



## **FACTUAL HISTORY**

The case has been before the Board on prior appeals. On October 18, 2002 the Board set aside the Office's August 4, 2000 decision denying appellant's compensation claim and the May 7, 2001 decision finding that appellant abandoned his request for a hearing.<sup>1</sup> By order dated July 19, 2007, the Board set aside its September 21, 2005 and May 24, 2006 decisions denying appellant's claim for a recurrence of disability, and remanded the case, finding that the Office should have adjudicated the issue of modification of the March 30, 1998 loss of wage-earning capacity (LWEC) decision.<sup>2</sup> The facts and the law contained in those decisions are incorporated herein by reference.

Appellant sustained injuries to his right knee on July 7, 1992. The Office accepted his claim for a tear of the right meniscus and subsequent total right knee replacement and paid appropriate compensation.<sup>3</sup>

On November 7, 1997 appellant accepted a position as a modified distribution clerk. Duties included standing and casing mail for no more than four hours, delivering mail curbside, riding for no more than eight hours or walking for no more than two to three hours, casing mail and pulling and pushing a hamper to a vehicle. In a report dated November 7, 1997, appellant's treating physician, Dr. Gurpal S. Bhuller, a Board-certified orthopedic surgeon, reviewed the modified clerk position description and opined that the position was suitable for appellant and within his restrictions.

By decision dated March 30, 1998, the Office reduced appellant's compensation to zero, finding that his position of modified distribution clerk fairly and reasonably represented his wage-earning capacity and that his actual wages met or exceeded the wages of the job held when he was injured.

In reports dated June 27, 2005, Dr. William D. Brickhouse, a Board-certified orthopedic surgeon, opined that appellant was totally disabled due to his July 1, 1992 injury. He reported appellant's complaints of increased pain, stiffness and difficulty standing and walking. Examination of the right knee demonstrated diffuse tenderness and a severely restricted range of motion. Dr. Brickhouse noted that appellant originally had an extension lag of about 20 to 30 degrees and flexion to only 78 degrees, but that his condition had worsened. Anteroposterior (AP) and lateral x-rays revealed some settling in the posterior aspect of the tibia, some thinning of the tibial polyethylene, as evidence by loss of joint space and a metal-backed patella, which suggests loosening. Dr. Brickhouse indicated that appellant was unable to perform the duties of his modified position, which included sitting and standing for four hours, walking for three hours, pulling and pushing for two hours and keyboarding for eight hours.

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<sup>1</sup> *Nelson R. Hubbard*, 54 ECAB 156 (2002).

<sup>2</sup> Docket No. 06-1704 (issued July 19, 2007).

<sup>3</sup> The record reflects that appellant's December 5, 1988 traumatic injury claim was accepted for right knee sprain and aggravation of preexisting arthritis. (File No. xxxxxx503) On February 26, 1996 File No. xxxxxx503 was combined with File No. xxxxxx870, which was designated as the master file. Appellant received schedule awards in 1991, 2003 and 2004, for the total of a 75 percent impairment of his right lower extremity.

On July 11, 2005 Dr. Brickhouse noted that appellant's complaints of pain that seems to be more in the anterior aspect and piercing throughout the posterior aspect of the knee. X-rays showed some loss of space laterally, and a lucent line around the metal back prosthesis. Dr. Brickhouse stated that the only option left was to consider revision knee replacement. A July 11, 2005 duty status report reflected that appellant was totally disabled.

On August 1, 2005 Dr. Brickhouse opined that appellant was not able to return to his modified position and that he could perform only sedentary work due to his disabling knee condition. He stated that appellant was not able to walk appreciable distances, was unable to get in and out of a car and was unable to go up and down stairs.

On August 5, 2005 appellant filed a claim for recurrence of disability as of June 21, 2005. In an August 5, 2005 statement, he indicated that his knee condition had progressively worsened to the degree that he was unable to perform the duties of his modified position. Appellant stated that his knee replacement had "worn out" and that his work duties caused increased knee pain, even though he had been performing the duties of a passport agent since August 2004.

