

FACTUAL HISTORY

On March 26, 1999 appellant, then a 45-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome as a result of her federal employment duties. She first became aware of her condition on February 8, 1999. OWCP accepted the claim for bilateral carpal tunnel syndrome and left shoulder region localized primary osteoarthritis. Appellant stopped work on March 1, 1999 and received medical and wage-loss compensation for which she was placed on the periodic rolls. She sought treatment with Dr. Badi Jeffers, a doctor of osteopathic medicine.

In a January 14, 2013 medical report, Dr. Jeffers diagnosed bilateral carpal tunnel syndrome and reported that appellant could return to work with her permanent restrictions declared in 1999 of no lifting more than 10 pounds intermittently, grasping limited to 3.5 hours intermittently, fine manipulation limited to 4 hours intermittently, and driving limited to 1 hour.

On October 31, 2013 OWCP referred appellant to Dr. Ronny Ghazal, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions. In an October 31 and December 27, 2013 medical report, Dr. Ghazal provided appellant's history of injury and medical background. He reviewed medical records, reported examination findings, and diagnosed bilateral carpal tunnel syndrome, asymptomatic carpometacarpal (CMC) degenerative joint disease of the bilateral thumbs, asymptomatic calcific tendinitis of the right shoulder, and status post left shoulder open surgery. Dr. Ghazal reported that appellant continued to suffer from residuals of her work-related injury, but provided work restrictions of no forceful gripping and grasping, and no prolonged data entry for more than 50 percent of the time.

OWCP notified appellant that she was being referred for vocational rehabilitation as Dr. Ghazal had found her capable of returning to work with restrictions. Based upon her age, experience, education, medical restrictions, and a labor market survey, the rehabilitation counselor identified target positions for reemployment as a customer complaint clerk and information clerk.

In an April 2, 2014 memorandum, OWCP identified the positions of customer complaint clerk and information clerk as vocationally and medically suitable. It noted that both positions were considered sedentary by the Department of Labor's *Dictionary of Occupational Titles* (DOT).³ Appellant has previously been successfully trained for such employment at Celdonian training from July 22 through November 18, 2013. She was provided with 90 days of vocational placement beginning on November 22, 2013 through February 19, 2014. While the rehabilitation counselor attempted to secure employment as an information clerk, which was selected as the most appropriate for her disabling conditions, appellant did not obtain such

³ Sedentary Work -- Sedentary work involves exerting up to 10 pounds of force occasionally (occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

employment. Vocational rehabilitation services were terminated without job placement on February 19, 2014. OWCP noted that appellant was capable of earning \$320.00 per week (\$8.00 per hour) as an entry-level information clerk (DOT #37.367-022).⁴

In April 8 and August 29, 2014 medical reports, Dr. Jeffers diagnosed bilateral carpal tunnel syndrome and reported that appellant could return to work with her permanent restrictions declared in 1999 of no lifting more than 10 pounds intermittently, grasping limited to 3.5 hours intermittently, fine manipulation limited to 4 hours intermittently, and driving limited to 1 hour.

By letter dated September 4, 2014, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages of \$320.00 per week as an information clerk. It found that wage-loss compensation should be reduced as she was no longer totally disabled and the position of information clerk was medically and vocationally suitable.

By letter dated September 24, 2014, appellant contested the proposed reduction. She reported that, soon after her examination with Dr. Ghazal in October and December 2013, she had a flare-up of her condition. Appellant has informed her rehabilitation counselor in January 2014 that she was unable to seek employment as a result of this flare-up and sought treatment with Dr. Jeffers. A February 13, 2014 report from Dr. Mirou Pich Dom, a Board-certified psychiatrist, reflected restriction from returning to work due to her medical condition and anxiety disorder. On April 8, 2014 appellant saw Dr. Jeffers, who related that Dr. Dom had restricted her from working due to depression and anxiety. On August 29, 2014 she informed Dr. Jeffers that she was starting to feel better, but continued to have chronic bone pain.

In a September 17, 2014 report, Dr. Dom related that appellant was under her care and had been seen on two separate occasions, initially on February 13, 2014 and again on September 17, 2014. She noted diagnoses for mood disorder, anxiety disorder, and psychotic disorder. Dr. Dom's current treatment included routine medication management and follow-up for Zoloft.

In a September 12, 2014 medical report, Dr. Jeffers reported that appellant complained of continued bilateral wrist/hand pain and did not feel that she could return to work. He noted that she was seen by Dr. Dom who had informed her that she should not return to work due to anxiety. Dr. Jeffers reported that the psychiatry department was addressing treatment and whether she should be off work. He diagnosed bilateral carpal tunnel syndrome and provided appellant with the permanent work restrictions declared in 1999 of no lifting more than 10 pounds intermittently, grasping limited to 3.5 hours intermittently, fine manipulation limited to 4 hours intermittently, and driving limited to 1 hour.

⁴ The Department of Labor's *Dictionary of Occupational Titles* describes the position of information clerk (DOT #37.367-022) as follows, "Answers inquiries from persons entering establishment: Provides information regarding activities conducted at establishment, and location of departments, offices, and employees within organization. Informs customer of location of store merchandise in retail establishment. Provides information concerning services, such as laundry and valet services, in hotel. Receives and answers requests for information from company officials and employees. May call employees or officials to information desk to answer inquiries. May keep record of questions asked."

