



## ISSUE

The issue is whether OWCP properly considered appellant's July 21, 2016 filing as an untimely request for reconsideration, rather than a request for modification of its April 1, 2008 loss of wage-earning capacity (LWEC) determination.

## FACTUAL HISTORY

On January 7, 2007 appellant, then a 48-year-old staff nurse, sustained injury to her left lower extremity at work when a patient fell on her left leg. OWCP accepted her traumatic injury claim (Form CA-1) for left knee lateral medial and meniscal ligament tears and left knee anterior cruciate ligament (ACL) tear. Appellant received continuation of pay from January 8 through February 21, 2007, and OWCP paid wage-loss compensation for temporary total disability beginning February 22, 2007. OWCP also authorized a March 21, 2007 left knee arthroscopic procedure.<sup>3</sup>

In a July 9, 2007 report, Dr. Salloum reported that appellant was approximately 15 to 16 weeks postsurgery. While she would not likely achieve hyperextension of the left knee, he felt that she had an excellent surgical result. Dr. Salloum indicated that appellant could return to work with limited duties. In a July 9, 2007 work capacity evaluation (Form OWCP-5c), he indicated that she could work eight hours a day with lifting limitations of no more than 30 pounds for an hour. Also appellant should have no contact with psychiatric patients. Dr. Salloum's restrictions were applicable for three months. In a July 21, 2007 Form OWCP-5c report, he advised that appellant could work eight-hour days with weight restrictions on lifting/carrying and pulling/pushing. Appellant was also restricted from physical takedown of patients and/or psychiatric codes.

On July 19, 2007 an employing establishment representative telephoned OWCP and advised that appellant had returned to work that day "FT [full time], modified temporary position." The record is devoid of a description for the temporary position.

OWCP terminated appellant's wage-loss compensation, effective July 19, 2007.

On September 13, 2007 OWCP requested that Dr. Salloum provide an update on appellant's work restrictions. It noted that she had been working in a light-duty capacity since July 18, 2007 based on the work restrictions outlined in his July 9, 2007 report, which were to remain in place for about three months. OWCP also requested that Dr. Salloum indicate whether appellant reached maximum medical improvement, her current work limitations and restrictions, and whether she could perform the duties of a nurse. It enclosed a work capacity evaluation form (OWCP-5c) for his completion in order to establish her current work limitations.

OWCP subsequently received Dr. Salloum's September 10, 2007 Form OWCP-5c with weight restrictions of pushing and pulling no more than eight hours a day and lifting no more than one hour a day. The restrictions were noted to be applicable until a functional capacity evaluation

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<sup>3</sup> Dr. George T. Salloum, a Board-certified orthopedic surgeon, performed a left knee partial medial meniscectomy and ACL reconstruction.

(FCE) was performed. In his September 10, 2007 treatment note, Dr. Salloum recommended that appellant undergo a strengthening program due to her complaints of weakness and fatigue. He noted that her previous work restrictions would remain in effect for approximately two to three more months until an FCE was completed. Dr. Salloum also noted that appellant had mild arthritis in her knee.

In a September 26, 2007 Form OWCP-5c, Dr. Salloum changed appellant's work restrictions indicating that she was capable of working only four hours a day walking and standing. He also indicated that appellant could not participate in the physical take down of patients and/or psychiatric codes. Dr. Salloum reported that the restrictions would apply until after an FCE was completed.

On October 15, 2007 OWCP sent Dr. Salloum a second request for an update of appellant's work status.

In a November 5, 2007 Form OWCP-5c, Dr. Salloum noted that appellant could work eight hour days with weight restrictions on pushing, pulling, and lifting. He indicated that the restrictions would not apply until after the FCE.

On November 15, 2007 OWCP authorized the requested FCE. It requested that Dr. Salloum indicate, once the FCE results were obtained, whether appellant reached maximum medical improvement and what her current work limitations and restrictions were.

