

2003 the claim was accepted for right knee and right wrist sprain. It assigned the claim File No. xxxxxx924.

Dr. Brian Walsh, an attending osteopathic physician Board-certified in family practice, followed appellant beginning on January 27, 2003. He diagnosed a right wrist sprain, right knee sprain, and torn right medial meniscus.² Dr. Walsh obtained a magnetic resonance imaging (MRI) scan of the right knee, demonstrating a posterior horn tear with medial compartment osteoarthritis. On March 31, 2003 Dr. Donald F. Leatherwood, an attending Board-certified orthopedic surgeon, performed an arthroscopic medial meniscectomy, shaving of multiple meniscal tears, chondroplasty, removal of loose bodies, and partial synovectomy. OWCP authorized the procedure. Appellant remained off work following the procedure.

Appellant continued under treatment for right knee osteoarthritis, including physical therapy and a series of Synvisc injections. On January 30, 2004 Dr. John R. Duda, an attending Board-certified orthopedic surgeon, performed an authorized total right knee arthroplasty and partial synovectomy.

In late 2004, appellant returned briefly to a sedentary job at the employing establishment. She sustained a recurrence of disability on October 5, 2004 and remained off work. Appellant received wage-loss compensation.

On May 5, 2006 Dr. Walsh noted permanent restrictions of sitting eight hours, standing two hours, walking four hours, lifting up to 20 pounds, and no climbing steps. Appellant accepted a full-time position at the employing establishment on June 19, 2006, working as a modified carrier technician. The position required standing up to four hours, driving, walking and writing up to two hours, and clerical duties for up to five hours a work shift. The starting salary was \$945.15 a week.

By decision dated June 19, 2006, OWCP terminated appellant's wage-loss compensation benefits as her actual earnings as a modified letter carrier exceeded the current wages of her date-of-injury position. Appellant continued working as a modified carrier technician through October 2008.

Appellant filed another traumatic injury claim alleging that on October 2, 2008 she sustained injury to her left knee when a cart fell on her. OWCP accepted the claim for left knee sprain/strain, and aggravation of degenerative joint disease. It assigned the claim File No. xxxxxx392.³

Appellant was followed for the left knee injury by Dr. Seth D. Krum, an attending osteopathic physician Board-certified in orthopedic surgery. On January 13, 2010 Dr. Krum performed a total left knee arthroplasty with synovectomy, and a right patellar revision arthroplasty, authorized by OWCP. OWCP expanded the claim to accept localized secondary

² Dr. Walsh noted that appellant had previously injured her right knee and low back in a 1998 motor vehicle accident, but had fully recovered prior to the January 18, 2003 incident.

³ On or about April 8, 2013 OWCP doubled File No. xxxxxx392 with the present claim, File No. xxxxxx924.

osteoarthritis of the right lower leg. Appellant remained off work following surgery. She received compensation on the periodic rolls.

In reports from February to April 2010, Dr. Krum opined that physical therapy aggravated appellant's degenerative lumbar disc disease, causing bilateral L4-5 radiculopathy. He administered a series of injections.

On November 4, 2010 the employing establishment offered appellant a modified carrier position, working fulltime casing mail. The job required two hours of standing, bending, simple grasping, and fine manipulation. Appellant returned to work for two hours a day casing mail on November 20, 2010 under File No. xxxxxx392. She continued working through April 14, 2011 with intermittent absences, then stopped work. Appellant returned to total disability.⁴

Effective March 16, 2011, OWCP expanded File No. xxxxxx392 to accept a temporary aggravation of L4-5 lumbosacral intervertebral disc disease.

On April 29, 2011 OWCP obtained a second opinion from Dr. Robert A. Smith, a Board-certified orthopedic surgeon. Dr. Smith noted that appellant believed a lumbar injury had been accepted, but the statement of accepted facts (SOAF) did not list a lumbar injury or condition. He opined that, regarding the right knee, appellant could perform full-time sedentary to light-duty work, with permanent restrictions. Dr. Smith diagnosed age-related lumbar degenerative disc disease, noting that the SOAF did not list an accepted lumbar injury or condition.

On May 9, 2011 appellant claimed a recurrence of disability (Form CA-2a) in File No. xxxxxx392, commencing April 14, 2011, as casing mail for two hours a day caused back and knee pain.⁵

Dr. Krum performed a right total knee arthroscopic synovectomy on October 4, 2011, authorized by OWCP.⁶ OWCP accepted a recurrence of total disability commencing October 4, 2011. Appellant received compensation for six hours a day.

