a claimant may establish that a modification of a wage-earning capacity is warranted if there is a material change in the nature and extent of an injury-related condition, or a showing that the original determination was, in fact, erroneous.<sup>10</sup> Although appellant's October 29, 2013 correspondence used the term "reconsideration," she certainly contended that OWCP committed

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<sup>6</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>7</sup> 20 C.F.R. § 10.511.

<sup>8</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>9</sup> Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>10</sup> *P.C.*, 58 ECAB 405 (2007).

error in its wage-earning capacity. The Board finds that her October 29, 2013 correspondence constitutes a request for modification of the December 29, 2011 wage-earning capacity determination.<sup>11</sup> The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>12</sup> In this case appellant asserted that the pay rate for compensation purposes was incorrect, and she submitted pay stubs to support this assertion. In its decisions dated July 8, 2013 and January 15, 2014, rather than evaluating whether appellant established modification of the wage-earning capacity, OWCP evaluated her requests under the clear evidence of error standard.<sup>13</sup>

The Board finds that OWCP should have adjudicated appellant's October 29, 2013 request, in which she asserted the wage-earning capacity was premised on an incorrect pay rate, as a request for modification of the wage-earning capacity determination.<sup>14</sup> The Board will, therefore, remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.

### **CONCLUSION**

The Board finds that OWCP should have adjudicated appellant's October 29, 2013 application under the modification of wage-earning capacity standard.

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<sup>11</sup> See *M.N.*, Docket No. 10-51 (issued July 8, 2010).

<sup>12</sup> *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

<sup>13</sup> The Board notes that it does not have jurisdiction to review the July 8, 2013 decision. For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e); *D.G.*, Docket No. 12-770 (issued April 20, 2012).

<sup>14</sup> *F.B.*, Docket No. 09-99 (issued July 21, 2010); see also *M.D.*, Docket No. 12-1317 (issued December 21, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 15, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: March 18, 2015  
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