OWCP subsequently received Dr. Salloum's November 1, 2007 duty status report (Form CA-17), which indicated that appellant could work eight hours a day with weight restrictions of pushing/pulling and lifting/carrying and no more than four hours of standing and walking. Appellant was also restricted from being involved in psychiatric codes or physical takedown of patients.

On December 11, 2007 appellant underwent an FCE which indicated that she was capable of medium-duty work.

In his December 20, 2007 duty status report (Form CA-17), Dr. Salloum noted that appellant was advised that she could resume regular work as of December 21, 2007. In his December 20, 2007 treatment notes, Dr. Salloum indicated that appellant was at maximum medical improvement. He stated "I would let her return to work to full duty with the only exception of no physical take downs of psychiatric patients." Dr. Salloum indicated that this restriction could be lifted after 12 months and that she was told that she would not be at increased risk whether or not she had surgery.

On January 15, 2008 appellant underwent a second opinion examination with Dr. Raymond R. Fletcher, a Board-certified orthopedic surgeon. Dr. Fletcher found that she had permanent impairment of the left knee as a result of the employment injury and had reached maximum medical improvement. He opined that she could perform her duties as a nurse eight hours a day with restrictions to include no participation in "physical takedowns" of violent patients. Dr. Fletcher also completed a Form OWCP-5c which listed permanent work restrictions within the eight-hour workday. This included no more than six hours of walking, standing, bending/stooping, pushing, pulling, and lifting and three hours of squatting, kneeling, and climbing. Weight

restrictions of no more than 45 pounds were provided for pushing, pulling and lifting and no more than 25 pounds for squatting, kneeling, and climbing. Appellant was also restricted from participation in “physical takedowns” of violent patients.

On January 28, 2008 OWCP contacted the employing establishment and asked if they could offer appellant a permanent job consistent with the permanent work restrictions set forth by Dr. Fletcher and Dr. Salloum.

In CA-110 notes of March 31, 2008, OWCP noted that the employing establishment indicated that “a job offer was in the works,” but they had not settled on a specific assignment for appellant. The employing establishment stated that appellant was in the same job, but with restrictions. It noted that the opportunity for night differential, *etc.*, was the same as the date-of-injury position and would continue even after the job offer was finalized to prevent loss of wage-earning capacity.

By decision dated April 1, 2008, OWCP determined that the modified nurse position which appellant had worked since July 19, 2007 fairly and reasonably represented her wage-earning capacity. It further found that appellant had no loss of wage-earning capacity (zero) because her actual earnings met or exceeded the current wages for the job she held when injured.

On April 7, 2008 OWCP received a copy of a March 28, 2008 job offer (full-time, permanent modified/limited-duty), which appellant accepted on April 2, 2008. The employing establishment offered appellant a position as a staff nurse in mental health clinic working 7:30 a.m. until 4:00 p.m. The physical requirements of the position indicated that appellant may not walk for more than six hours per day, stand for more than six hours per day, bend/stoop for more than six hours per day, push more than 45 pounds for more than six hours per day, pull more than 45 pounds for more than six hours per day, lift more than 45 pounds for more than six hours per day, squat with more than 25 pounds for more than three hours per day, kneel with more than 25 pounds for more than three hours per day, climb with more than 25 pounds for more than three hours per day, and may not participate in “physical takedowns” of violent patients. The employing establishment indicated that any loss of wages would be compensated by OWCP.

On April 4, 2008 appellant filed a claim for compensation (Form CA-7) for wage loss beginning April 13, 2008. She identified the type of wage loss as “LWEC.” The employing establishment remarked that appellant was “claiming LWEC for job offer accepted.”

During an April 10, 2008 telephone conversation, the employing establishment advised OWCP that appellant had changed jobs from in-patient care to working in the out-patient clinic. Appellant’s base salary was the same as her previous job. The employing establishment further advised that while she still had opportunities for night differential, Sunday premium, *etc.*, it was on a less frequent basis than her date-of-injury position.