In a December 14, 2011 report, an OWCP medical adviser opined that the change in gait pattern due to knee replacement had not aggravated appellant's lumbar disc disease. He

⁴ Following additional development, appellant received compensation for six hours a day under File No. xxxxxx924 and two hours a day under File No. xxxxxx392.

⁵ By decision dated May 13, 2011, OWCP denied appellant's claim for a consequential aggravation of a lumbar condition and for a recurrence of disability commencing April 15, 2011.

⁶ By decision dated November 30, 2011, it denied authorization of the October 4, 2011 procedure. In a December 12, 2011 letter, counsel requested a hearing. On March 8, 2012 an OWCP hearing representative set aside the November 30, 2011 decision, finding that the case was not in posture for a hearing pending a requested second opinion. OWCP obtained a second opinion from Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, who opined on April 10, 2012 that the October 4, 2011 surgery was directly related to the accepted injury. On June 12, 2012 it authorized the October 4, 2011 right knee arthroscopy as related to the January 18, 2003 right knee injury.

therefore found that OWCP should not change the accepted temporary aggravation of lumbar disc disease accepted under File No. xxxxxx392 to a permanent aggravation.⁷

Dr. Krum explained in a January 16, 2012 letter that postsurgical ileitis following the January 13, 2010 bilateral knee procedure delayed appellant's rehabilitation, causing core weakness that aggravated preexisting lumbar stenosis and caused bilateral lumbar radiculopathy.

On March 13, 2012 OWCP obtained a second opinion from Dr. Valentino, regarding the extent of the accepted right knee condition. Dr. Valentino opined that the accepted January 18, 2003 knee injury had resolved without residuals, asserting that the knee replacement was due to idiopathic degenerative arthritis and not any work incident. He checked a box indicating that appellant had reached maximum medical improvement. Dr. Valentino noted that appellant did not require any work restrictions due to the accepted right knee injury. He released appellant to full-time light-duty work.

In an August 2, 2012 report, Dr. Krum noted that he disagreed significantly with Dr. Valentino's finding that appellant could perform full-time light-duty work as he had "a difficult time with any periods of sitting or standing." Appellant continued to require periodic aspiration of the right knee and lumbar epidural injections.

On March 6, 2013 OWCP found a conflict of medical opinion between Dr. Krum, for appellant, and Dr. Valentino, for the government, regarding appellant's work capacity. To resolve the conflict, it selected Dr. Stanley Askin, a Board-certified orthopedic surgeon, as the impartial medical specialist. OWCP included a March 7, 2013 ME023 form. It advised Dr. Askin that, in addition to the right knee sprain, right wrist sprain, and aggravation of right knee osteoarthritis accepted under File No. xxxxxx924, OWCP had previously accepted other claims for a left knee sprain, aggravation of degenerative joint disease of the left knee, and aggravation of the L4-5 disc.

Dr. Walsh provided a work capacity evaluation (Form OWCP-5) dated March 11, 2013 finding appellant totally and permanently disabled for work due to constant severe pain, limited mobility, recurrent fluid accumulation in the right knee, and medication side effects.

Dr. Askin provided a March 28, 2013 report reviewing the SOAF and the medical record. He noted that appellant ambulated with a cane and walked with a limp. On examination Dr. Askin found surgical scars on both knees, a slight effusion in the left knee with full motion, restricted motion and effusion in the right knee, slight laxity in the right knee, and symmetrical reflexes of the knees and ankles. He opined that appellant had continuing right knee problems due to particulate synovitis. Dr. Askin commented that appellant's lumbar symptoms were due solely to age and that narcotic medications were not helpful or necessary. He found appellant was able to perform full-time, sedentary work with permanent restrictions limiting walking, standing, and climbing to one hour, and lifting to 10 pounds.

⁷ In a December 21, 2011 report, Dr. Douglas C. Sutton, an attending Board-certified orthopedic surgeon, noted that imaging studies showed "fairly severe disc space collapse at L4-5" with moderate central canal stenosis and moderate-to-severe lateral recess stenosis.

In an April 9, 2013 letter, counsel requested that OWCP verify that Dr. Askin was properly selected by providing the bypass screen captures and Form ME023. On April 9, 2013 OWCP imaged screen captures from Dr. Askin's selection process into the case record, documenting that OWCP bypassed one physician who evaluated only hand conditions, one physician who could not be reached and did not have an answering machine, and one physician who no longer practiced locally.

