

this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 29, 2010 appellant, then a 41-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she injured her head, neck, and back on December 24, 2010 during a motor vehicle accident in the performance of duty. Her regular work hours were from 6:30 a.m. until 3:00 p.m. on Saturdays, one day per week. On January 31, 2011 OWCP accepted appellant's traumatic injury claim for concussion without loss of consciousness, cervical strain, and lumbar strain.

Appellant's date-of-injury pay rate on December 24, 2010 was \$18.50 per hour. The employing establishment indicated that she worked approximately 11 hours per week in the year prior to her injury. OWCP calculated her weekly pay rate for wage-loss compensation varyingly as \$173.02, \$203.50, or \$209.24. It authorized wage-loss compensation based on the weekly pay rate of \$209.24 from February 8 until September 13, 2011 at which point it increased appellant's weekly pay rate for wage-loss compensation purposes to \$426.92. OWCP further calculated that appellant averaged 9.34 hours per week over the year prior to her date of injury. Appellant reported that she worked as a restaurant shift leader intermittently from February 22 through April 21, 2011. On October 19, 2011 OWCP placed her on the periodic rolls based on a weekly pay rate of \$426.92.

On October 19, 2011 OWCP expanded acceptance of appellant's claim to include right shoulder and trapezius sprain and right shoulder impingement. On March 29, 2012 appellant underwent authorized right shoulder arthroscopy with subacromial decompression, including acromioplasty and distal clavicle excision.

On September 15, 2015 the employing establishment offered appellant a light-duty position as a passport clerk working six hours each Wednesday and five hours each Friday. In a note dated September 24, 2015, appellant's physician, Dr. Maurizio Cibischino, a Board-certified orthopedic surgeon, opined that appellant could perform sedentary duty with no lifting over 10 pounds for 11 hours a week. He further noted that appellant should stand for two hours and sit for two hours with no bending, crawling, or squatting. On October 1, 2015 appellant accepted the passport clerk position which required standing for two hours, sitting for two hours, and fine manipulation for one hour.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the January 19, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

In an e-mail dated January 13, 2016, the employing establishment reported that appellant's position was classified as a grade 5Y and she was earning \$18.50 per hour due to contractual increases over the term of her employment. It further noted that a new employee hired as a grade 5Y would have a starting hourly base rate wage of \$16.65.

By decision dated January 15, 2016, OWCP found that appellant's employment as a passport clerk fairly and reasonably represented her wage-earning capacity. It noted that effective October 1, 2015 she had worked as a passport clerk for 11 hours a week with wages of \$231.11 per week. OWCP determined that appellant had demonstrated the ability to perform the duties of this position for 60 days or more. It found that her weekly pay rate when injured was \$426.92, effective December 24, 2010, and the current pay rate for the job and step she held when she was injured was \$203.50 effective September 30, 2015. OWCP determined that appellant's actual earnings of \$231.11 per week as a passport clerk met or exceeded the current wages of her date-of-injury position and that therefore she had no loss in wage-earning capacity. It found that in accordance with 5 U.S.C. §§ 8106 and 8115 she was employed with no loss of wage-earning capacity (LWEC) and her compensation payments had been terminated.

On January 27, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, but noted that if a telephonic hearing could not occur he would prefer a local hearing.

Counsel appeared at the oral hearing on August 25, 2016 and he contended that OWCP did not use the correct pay rate when calculating appellant's LWEC determination.

In a letter dated September 27, 2016, the employing establishment noted that appellant's current position as a passport clerk offered a pay rate of \$21.01 per hour. It further contended that her date-of-injury position began with a pay rate of \$16.65 per hour.

By decision dated October 21, 2016, OWCP's hearing representative found that appellant's hourly pay rate as of December 24, 2010 as rural carrier associate was \$18.50 per hour, less than her earnings as a part-time passport clerk at \$21.01 per hour. He concluded that appellant had no LWEC and affirmed OWCP's January 15, 2016 decision.