In an April 15, 2008 letter, OWCP acknowledged receipt of appellant’s April 4, 2008 Form CA-7 claiming an LWEC beginning April 13, 2008. It referenced its April 1, 2008 determination that appellant had no LWEC as a result of her January 7, 2007 work injury, and advised her that no further action would be taken on her claim at the time. Additionally, OWCP referenced its

FECA Procedure Manual and explained the process for seeking modification of an LWEC determination. It further advised appellant:

“If you believe that that the original wage-earning capacity decision was in error or that your injury-related condition has worsened, please explain the specific reasons why you feel this is the case. You should also provide any documentary evidence which supports your case. I will be happy to revisit this issue upon receipt.”

Appellant subsequently filed a claim for a schedule award (Form CA-7).

By decision dated May 6, 2008, OWCP granted appellant a schedule award for nine percent permanent impairment of her left lower extremity.<sup>4</sup>

In a July 6, 2016 telephone conversation, appellant stated that she did not think her wages were correctly calculated on the April 1, 2008 zero wage-earning capacity decision.

On July 21, 2016 appellant resubmitted the April 4, 2008 Form CA-7 claiming LWEC compensation for the period April 13, 2008 and continuing.

On July 21, 2016 appellant, through her then representative, requested reconsideration. Although she acknowledged that the request was untimely, she contended that it demonstrated clear evidence of error regarding wage-earning capacity entitlement. She argued that the April 15, 2008 LWEC determination was issued in error. Appellant advised that while the April 13, 2008 position to which she was reassigned conformed to the physical restrictions set forth by OWCP's second opinion evaluator, there was no opportunity for additional pay shift differential, weekend premium, and holiday premium. She indicated that prior to the injury, she routinely worked nights, weekends and holidays, but the reassigned position did not allow her that additional pay opportunity. Thus, appellant argued that the earnings in her reassigned position did not fairly and reasonably represent her wage-earning capacity.

By decision dated October 12, 2016, OWCP denied appellant's July 21, 2016 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error with respect to the April 1, 2008 LWEC determination. It indicated that the basis of its decision was that her letter did not show that it made an error when it issued the LWEC determination. It explained that the April 1, 2008 LWEC determination was based on her date-of-injury rate of pay which included premium pay without overtime. Appellant's modified job offer was for a modified position that had equal pay to her date-of-injury job. OWCP found that she had not demonstrated clear evidence of error as the evidence she provided did not provide information that it did not calculate her LWEC determination correctly.

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<sup>4</sup> By decision dated April 9, 2009, an OWCP hearing representative affirmed the May 6, 2008 schedule award decision. Appellant has other claims which OWCP has administratively combined under the current File No. xxxxxx772, serving as the master file.

## LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>5</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>6</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>7</sup> For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be “mailed” to OWCP within one year of OWCP’s decision for which review is sought.<sup>8</sup>

OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”<sup>9</sup> The request must establish on its face that such decision was erroneous.<sup>10</sup> Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>11</sup>

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on LWEC.<sup>12</sup> A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant’s ability to earn wages.<sup>13</sup> Generally, an

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<sup>5</sup> This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. *Id.* at Chapter 2.1602.4b.

<sup>8</sup> *Id.* at Chapter 2.1602.4e.

<sup>9</sup> 20 C.F.R. § 10.607(b).

<sup>10</sup> *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>11</sup> 20 C.F.R. § 10.608(b).