On July 11, 2013 Dr. Walsh restricted appellant from driving due to medication side effects.

As Dr. Askin opined that appellant could perform sedentary duty, OWCP referred appellant for vocational rehabilitation.

Appellant met with a vocational rehabilitation counselor on July 22, 2013. The counselor noted that, although appellant had graduated from high school, he had never learned to type and had no computer skills. Appellant worked for 15 years operating an envelope making machine, then for 21 years at the employing establishment. On September 23, 2013 the counselor performed a labor market survey of job opportunities in appellant's commuting area, and identified the positions of telephone sales representative (DOT No. 299.357-014) or information clerk (DOT No. 237.367-022) as reemployment goals. Both jobs were at the sedentary level, requiring occasional lifting up to 10 pounds, occasional reaching, no stooping, kneeling, crouching, or climbing. Both positions required specific vocational preparation three to six months, which appellant met through her work history. On September 24, 2013 it approved the vocational rehabilitation counselor's plan to place appellant with a new employer as an information clerk (Department of Labor, *Dictionary of Occupational Titles* (DOT) Code 237.367-022) or telephone sales representative (DOT No. 299.357.015). From October to December 2013, the counselor provided appellant job leads for 13 entry level positions in her commuting area. Appellant submitted job search logs.

On January 26, 2014 the counselor confirmed that entry level information clerk jobs remained readily available in appellant's commuting area, with wages of \$574.00 a week.

By notice dated March 14, 2014, OWCP advised appellant that it proposed to reduce her compensation benefits based on her projected earnings of \$574.00 a week in the selected position of information clerk. It found that the information clerk position was suitable work, within appellant's vocational abilities and the work restrictions provided by Dr. Askin. OWCP allowed 30 days for appellant to submit evidence and argument as to why the selected position was not suitable.

Counsel responded by March 21, 2014 letter, contending that appellant's physicians did not support that appellant was able to return to work as an information clerk. He provided a March 31, 2014 report from Dr. Walsh finding appellant totally and permanently disabled as the accepted right knee condition and surgery prevented her from sitting or standing for prolonged periods, and prescription medications prevented her from driving to or from work. Counsel asserted that there was a conflict of medical opinion evidence between Dr. Askin and Dr. Walsh regarding appellant's work capacity.

By decision dated May 15, 2014, OWCP finalized the March 14, 2014 notice, reducing appellant's compensation, effective June 1, 2014, based on her ability to earn \$574.00 a week in the selected position of information clerk. It affirmed that the position was within her vocational and medical capacities.

Counsel disagreed and, in a May 20, 2014 letter, requested a hearing. He submitted a March 27, 2014 letter from Dr. Walsh finding appellant totally and permanently disabled due to sequelae of her right knee injury and arthroplasty. Dr. Walsh noted that appellant was not able to sit or stand for prolonged periods, and could not drive due to medication side effects.

On September 23, 2014 the employing establishment offered appellant a position as a modified carrier technician for four hours a day, five days a week, with annual wages of \$59,654.00. The listed duties involved making and answering telephone calls, light data entry, and clerical duties. The job required intermittent sitting, standing, grasping, and pushing/pulling.

In a September 26, 2014 report, Dr. Walsh observed chronic swelling in the right knee that interfered with appellant's ability to stand and walk. He reviewed the employing establishment's job offer and opined that appellant was not "capable of consistently performing this job." Appellant would require frequent, unscheduled breaks and the ability to change positions freely. Dr. Walsh found appellant "completely and permanently disabled."

On October 3, 2014 appellant accepted the employing establishment's September 23, 2014 offer of a modified carrier technician position. She returned to work on approximately October 6, 2014.

At the hearing, held October 20, 2014, appellant explained that she had returned to work in the modified carrier technician position approximately two weeks earlier, as the employing establishment had warned that refusing the offer would negatively affect her compensation benefits. She noted difficulties with transportation, as she could not drive due to stiffness and swelling in her right knee. Appellant added that narcotic medication for knee and back pain interfered with her concentration and impaired her ability to process telephone calls at work. She contended that she could not sit for four hours a day. Counsel contended that OWCP failed to provide Dr. Askin medical records from File No. xxxxxx392 regarding the accepted back injury.

