

**United States Department of Labor
Employees' Compensation Appeals Board**

A.T., Appellant

and

**U.S. POSTAL SERVICE, SUNSET STATION,
Pueblo, CO, Employer**

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**Docket No. 11-375
Issued: September 19, 2012**

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2010 appellant, through counsel, filed a timely appeal from an October 7, 2010 decision of the Office of Workers' Compensation Programs (OWCP) that denied modification of an April 23, 2008 wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that an April 30, 2008 wage-earning capacity decision should be modified.

On appeal, appellant's attorney asserts that the criteria for modifying the wage-earning capacity determination were met because the decision was in error and appellant's medical condition worsened.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 10, 2003 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that he injured his right knee when he tripped over a pallet jack that day. Dr. Michael A. Dallenbach, who practices occupational medicine, treated appellant on September 16, 2003. OWCP accepted that appellant sustained a right patellar sprain and left shin contusion. The accepted conditions were expanded to include other joint derangement of the right lower leg, other derangement of the right lateral meniscus and traumatic arthropathy of the right lower leg.

On March 29, 2004 appellant underwent arthroscopic chondroplasty of the right knee. By decision dated September 7, 2004, he was granted a schedule award for two percent impairment of the right leg. By decision dated March 1, 2005, the Board affirmed the September 7, 2004 schedule award decision.² Appellant underwent a second operation on the right knee on April 14, 2005, and on August 2, 2006 had a third procedure. After each procedure he returned to modified work.

In a January 2007 evaluation, Dr. William V. Watson, a Board-certified orthopedic surgeon, provided a second opinion evaluation. He advised that appellant could work eight hours a day with permanent work restrictions.

On February 13, 2007 appellant was granted a schedule award for an additional three percent, for a total of five percent impairment, right leg. By decision dated July 11, 2007, OWCP's hearing representative affirmed the February 13, 2007 schedule award decision.

OWCP determined that a conflict arose between the medical opinions of Dr. Dallenbach and Dr. Watson regarding appellant's work restrictions and capacity. It referred appellant to Dr. Hendrick J. Arnold, a Board-certified orthopedist, for an impartial medical evaluation. In an August 28, 2007 report, Dr. Arnold provided physical examination findings and diagnosed anterior patellofemoral pain syndrome, and chondral changes of the medial femoral condyle and medial patellar facet. He advised that maximum medical improvement was reached on January 2, 2007 and that appellant could work eight hours a day with permanent restrictions of one hour standing; two hours walking; and six hours sitting, bending, stooping, operating a motor vehicle, pushing, pulling and lifting. Dr. Arnold imposed a weight restriction of 10 pounds frequently and 30 pounds occasionally.

On December 14, 2007 the employing establishment offered appellant a permanent modified position. The offer stated that it was "tailored to meet your personal physical limitations." The job duties, which were modified on January 17, 2008, indicated that appellant was to case mail for three to five hours, using a stool, deliver walking one to two hours, deliver mounted four to six hours and deliver express mail up to one hour. Standing was limited to one hour, walking, stooping and bending to two hours, pushing and pulling to one to two hours and sitting to three to four hours. Carrying and reaching were limited to three to eight hours with a 30-pound weight restriction. Appellant accepted the position on January 17, 2008, "under

² Docket No. 04-2305 (issued March 1, 2005).

protest,” stating that this was mainly because he wanted to know if he “could opt on driving routes that were open for vacations or sickness.”

By decision dated April 23, 2008, OWCP stated that appellant had been reemployed as a modified letter carrier, effective on January 17, 2008. It found that his actual earnings represented his wage-earning capacity with zero loss.

On August 11, 2008 appellant was granted a schedule award for a total 32 percent right leg impairment, less that previously awarded.³ Dr. Dallenbach submitted additional reports noting examination findings and diagnosing chronic bilateral knee pain.

On July 23, 2009 appellant filed a claim for compensation for the period July 10 to 13, 2009. He attached a brief report from Dr. Dallenbach, dated July 13, 2009, who advised that appellant was unable to work for this period secondary to significant bilateral knee pain. In a July 13, 2009 duty status report, Dr. Dallenbach provided restrictions to appellant’s physical activity. In reports dated August 10 and 26, 2009, he noted appellant’s report that his pain had increased and it had become harder to continue working. Dr. Dallenbach provided examination findings and reiterated his diagnosis, stating that appellant remained at maximum medical improvement with no new impairment.