On September 2, 2005 Dr. Brickhouse stated that appellant needed surgery to correct his failed knee revision. X-rays showed significant tilt involving the patella and loss of space, which suggested significant polyethylene weakness. Dr. Brickhouse again opined that appellant was totally disabled. On September 12, 2005 he requested authorization for total knee replacement surgery.

In a decision dated September 21, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to establish that the claimed recurrence was due to the accepted injury. On October 19, 2005 appellant requested reconsideration.

Appellant submitted an October 18, 2005 report from Dr. Brickhouse, who stated that appellant's x-rays revealed evidence of prosthetic wear. Dr. Brickhouse opined that appellant needed a total knee replacement due to traumatic arthritis of the right knee. On May 5, 2006 he noted appellant's continuing disability due to his right knee condition, and stated that he had not decided whether or not to undergo surgery.

By decision dated May 24, 2006, the Office affirmed the denial of appellant's recurrence claim, but modified its decision to accept claims for medical benefits related to the accepted conditions retroactive to September 21, 2005. The Office found that there was no rationalized medical opinion evidence connecting the accepted work injuries to appellant's alleged disability after June 21, 2005 and his need for surgery. Appellant appealed the Office's denial to the Board.

In an order dated July 19, 2007, the Board set aside the Office's September 21, 2005 and May 24, 2006 decisions denying appellant's claim for a recurrence of disability, and remanded the case for adjudication of the issue of modification of the March 30, 1998 LWEC decision.<sup>4</sup>

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<sup>4</sup> See *supra* note 2.

In a July 23, 2007 report, Dr. Brickhouse reiterated his opinion that appellant needed a total knee replacement, due to a failed prosthesis, which limited his ability to stand and walk and created significant pain. He stated that appellant had an extension lag of 10 degrees and flexion from 60 to 70 degrees.

In an August 30, 2007 decision, the Office denied modification of the March 30, 1998 wage-earning capacity decision. It found that appellant had failed to meet any of the established criteria, including the submission of rationalized medical evidence explaining how his work-related condition had worsened to the degree that he was unable to perform the duties of his modified position. The Office stated that clarification was required to determine whether appellant was able to work at all, prior to actual revision surgery.

In a report dated September 10, 2007, the district medical adviser (DMA) reviewed appellant's medical records and opined that the recommended revision knee replacement was appropriate and medically necessary as related to factors of his employment. He noted that appellant was then 10 years' status post knee replacement, with loosening of the prosthesis; had increased pain with significant loss of motion; had a 15 degree extension lag and flexion limited to about 70 degrees; and was using a cane for ambulatory support.

On October 25, 2007 appellant requested reconsideration of the August 30, 2007 decision. He stated that he had been notified by letter dated July 11, 2006 that he had been reassigned, outside of his installation to the position of sales distribution associate effective July 8, 2006. Appellant also received a letter from the employing establishment dated July 30, 2007 indicating that he was unable to perform the duties of the assigned position and that they were unable to accommodate his disability. Further, he was notified by the Office on October 11, 2007 that total knee replacement surgery had been authorized. Appellant stated that he had been performing the duties of a passport clerk, as well as all of the other duties of his modified position and that, as a result, his work-related condition had worsened.

By decision dated November 15, 2007, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.<sup>5</sup> The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.<sup>6</sup>

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

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.<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>

### ANALYSIS -- ISSUE 1

In its March 30, 1998 LWEC decision, the Office found that the position of modified distribution clerk fairly and reasonably represented appellant's wage-earning capacity. Since appellant requested a modification of the LWEC decision, he has the burden of proof to show that a modification of the wage-earning capacity determination is warranted.<sup>9</sup>

Appellant's representative argues that the original LWEC determination was erroneous, in that the limited-duty position did not reasonably reflect his wage-earning capacity. However, he provided no evidence that the original determination was erroneous. On the contrary, the evidence of record reflects approval of the modified position by appellant's treating physician, and his opinion that the position was within appellant's restrictions.