On October 23, 2017 appellant, through counsel, requested reconsideration of the October 21, 2016 OWCP hearing representative's decision.⁵ He provided copies of appellant's pay stubs and asserted that she regularly earned more than \$231.11 per week. For the year 2010, appellant received gross pay in the amount of \$9,576.95 for the 26 pay periods as a rural carrier associate.

By decision dated January 19, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error with respect to the October 21, 2016 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. OWCP further found that the additional evidence submitted was not clear on its face that the LWEC determination was in error.

⁵ Counsel asserted that this request was timely filed as October 21, 2017, the 365th day, was a Saturday which allowed him until Monday, October 23, 2017 to request reconsideration.

LEGAL PRECEDENT

A loss of 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.⁶ As a general rule, once the loss of wage-earning capacity of an injured employee is determined, it remains undisturbed regardless of actual earnings or lack of earnings until properly modified.⁷ A formal loss of wage-earning capacity determination will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.⁸ The burden of proof is on the party attempting to show that modification of the loss of wage-earning capacity determination is appropriate.⁹ Any request for modification should be reviewed carefully by OWCP to determine whether the claimant is seeking a reconsideration of a recently issued loss of wage-earning capacity determination or requesting modification of the loss of wage-earning capacity determination.¹⁰ There is no time limit for a claimant to submit a request for modification of a loss of wage-earning capacity determination.¹¹

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² Timeliness is determined by the document receipt date (*i.e.*, the "received date") in OWCP's integrated Federal Employees' Compensation System (iFECS).¹³ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹⁴

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁵ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue

⁶ *K.K.*, Docket No. 17-0242 (issued May 9, 2017).

⁷ *Id.*; *Sharon C. Clement*, 55 ECAB 552 (issued May 18, 2004).

⁸ *E.H.*, Docket No. 17-0963 (issued August 24, 2018).

⁹ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁰ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4(a) (June 2013).

¹¹ *A.G.*, Docket No. 14-1347 (issued December 9, 2014).

¹² 20 C.F.R. § 10.607(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁴ 5 U.S.C. § 8128(a); *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁵ *G.G., id.*; *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 13 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

that was decided by OWCP,¹⁶ is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.¹⁷ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration.

OWCP considered appellant's October 23, 2017 letter as a request for reconsideration of the October 21, 2016 LWEC determination, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that appellant's October 23, 2017 reconsideration request was, instead, a request for modification of the January 15, 2016 LWEC determination. Although appellant requested reconsideration, as noted above, when the underlying issue is LWEC, an initial question is whether the claimant has submitted an application for reconsideration of a recent LWEC determination or has requested modification of the LWEC determination.¹⁹ This requires that OWCP conduct a limited review of the evidence or argument submitted to determine if the claimant is alleging either that the original determination was in error or that her injury-related condition had worsened.²⁰ The Board has held that, when a LWEC 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 the LWEC is warranted.²¹

In the October 23, 2017 letter, appellant contended that the January 15, 2016 LWEC determination was in error as it was based on an incorrect pay rate. In support of this contention, she provided pay stubs and asserted that she regularly earned more than \$231.11 per week. An

¹⁶ See *G.G.*, *supra* note 14; *A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁷ See *A.F.*, *id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁸ See *G.G.*, *supra* note 14.

¹⁹ Compare *C.R.*, Docket No. 17-0226 (issued June 26, 2018) (noting that OWCP must consider whether a request for "reconsideration" is in fact a request for an additional schedule award).

²⁰ *Supra* note 10 at Chapter 2.1501.4(b).

²¹ *Supra* note 9.

assertion that the original determination was, in fact, erroneous is a basis on which a claimant may seek modification of an LWEC determination.²²

The Board finds that OWCP should have adjudicated appellant's October 23, 2017 request as a request for modification of the January 15, 2016 LWEC determination. As appellant has requested modification of the January 15, 2016 LWEC determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) do not apply.²³ OWCP's adjudication should have included a merit review of the evidence submitted in support of the request.²⁴ The Board will, therefore, remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve her appeal rights.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

²² 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. *E.H.*, *supra* note 8; *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).

²³ *E.H.*, *supra* note 8.

²⁴ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Issued: February 22, 2019
Washington, DC

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

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

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