

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

T.W., Appellant)	
)	
and)	Docket No. 12-1162
)	Issued: December 19, 2012
U.S. POSTAL SERVICE, POST OFFICE, Reynoldsburg, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 2, 2012 appellant, through her attorney, filed a timely appeal of a December 21, 2011 merit decision and a January 12, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly denied a claim for a recurrence of disability on July 18, 2011 causally related to her January 23, 2002 employment injury; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On March 4, 2002 appellant, then a 46-year-old clerk, filed a traumatic injury claim alleging that she fell in the performance of duty on January 23, 2002 injuring her shoulder, arm

¹ 5 U.S.C. § 8101 *et seq.*

knee and head. In a letter dated March 27, 2002, Dr. Robert A. Durbin, a Board-certified orthopedic surgeon, noted appellant's fall and stated that her knee and shoulder pain had improved. OWCP accepted appellant's claim for left knee sprain, left knee contusion and left knee tendinitis on April 17, 2002. Dr. Durbin performed a left knee arthroscopy on May 24, 2002 and diagnosed a chondral flap separation in the medial femoral condyle. He performed an arthroscopy with arthroscopic lateral release of the left knee on July 11, 2003. OWCP accepted the additional conditions of left chondral flap separation and left hemarthrosis.

Appellant returned to limited-duty work on October 16, 2003. The employing establishment offered her a modified distribution clerk position on October 19, 2004 working from 6:30 a.m. to 3:30 p.m. with one hour for lunch. Appellant accepted this position and began working on November 13, 2004.

By decision dated August 1, 2005, OWCP reduced appellant's compensation benefits to zero based on a finding that the modified distribution clerk position fairly and reasonably represented her wage-earning capacity.

OWCP granted appellant, effective September 28, 2005, a schedule award for 10 percent impairment of the left lower extremity. It denied appellant's claim for an additional schedule award on December 5, 2009. By decision dated July 29, 2010, OWCP granted her a schedule award for an additional 20 percent impairment of her left lower extremity.

Appellant underwent a esophagogastroduodenoscopy (EDG) on December 16, 2009 due to heartburn. This test revealed mild reactive gastropathy with chronic inflammation and grade 2 esophagitis in the gastroesophageal junction. Appellant underwent additional testing on January 26, 2011 which included evidence of hepatitis A exposure in the past.

Dr. Durbin examined appellant on March 24, 2011 and noted her reports of bilateral shoulder and neck pain. He described her fall on January 23, 2002 and noted that she landed on her knees and braced her fall with both arms. Appellant reported a recent exacerbation of shoulder pain. She underwent magnetic resonance imaging (MRI) scans which revealed tears of her rotator cuffs bilaterally with some migration of her biceps tendon on the left side. Appellant also reported pain in her paracervical region and underwent an MRI scan which demonstrated some cervical spondylosis and disc bulging.

Appellant requested medical treatment for her neck and shoulders attributing her conditions to her January 23, 2002 fall. She stated that, although she had shoulder pain, the anti-inflammatory medication that she used controlled her symptoms. On February 24, 2011 appellant underwent an MRI scan of the right shoulder which demonstrated a full-thickness tear of the anterior portion of the supraspinatus tendon but no evidence of labral tear.

By decision dated May 4, 2011, OWCP denied appellant's request to expand her claim to include bilateral rotator cuff tears as causally related to her January 23, 2002 employment injury. Appellant requested reconsideration.

Appellant filed claims for compensation requesting wage-loss compensation from July 18 through 28, 2011 and August 15 through September 9, 2011. In a report dated July 14, 2011, Dr. Durbin examined her due to chronic knee pain secondary to osseous contusion related to a fall. Appellant noted that her liver functions were abnormal and that she had been advised to get

off all of her medication. He recommended that she limit her time on her feet and work only four to six hours a day. Dr. Durbin completed a report on July 29, 2011 and provided work restrictions of four hours a day due to knee pain to allow her to rest and elevate her knee to reduce inflammation. In a letter dated August 9, 2011, OWCP requested that appellant provide additional evidence in support of her claim for compensation.

Dr. Durbin completed a form report on August 8, 2011 and stated that appellant should limit the hours on her feet to help decrease inflammation and swelling.

In a letter dated August 23, 2011, appellant described her employment injury on January 23, 2002 and stated that she fell hitting her arm, shoulder and head. She stated that she had taken pain medication including Darvocet, Ibuprofen, Naproxen and Tramadol. Appellant stated that her knee remained swollen and that her shoulders had pained her since the injury, but were controlled due to her knee medications. She noted that her liver functions had changed due to her use of anti-inflammatories and that her physician advised her to reduce usage of these pain medications. Appellant attributed her severe knee pain, two torn rotator cuffs and bulging cervical disc to her employment injury in 2002.

