



## **FACTUAL HISTORY**

OWCP accepted that on December 14, 1984 appellant, then a 33-year-old letter carrier, sustained a contusion of his left knee, sprain of his left medial collateral ligament and tear of his left medial meniscus when he slipped on steps at work. On April 28, 1987 a ledge of a case struck his right knee and this claim was accepted for several right knee conditions, including contusion, torn medial cartilage, arthritis and permanent aggravation of chondromalacia. OWCP authorized arthroscopic surgical procedures of both knees which were performed in July and October 1987, including left knee chondroplasty, removal of a shelf tear of the left posterior horn medial cartilage and bilateral medial cartilage repair. In May 1989, appellant was terminated by the employing establishment for falsifying medical documents pertaining to his medical condition.

In a decision dated December 15, 2000, OWCP adjusted appellant's compensation, effective December 15, 2000, based upon a determination that the constructed position of customer service clerk represented his wage-earning capacity. It determined that he was physically capable of performing the position based on the June 7, 2000 opinion of Dr. Alan H. Wilde, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.<sup>2</sup> Appellant's vocational rehabilitation counselor had determined that appellant was able to perform the position of customer service clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. By decision dated September 19, 2001, an OWCP hearing representative determined that the position of modified distribution clerk represented his wage-earning capacity. In a decision dated March 11, 2003,<sup>3</sup> the Board affirmed OWCP's September 19, 2001 decision, but modified the decision to reflect that appellant was capable of performing the position of customer service clerk. By decision dated June 8, 2005,<sup>4</sup> the Board denied his request for further review of the merits of his claim under 5 U.S.C. § 8128.

In a January 25, 2007 letter, appellant's counsel asserted that appellant was totally disabled and that he was due an increase in his compensation benefits. He suggested that OWCP's December 15, 2000 wage-earning capacity determination should be modified.

By decision dated September 23, 2008, OWCP denied modification of OWCP's December 15, 2000 wage-earning capacity determination. In a January 5, 2009 decision, an OWCP hearing representative set aside OWCP's September 23, 2008 decision and directed OWCP to undertake development of the claim to determine if there had been a change in the nature and extent of appellant's work-related condition.

In a decision dated December 10, 2010, OWCP accepted that the medical evidence showed that appellant had experienced a material worsening of his work-related condition

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<sup>2</sup> Dr. Wilde actually indicated that appellant could work as a modified distribution clerk, a position which required duties that were more strenuous than those required by the customer service clerk position.

<sup>3</sup> Docket No. 02-365 (issued March 11, 2003).

<sup>4</sup> Docket No. 05-423 (issued June 8, 2005).

effective April 14, 2009, but denied his entitlement to compensation for the period February 1, 2007 to April 13, 2009 as the medical evidence of record did not support entitlement to compensation for this period. The acceptance was based on an April 14, 2009 report of Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, who served as an OWCP referral physician.

In a March 9, 2011 decision, an OWCP hearing representative remanded the case to OWCP to obtain a supplemental report from Dr. Ghanma which provided a rationalized opinion, based on review of the medical evidence, regarding the date that appellant became totally disabled from the customer service clerk position due to a material worsening of his work-related condition. Following the referral to Dr. Ghanma for a supplemental report, OWCP was directed to issue a *de novo* decision on the period appellant was entitled to additional disability compensation benefits.

On March 10, 2011 OWCP wrote to Dr. Ghanma, provided him with appellant's medical records back to December 15, 2000 and requested that he provide a supplemental report regarding the date appellant became disabled from the customer service position based on a material worsening of his work-related condition. Dr. Ghanma responded per addendum report dated March 13, 2011, noting that he had reviewed the medical file and stating that there was no specific date of disability that could be arrived at based on the medical records. He noted that Dr. Wilde had examined and evaluated appellant on June 7, 2000 and had stated that appellant was not able to work on an unrestricted basis as a letter carrier, but that he could work as a modified distribution clerk. Dr. Ghanma indicated that the next medical information in the file was an October 25, 2004 report of Dr. Timothy J. Nice, an attending Board-certified orthopedic surgeon and indicated that Dr. Nice had opined that appellant was totally disabled. He advised that, judging from the evidence in the file, the date appellant became disabled from the clerk job was between the examination by Dr. Wilde in 2000 and the examination of Dr. Nice in 2004. Dr. Ghanma related that, if further specific medical information was made available, his opinion on disability could be refined and he noted that no information was in the file concerning the details of appellant's medical condition between June 7, 2000 and October 25, 2004.