In correspondence dated October 6 and November 24, 2009, the employing establishment informed appellant that it had no work available for him. On November 9, 2009 appellant filed a recurrence claim, stating that his right knee continued to deteriorate and his left knee was also painful. On November 22, 2009 he filed a claim for compensation from November 7 to 20, 2009. An attached leave analysis indicated that appellant was sent home because no work was available under the National Reassessment Policy (NRP). On November 30, 2009 Dr. Dallenbach reported that appellant remained at maximum medical improvement with no new impairment. Appellant continued to submit claims for compensation beginning January 13, 2010, with attached forms indicating that no work was available under NRP.

By decision dated January 29, 2010, OWCP denied appellant’s claim for wage-loss compensation for the period July 10 to 13, 2009 finding that the evidence was not sufficient to warrant modification of the April 23, 2008 wage-earning capacity determination.

On March 2, 2010 appellant submitted a treatment note dated July 13, 2009 from Dr. Dallenbach who noted appellant’s complaint of increased knee pain, aggravated by prolonged weight bearing. Dr. Dallenbach diagnosed exacerbation of chronic bilateral knee pain, right greater than left and advised that appellant was unable to work from July 10 through 13, 2009 due to a significant increase in bilateral knee pain.

³ Appellant timely requested a hearing of the schedule award decision. At the January 21, 2009 video hearing, counsel stated that he did not dispute the right leg award but asserted that appellant was entitled to a schedule award for his left leg. OWCP’s hearing representative informed him that the left leg was not at issue at that time and issued a summary decision, remanding the case to OWCP to develop and adjudicate appellant’s claim for a left leg schedule award. *See discussion, infra.*

In a March 23, 2010 decision, OWCP denied appellant's claim for wage-loss compensation beginning November 7, 2009 on the grounds that he submitted insufficient evidence to warrant modification of the April 23, 2008 wage-earning capacity determination.

Appellant, through his attorney, timely requested a hearing. On April 27, 2010 OWCP accepted employment-related left knee chondromalacia.⁴

In a July 8, 2010 report, Dr. Dallenbach advised that appellant was currently not working because he had constant left knee pain aggravated with prolonged standing and walking. He provided examination findings and diagnosed chronic left knee pain. Dr. Dallenbach advised that appellant could return to work with restrictions of sitting essentially 100 percent of the time. He advised that appellant should change positions as needed, and should not climb stairs, crawl, kneel or squat. Lifting, pushing, pulling and carrying were limited to 10 pounds.

At a hearing held on July 29, 2010, counsel argued that appellant's condition had significantly worsened due to bilateral knee pain. He further contended that the wage-earning capacity decision was in error because the job was makeshift and tailored to meet appellant's needs. Appellant discussed his modified assignments, noting that he worked periodically.

On August 27, 2010 OWCP began paying wage-loss compensation under the left knee claim, beginning January 13, 2010. Appellant was placed on the periodic compensation rolls in September 2010.

By decision dated October 7, 2010, OWCP's hearing representative found that appellant did not meet his burden of proof to modify the April 23, 2008 wage-earning capacity determination.

LEGAL PRECEDENT

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal loss of wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁷

⁴ The claims for appellant's right and left knees were doubled on September 30, 2010.

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

ANALYSIS

The Board finds this case is not in posture for decision. OWCP accepted that appellant sustained employment-related right patellar sprain, joint derangement and traumatic arthropathy of the right lower extremity. He underwent right knee surgery on March 9, 2004, April 14, 2005 and August 2, 2006. After each procedure, appellant returned to a modified carrier position. On December 14, 2007 the employing establishment offered him a modified position that he accepted. By decision dated April 23, 2008, OWCP found that appellant's actual earnings in his modified position represented his wage-earning capacity.

Appellant continued to work in the modified position until November 2009 when the employing establishment sent him home as part of NRP after determining that it did not have work available in his position. He filed claims for compensation and notice of disability based on the withdrawal of the modified position. Appellant's attorney asserted on appeal that the wage-earning capacity decision was in error and that appellant's medical condition had worsened.

OWCP analyzed appellant's claim under the customary criteria for modifying a loss of wage-earning capacity determination, but did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

When a loss of wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.⁸ FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position. FECA Bulletin No. 09-05 requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals, and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.⁹

FECA Bulletin No. 09-05 states that OWCP, in an effort to proactively manage these types of cases, may undertake further nonmedical development, such as requiring that the employing establishment address in writing whether the position on which the loss of wage-earning capacity determination was based was a *bona fide* position at the time of the rating, and to direct the employing establishment to review its files for contemporaneous evidence concerning the position.¹⁰

As OWCP failed to fully follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the October 7, 2010 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate

⁸ *Id.*

⁹ *Id.* at § I.A.1-2

¹⁰ *Id.* at § I.A.3.

de novo decision on appellant's entitlement to wage-loss compensation beginning October 24, 2009.¹¹

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 19, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹¹ See *M.E.*, Docket No. 11-1416 (issued May 17, 2012).