Dr. Durbin completed a note dated August 25, 2011 and stated that appellant had persistent knee pain which was controlled with oral nonsteroidals (NSAID) and analgesic medication. He noted that she had liver abnormalities which were “most likely related to her chronic use of nonsteroidal medications.” Dr. Durbin stated that due to appellant’s inability to continue to use NSAID medications she was unable to perform her job duties. He recommended that she reduce her work hours from six hours to four hours a day with only one hour of standing. Dr. Durbin stated that appellant could sit for an unlimited period of time. He diagnosed chronic knee pain and abnormal liver functions due to treatment of chronic knee pain.

By decision dated September 2, 2011, OWCP denied appellant’s request for reconsideration finding that she failed to submit relevant new evidence to establish total disability due to her accepted conditions.

Appellant submitted a report dated September 6, 2011 from Dr. Kevin Granger, a chiropractor, diagnosing cervical spine degeneration due to her 2002 employment injury.

On January 2, 2010 Dr. Madhu Mehta, a Board-certified rheumatologist of professorial rank, diagnosed advanced osteoarthritis of the left knee and gastritis secondary to NSAIDs. He noted that appellant had elevated liver enzymes and was advised to “slow down” on most of her medications including NSAIDs. Dr. Mehta recommended knee replacement.

By decision dated September 21, 2011, OWCP denied appellant’s claim for recurrence of disability beginning July 18, 2011. It found that Dr. Durbin did not provide medical rationale explaining why appellant could not work a full day with restrictions of alternating sitting and standing.

Appellant requested reconsideration on October 6, 2011. In a letter dated October 3, 2011, she stated that she could no longer use pain medication and therefore no longer work full time. Appellant stated that based on her physician’s reports she could only work four hours a day.

Dr. Durbin completed a report on October 21, 2011 and noted appellant's history of injury in 2002. He noted that appellant had used Darvocet and Ibuprofen to manage her pain, but had recently been diagnosed with elevated liver enzymes and taken off all her medications. Without medication appellant reported increased pain which made it extremely difficult for her to perform her work duties. Dr. Durbin found that appellant had no true knee instability, but some soft tissue swelling with full range of motion in her knees. He noted that meniscal grind maneuvers were unremarkable and that she had normal muscle strength in her lower extremities with normal sensation. Dr. Durbin diagnosed chronic pain of the left knee following arthroscopic lateral release. He stated that appellant was disabled due to her inability to take pain medication.

By decision dated December 21, 2011, OWCP denied modification of appellant's recurrence of disability claim. It found that the medical evidence did not establish a change in the nature and extent of appellant's work-related condition.

Counsel requested an oral hearing before an OWCP hearing representative on December 27, 2011. By decision dated January 12, 2012, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration and received a decision on her reconsideration request on December 21, 2011. The Branch of Hearings and Review stated that under these circumstances appellant was not entitled to a hearing on the same issue as a matter of right. The Branch of Hearings and Review further found that the case could equally well be addressed through the reconsideration process with new evidence establishing her total disability beginning July 18, 2011.

LEGAL PRECEDENT -- ISSUE 1

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.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴

Modification of a standing wage-earning capacity 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 erroneous.⁵ OWCP's procedures provide 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. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

³ *K.R.*, *supra* note 2; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁴ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

capacity.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a left knee sprain, left knee contusion and left knee tendinitis as a result of her fall on January 23, 2002 in the performance of duty. Appellant also underwent left knee arthroscopy on May 24, 2002 due chondral flap separation in the medial femoral condyle. OWCP accepted the additional conditions of left chondral flap separation and left hemarthrosis. Appellant returned to work on November 13, 2004 and OWCP found that this position fairly and reasonably represented her wage-earning capacity on August 1, 2005.

Appellant filed a claim for compensation beginning July 18, 2011 and alleged that she could no longer perform her work duties. OWCP determined that the issue was whether she sustained a recurrence of disability. As there is an August 1, 2005 loss of wage-earning capacity determination in place, OWCP was obligated to evaluate the evidence to determine if modification of the loss of wage-earning capacity was warranted.⁹ As noted above appellant's entitlement to compensation is based on the loss of wage-earning capacity determination and it remains undisturbed until modified.

On remand, OWCP must evaluate the record to determine whether appellant had established a modification of the loss of wage-earning capacity issued by decision of OWCP on August 1, 2005. After this and such further development of these issues as it deems necessary, OWCP should issue a *de novo* decision on appellant's claims for compensation.¹⁰

CONCLUSION

The Board finds that the case is not in posture for a decision on whether appellant's disability commencing on July 18, 2011 is compensable.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

⁷ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁸ *K.R.*, *supra* note 2; *K.R.*, Docket No. 09-28 (issued September 16, 2009); *Debbie A. Titus*, Docket No. 05-360 (issued June 3, 2005).

⁹ *See C.S.*, Docket No. 12-626 (issued September 20, 2012); *Katherine T. Kreger*, 55 ECAB 633 (2004). The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the loss of wage-earning capacity determination. *See also Sharon C. Clement*, *supra* note 4.

¹⁰ Due to the disposition of OWCP's December 21, 2011 decision, the second issue of whether OWCP's BH&R properly denied appellant's request for an oral hearing is moot and will not be addressed in this decision of the Board.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2012 and December 21, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further development consistent with this decision of the Board.

Issued: December 19, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board