OWCP asked Dr. Ghanma to provide further commentary as he did not discuss May 11 and September 17, 2004 reports of Dr. Michael M. Lew, an attending Board-certified orthopedic surgeon. Dr. Ghanma provided a report dated March 27, 2011, stating that there is no specific date of disability that could be arrived at based on these medical reports. He noted that the September 17, 2004 work restrictions form report did document that appellant had severe bilateral knee osteoarthritis and contained an opinion that he was totally disabled, but he pointed out that appellant had severe arthritis in 2000 as well. Dr. Ghanma noted that the September 17, 2004 report indicated that appellant also had nonwork-related pathologies, including severe obesity, peripheral edema, cellulitis and vascular insufficiency. He explained that Dr. Wilde indicated on June 7, 2000 that appellant presented to the office using a cane and was able to walk at about 80 feet, but that it was noted that surveillance tapes revealed that he was able to walk without a cane, carry a baby, carry a can of paint and carry a piece of plywood. Dr. Wilde had stated that appellant was not able to work as a letter carrier, but that he could work as a modified distribution clerk.

Dr. Ghanma further indicated that the May 11, 2004 report did not comment on appellant's work ability as specifically relating to worsening of his knee osteoarthritis, but rather noted that he would be a good candidate for knee replacement if he were able to lose weight, cure his diabetes and get rid of his peripheral edema and vascular insufficiency. He then reviewed an October 25, 2004 report of Dr. Nice, which indicated that appellant was totally disabled and that his knee conditions had worsened since his last evaluation. Dr. Nice cited x-rays which revealed progression of appellant's arthritis and noted that he was again ambulating with a cane. Appellant advised that Dr. Nice's October 25, 2004 report supported that he was disabled by October 25, 2004 due to a worsening of his work-related knee condition.

In a decision dated April 15, 2011, OWCP accepted that appellant's work-related condition materially worsened effective October 25, 2004 and found that he was entitled to disability compensation from October 25, 2004 to April 13, 2009. It found that he had established that the December 15, 2000 wage-earning capacity decision should be modified beginning October 25, 2004. OWCP denied appellant's entitlement to disability compensation from December 15, 2000 (the effective date of OWCP's wage-earning capacity determination) to October 24, 2004 because the medical evidence did not support this period of disability. Appellant had not established that the December 15, 2000 decision should be modified for this period.

By letter dated April 26, 2011, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative. At the August 2, 2011 telephone hearing, counsel argued that OWCP's December 15, 2000 wage-earning capacity determination was inappropriate because OWCP did not consider appellant's concurrent conditions and did not properly review the vocational counselor's determination regarding suitability and availability of the position selected to represent his wage-earning capacity.

In a September 27, 2011 decision, an OWCP hearing representative affirmed OWCP's April 15, 2011 decision finding that the evidence did not show a material worsening of appellant's work-related condition for the period December 15, 2000 to October 23, 2004 or that there was any other basis to modify the December 15, 2000 wage-earning capacity decision for this period.

### **LEGAL PRECEDENT**

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 and it remains undisturbed until properly modified.<sup>5</sup> OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless appellant requests resumption of compensation for total wage loss. In this instance the

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<sup>5</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

[claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”<sup>6</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.<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>

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>9</sup> 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 or to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor’s *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee’s capabilities with regard to his 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee’s loss of wage-earning capacity.<sup>10</sup>

### ANALYSIS

OWCP accepted that appellant sustained several work-related conditions in the 1980s, including a contusion of his left knee, sprain of his left medial collateral ligament, tear of his left medial meniscus, right knee contusion, torn right medial cartilage, right knee arthritis and permanent aggravation of right knee chondromalacia. In a decision dated December 15, 2000, it

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>7</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000). See also *id.* at Chapter 2.814.11 (June 1996).