By decision dated December 5, 2014, an OWCP hearing representative affirmed the May 15, 2014 decision, finding that the selected position of information clerk properly represented appellant's wage-earning capacity, based on Dr. Askin's opinion as the weight of the medical evidence.⁸

⁸ On February 4, 2016 OWCP denied appellant's request to modify the May 15, 2014 wage-earning capacity decision. However, the Board acquired jurisdiction over this appeal on March 18, 2015. Therefore, the February 4, 2016 OWCP decision is null and void. The Board and OWCP may not have concurrent jurisdiction over the same issues in a case. See *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁹ 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 loss of wage-earning capacity.¹⁰ A 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. Compensation payments are based on the wage-earning capacity determination.¹¹

Section 8115 of FECA and OWCP regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.¹²

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹³ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁴ When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁵ Finally, application of the principles set forth

⁹ *James M. Frasher*, 53 ECAB 794 (2002).

¹⁰ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

¹¹ *See Sharon C. Clement*, 55 ECAB 552 (2004).

¹² 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 9.

¹³ *William H. Woods*, 51 ECAB 619 (2000).

¹⁴ *John D. Jackson*, *supra* note 9.

¹⁵ *Supra* note 11

in *Albert C. Shadrick*,¹⁶ as codified in section 10.403 of OWCP regulations,¹⁷ will result in the percentage of the employee's loss of wage-earning capacity.¹⁸

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁹

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.²⁰ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.²¹ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.²²

ANALYSIS

OWCP accepted that appellant sustained a right wrist sprain and right knee sprain necessitating total right knee arthroplasty under the present claim, File No. xxxxxx924. The record before the Board also demonstrates that OWCP accepted a left knee sprain/strain, aggravation of degenerative joint disease, and a temporary aggravation of L4-5 intervertebral disc disease under File No. xxxxxx392. Appellant received compensation for total disability beginning April 14, 2011. OWCP reduced her compensation effective May 15, 2014 based on its determination that the full-time position of information clerk represented her wage-earning capacity. It found that the opinions of Dr. Askin, a Board-certified orthopedic surgeon and impartial medical examiner, represented the weight of the evidence and established that appellant had the capacity to work as an information clerk.

¹⁶ 5 ECAB 376 (1953).

¹⁷ 20 C.F.R. § 10.403.

¹⁸ *Sharon C. Clement*, *supra* note 10.

¹⁹ *R.M.*, Docket No. 15-0368 (issued August 24, 2015); *John D. Jackson*, *supra* note 9.

²⁰ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

²¹ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

²² *Anna M. Delaney*, 53 ECAB 384 (2002).

To be an appropriate position for a wage-earning capacity determination under section 8115(a), the position must be medically and vocationally suitable.²³ The Board finds, however, that the case is not in posture for a decision regarding the medical suitability of the information clerk position.

In finding the job medically suitable, OWCP relied on Dr. Askin's March 28, 2013 report, finding appellant able to perform full-time sedentary work, with walking, standing, and climbing limited to one hour. Subsequent to this opinion, appellant submitted new, relevant reports from Dr. Walsh, appellant's treating physician. Dr. Walsh opined in March 11, 2013 and March 31, 2014 reports that appellant remained totally disabled due to the accepted right knee condition. Following issuance of the May 15, 2014 decision reducing appellant's compensation, Dr. Walsh further opined in a March 27, 2014 letter that the accepted right knee condition prevented appellant from sitting or standing for prolonged periods. He reiterated in a further September 26, 2014 report that appellant was permanently and totally disabled.

OWCP did not provide Dr. Askin with the new medical reports received from Dr. Walsh. The Board finds that Dr. Askin should be given the opportunity to review these reports and provide a supplemental report as to the suitability of the offered position. Once OWCP undertakes development of the record, it has the responsibility to do so in a proper manner.²⁴ Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

On appeal counsel contends that OWCP should utilize appellant's actual wages as a modified carrier technician to determine her wage-earning capacity, and not the selected information clerk position. As the wage-earning capacity determination is not in posture for decision, it is premature to address this argument.

Additionally, counsel argues that there is insufficient evidence that OWCP properly selected Dr. Askin as the impartial medical examiner, as there were no screen captures of record documenting his selection. The Board notes, however, that OWCP provided screen captures on April 9, 2013 describing the reasons that OWCP bypassed three physicians prior to Dr. Askin's selection. Counsel also contends that Dr. Askin's opinion cannot carry the weight of the medical evidence as he was not informed of the accepted back and left knee conditions under File No. xxxxxx392. The Board notes, however, that OWCP advised Dr. Askin of the accepted left knee and lumbar conditions, and that Dr. Askin addressed them in his report.

CONCLUSION

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

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816 (June 2013).

²⁴ See *Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for additional development consistent with this decision and order.

Issued: July 13, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board