By decision dated March 12, 2015, OWCP reduced appellant's compensation benefits, effective March 10, 2015, based on her capacity to earn wages of \$320.00 per week as an information clerk.⁵

Appellant requested reconsideration of the March 12, 2015 decision on April 11, 2016. In her narrative statement, appellant related that her request for reconsideration was delayed because the March 12, 2015 decision was not mailed until April 7, 2015, as indicated by the postmark on the envelope. She reported that she never received the initial March 12, 2015 decision because OWCP had incorrectly addressed it to 10633 when her correct address was 10663. OWCP remailed the notice of decision on April 7, 2015 after appellant contacted them to inquire about the reduction of her compensation benefits. Appellant submitted a copy of the envelope as evidence of having received the notice of reduction over one month late.

Appellant also argued that she had not successfully completed vocational rehabilitation training. She reported that, in October 2013, she sustained a flare-up of her condition during vocational training and could not continue with the class, which was immediately terminated due to her condition. Appellant reported that she sought treatment in January 2014 with Dr. Jeffers due to her flare-up and was advised to seek psychiatric treatment. She reported that she was totally disabled because the flare-up involved her neck, back, shoulders, and hands, more severe with hand sensory deficit causing coordination problems. Appellant further noted that the osteoarthritis in her shoulder caused painful episodes along her hands and thumb joints. She concluded that her work-related injuries affected her mental health and capacity.

In support of her claim, appellant submitted medical reports from Dr. Jeffers dated April 8, 2014 through May 13, 2016 which documented treatment for bilateral carpal tunnel syndrome and provided appellant with the same permanent work restrictions, which had been declared in 1999.

Thereafter OWCP also received February 23 and September 17, 2014 reports wherein Dr. Dom noted that appellant reported feeling stressed, anxious, and depressed. Appellant had been out of work due to disability and was required by the Department of Labor to have testing done. She reported being scared and anxious that these physicians were trying to hurt her. Dr. Dom diagnosed mood disorder, anxiety, psychotic disorder, axis II, axis III, and carpal tunnel syndrome.

In medical reports dated February 13 through June 23, 2015, Dr. Omar Farooqi, a Board-certified adult psychiatrist, reported that appellant was exhibiting manic symptoms of elevated mood, expansive mood, grandiosity, decreased need for sleep, feeling pressured to talk, and flight of ideas. He further noted psychotic symptoms of paranoid delusions. Dr. Farooqi diagnosed bipolar 1 disorder, manic episode with psychotic features.

By decision dated May 25, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

⁵ The March 12, 2015 decision was addressed to house number 10633 rather than the correct number 10663.

LEGAL PRECEDENT

OWCP regulations provide that to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶

OWCP, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.⁷ In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

The makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the fact of such evidence.¹³

ANALYSIS

The Board finds that the case is not in posture for decision.¹⁴ In a decision dated March 12, 2015, OWCP reduced appellant's compensation effective May 10, 2015 based on its finding that she had the capacity to work in the selected position of information clerk earning

⁶ 20 C.F.R. § 10.607.

⁷ *See id.*; *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Jimmy K. Day*, 48 ECAB 652 (1997).

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹¹ *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹⁴ *M.S.*, Docket No. 15-685 (issued June 12, 2015).

wages of \$320.00 per week. On April 11, 2016 appellant requested reconsideration, arguing that the position was not vocationally suitable, that she had not successfully completed the vocational training due to a flare-up of her condition, and that her work-related injury caused her additional psychiatric conditions rendering her totally disabled. In support of her request, she submitted medical evidence describing both her mental and bilateral hand conditions. By decision dated May 25, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

It is well established that a claimant may establish that a modification of a wage-earning capacity finding 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.¹⁵ Although appellant used the term reconsideration in her April 11, 2016 correspondence, she contended that OWCP committed error in its wage-earning capacity because she had not completed vocational rehabilitation training and as she was incapacitated at the time the determination was issued. She requested a resumption of compensation for total wage loss.

The Board finds that the April 11, 2016 letter from appellant constitutes a request for modification of the March 12, 2015 loss of wage-earning capacity determination.¹⁶ The Board has held that, when a loss of 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.¹⁷ In its May 25, 2016 decision, however, OWCP improperly evaluated her request under the clear evidence of error standard applicable to untimely requests for reconsideration.¹⁸ The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.¹⁹

CONCLUSION

The Board finds that this case is not in posture for a decision

¹⁵ 20 C.F.R. § 10.511; *see P.C.*, 58 ECAB 405 (2007).

¹⁶ *See E.L.*, Docket No. 14-1434 (issued March 18, 2015); *M.N.*, Docket No. 10-51 (issued July 8, 2010).

¹⁷ *See W.W.*, Docket No. 09-1934 (issued February 24, 2010).

¹⁸ *A.C.*, Docket No. 15-710 (issued June 5, 2015).

¹⁹ *W.R.*, Docket No. 16-0098 (issued May 26, 2016).

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: July 3, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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