<sup>8</sup> *Id.*

<sup>9</sup> See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a). Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

<sup>10</sup> See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also *supra* note 6 at Chapter 2.814.8 (December 1993).

adjusted his compensation, effective December 15, 2000, based upon a determination that the constructed position of customer service clerk represented his wage-earning capacity.<sup>11</sup>

Appellant later claimed that OWCP's December 15, 2000 wage-earning capacity determination should be modified. OWCP found that its December 15, 2000 determination should be modified effective October 25, 2004 because the medical evidence established that his injury-related condition had materially worsened by that date. However, it also found that appellant did not meet his burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted for the period December 15, 2000 to October 24, 2004. The Board finds that OWCP's determination was proper in this regard.

A review of the factual and medical evidence of record does not show that appellant experienced a material change in the nature and extent of the injury-related condition, that he was retrained or vocationally rehabilitated prior to October 25, 2004 or that the initial wage-earning determination of December 15, 2000 was, in fact, erroneous.

The record reflects that the selected position of customer service clerk fairly and reasonably reflected appellant's wage-earning capacity and that the original wage-earning determination was proper. A review of the medical evidence of record reflects that the case file does not establish that there was a material change in appellant's work-related condition prior to October 25, 2004.

OWCP based appellant's loss of wage-earning capacity on a determination that his wage-earning capacity was represented by wages he could earn in the constructed position of customer service clerk. Appellant did not submit evidence showing that OWCP's original determination with regard to his wage-earning capacity was erroneous. OWCP obtained medical evidence from Dr. Wilde, a Board-certified orthopedic surgeon serving as an impartial medical specialist, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of customer service clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the customer service clerk position and a review of the evidence reveals that he was physically capable of performing the position. Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the customer service clerk position.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the customer service clerk position represented his wage-earning capacity.<sup>12</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability,

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<sup>11</sup> In a March 11, 2003 decision, the Board affirmed OWCP's December 15, 2000 wage-earning capacity determination.

<sup>12</sup> See *Clayton Varner*, 37 ECAB 248, 256 (1985).

skill and experience to perform the customer service clerk position and that such a position was reasonably available within the general labor market of appellant's commuting area. The Board affirmed the December 15, 2000 wage-earning capacity determination in March 2003 and he did not submit evidence after that time showing that the December 15, 2000 determination was improper. For these reasons, appellant has not shown that OWCP's original determination with regard to his wage-earning capacity was erroneous.

Appellant alleged that there was a material change in the nature and extent of his employment-related condition between December 15, 2000 and October 24, 2004. However, this evidence does not contain a rationalized medical opinion explaining why an employment-related condition prevented him from performing the customer service clerk position between December 15, 2000 and October 24, 2004 and there is no indication in the record that OWCP improperly determined wage-earning capacity for this period.<sup>13</sup>

The record contains few medical reports produced between December 15, 2000 and October 24, 2004. Appellant's medical condition is discussed in May 11 and September 17, 2004 reports of Dr. Lew, an attending Board-certified orthopedic surgeon, but these reports do not clearly show a material worsening of appellant's injury-related condition that rendered him unable to work as a customer service clerk. The May 11, 2004 report did not comment on his work ability as specifically relating to worsening of his knee osteoarthritis, but rather noted that he would be a good candidate for knee replacement if he were able to lose weight, cure his diabetes and get rid of his peripheral edema and vascular insufficiency. The September 17, 2004 work restrictions form report did document that appellant had severe bilateral knee osteoarthritis and contained an opinion that he was totally disabled, but he had severe arthritis in 2000 as well and the report does not show a documented material worsening of an injury-related condition.<sup>14</sup>

Therefore, appellant has not shown a material change in his injury-related condition for the period December 15, 2000 and October 24, 2004. Moreover, as noted above, he has not been retrained or otherwise vocationally rehabilitated such that his work as a customer service clerk would not be representative of his wage-earning capacity.

For these reasons, appellant has not shown that modification of OWCP's wage-earning capacity decision was warranted for the period December 15, 2000 to October 24, 2004.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

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<sup>13</sup> See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

<sup>14</sup> OWCP asked Dr. Ghanma, a Board-certified orthopedic surgeon, who served as an OWCP referral physician, to indicate whether appellant suffered a material worsening of an injury-related condition, but he found that there was no evidence of such a material worsening prior to October 25, 2004.

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted for the period December 15, 2000 to October 24, 2004.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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