<sup>12</sup> 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>13</sup> See *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

employee's actual earnings best reflect his wage-earning capacity.<sup>14</sup> Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.<sup>15</sup>

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.<sup>16</sup> The position must conform to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.<sup>17</sup> If these circumstances are present, a determination may be made that the position constitutes "regular" federal employment.<sup>18</sup>

Reemployment may not be considered representative of the injured employee's wage-earning capacity where the job is temporary and the employee's date-of-injury job was permanent.<sup>19</sup> However, if the employee was a temporary employee when injured, a temporary position may reasonably represent his/her wage earning as long as the position will last for 90 days or more.<sup>20</sup>

As long as there is no work stoppage due to the accepted condition(s), a formal LWEC determination should be issued following 60 calendar days from the date of return to work.<sup>21</sup>

Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.<sup>22</sup> Modification of an LWEC determination is unwarranted 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,

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<sup>14</sup> *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>15</sup> *Id.*

<sup>16</sup> 20 C.F.R. § 10.510.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(2)(d). A job is considered temporary when expressly stated in the job offer, position description, or other supporting documentation. *Id.* If the language in the job offer is ambiguous, OWCP should ask the employing establishment if the position represents temporary work and document the file accordingly. *Id.*

<sup>20</sup> *Id.* at Chapter 2.815.5c(2)(d)(iii).

<sup>21</sup> *Id.* at Chapter 2.815.6a.

<sup>22</sup> *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

or the original determination was erroneous.<sup>23</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>24</sup>

Unlike reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting modification of a wage-earning capacity determination.<sup>25</sup> Chapter 2.1501.4a of OWCP's procedures provides that if a claim for wage loss is received (Form CA-7 or CA-2a), the claims examiner should review the file to determine whether a formal LWEC is in place, and, if so, the claim should be developed, if necessary, as a request for modification of the LWEC. Any request for "modification" (especially those without an accompanying claim for compensation) should be reviewed carefully to determine whether the claimant is seeking a reconsideration of a recently issued LWEC decision, as opposed to a modification of the LWEC determination.<sup>26</sup>

### ANALYSIS

OWCP considered appellant's July 21, 2016 letter as a request for reconsideration of the April 1, 2008 LWEC determination, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that appellant's July 21, 2016 reconsideration request was essentially a request for modification of the April 1, 2008 LWEC determination. Appellant indicated that she was formally reassigned to another position on April 13, 2008 which offered no opportunity for additional pay (shift differential, weekend premium, and holiday premium). Therefore, the resubmitted April 4, 2008 Form CA-7 pertained to her reassigned position effective April 13, 2008, in which she earned less than her date-of-injury position as there was no opportunity for additional pay. While appellant referred to documentation on the April 4, 2008 Form CA-7, the Form CA-7 information provided by the employing establishment just lists appellant's date-of-injury earnings. An assertion that the original determination was, in fact, erroneous or that she had been retrained are grounds on which a claimant may seek modification of an LWEC determination.<sup>27</sup> This request for modification is not a request for a review of OWCP's April 1, 2008 decision under 5 U.S.C. § 8128(a). The Board finds that OWCP should have adjudicated the

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<sup>23</sup> 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

<sup>24</sup> 20 C.F.R. § 10.511.

<sup>25</sup> *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>26</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501.4a (June 2013).

<sup>27</sup> 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. *Stanley B. Plotkin*, 51 ECAB 700 (2000); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.2(b) (June 2013).



issue of modification of the LWEC determination.<sup>28</sup> OWCP improperly adjudicated her July 21, 2016 letter as a request for reconsideration.<sup>29</sup>

As appellant has requested modification of the April 1, 2008 LWEC determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) do not apply. The case will be remanded to OWCP to adjudicate her request for modification of the LWEC determination based on a determination of whether the initial LWEC was erroneous.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's requested modification of the April 1, 2008 LWEC determination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Issued: August 24, 2018  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>28</sup> *G.E.*, Docket No. 13-0649 (issued October 21, 2013); *F.B.*, Docket No. 10-0099 (issued July 21, 2010).

<sup>29</sup> *F.B.*, *id.* See *M.J.*, Docket No. 08-2280 (issued July 7, 2009). See also *Gary L. Moreland*, *supra* note 25.