Appellant's representative also contends that there has been a material change in the nature and extent of the injury-related condition that renders him unable to perform the duties of the position.<sup>10</sup> The evidence of record supports this contention.

Appellant's treating physician at the time the Office issued the LWEC determination, Dr. Bhuller, reviewed the duties required for the position of modified distribution clerk, which included standing and casing mail for no more than four hours; delivering mail curbside, while riding for no more than eight hours, or walking for no more than two to three hours; casing mail; and pulling and pushing a hamper to a vehicle. He found that the position was suitable for appellant and within his restrictions. Based upon Dr. Bhuller's recommendation, the Office reduced appellant's compensation to zero and found that the modified position fairly and reasonably represented his wage-earning capacity.

On June 27, 2005 appellant's treating physician at that time, Dr. Brickhouse, opined that appellant was unable to perform the duties of his modified position, which included sitting and standing for four hours, walking for three hours, pulling and pushing for two hours and keyboarding for eight hours and was totally disabled from work. He reported appellant's complaints of increased pain, stiffness and difficulty standing and walking. Dr. Brickhouse

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<sup>7</sup> *D.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1230, issued November 13, 2007); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(b)(1) (October 2005) (if a claimant is seeking modification, he must establish that the original rating was in error or that the injury-related condition has worsened). *P.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1954, issued March 6, 2007); *Harley Sims, Jr.*, *supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Phillip S. Deering*, 47 ECAB 692 (1996).

found diffuse tenderness and a severely restricted range of motion in the right knee, noting that appellant originally had an extension lag of about 20 to 30 degrees and flexion to only 78 degrees, but that his condition had worsened. AP and lateral x-rays revealed some settling in the posterior aspect of the tibia; some thinning of the tibial polyethylene, as evidence by loss of joint space; and a metal-backed patella, which suggests loosening.

In follow-up reports, Dr. Brickhouse reiterated his opinion that appellant was unable to perform the duties of his modified position. On August 1, 2005 he stated that appellant could perform only sedentary work due to his disabling knee condition and indicated that appellant was not able to walk appreciable distances, was unable to get in and out of a car, and was unable to go up and down stairs. On September 2 and October 18, 2005 Dr. Brickhouse recommended total knee replacement surgery to correct appellant's failed knee revision, noting that x-rays revealed significant tilt involving the patella and loss of space, suggesting significant polyethylene weakness. On July 23, 2007 he reiterated his opinion that appellant needed a total knee replacement, due to a failed prosthesis, which limited his ability to stand and walk and created significant pain. The Board finds that Dr. Brickhouse's reports provide substantial support for appellant's contention that his employment-related condition has worsened to the degree that he is unable to perform the duties of the modified distribution clerk position on which the Office based its March 30, 1998 LWEC determination.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>11</sup> In this case, although Dr. Brickhouse's reports do not contain rationale sufficient to discharge appellant's burden of proof to establish that his employment-related condition has worsened or changed such that the March 30, 1998 wage-earning capacity decision should be modified, they do constitute substantial, unrefuted evidence in support of his modification claim, such that further development of the case by the Office is warranted.<sup>12</sup> His numerous reports, which contain findings on examination and a recommendation for total knee replacement surgery, are consistent in indicating that appellant is not able to perform the duties of the modified distribution clerk position, which involved driving, walking and casing mail, due to a worsening of his accepted knee condition.

On remand, the Office should further develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant has established that the March 30, 1998 loss of wage-earning capacity decision should be modified. Following such further development of the case record as it deems necessary, it should issue a *de novo* decision.<sup>13</sup>

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<sup>11</sup> *Donald R. Gervasi*, 57 ECAB 281 (2005); *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>12</sup> *Thaddeus J. Spevack*, 53 ECAB 474 (2002); see *John J. Carlone*, 41 ECAB 354 (1989).

<sup>13</sup> In light of the Board's ruling on the first issue, the second issue is moot.

**CONCLUSION**

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 15 and August 30, 2007 are set aside, and the case is remanded for further proceedings consistent with the above opinion.

Issued: April 13, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board