



finding that his actual earnings as a full-time customer service representative effective November 1, 2007 fairly and reasonably represented his wage-earning capacity.<sup>2</sup> The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

On March 29, 2009 appellant filed a claim for intermittent wage loss beginning January 29, 2009. In a progress report dated January 29, 2009, Dr. Lloyd E. Witham, an attending Board-certified orthopedic surgeon, noted that appellant experienced fatigue after working 40 hours a week and recommended that he reduce his hours to 30 per week to “allow rest of infected areas of injuries and reduce inflammation residuals.” On April 20, 2009 he discussed appellant’s complaints of discomfort in his lower extremities and noted that he wanted to decrease his work hours to 20 per week. Dr. Witham related that the reduction in work hours was “not discouraged.”

By decision dated May 5, 2009, OWCP denied modification of its January 23, 2008 wage-earning capacity determination.

On May 11, 2009 appellant requested reconsideration. He argued that the medical evidence supported that his condition had worsened. Appellant submitted an April 30, 2009 magnetic resonance imaging (MRI) scan study of the right knee showing changes in the interbody meniscus and marrow edema in the anterolateral tibial plateau. In a report dated May 11, 2009, Dr. Witham reviewed the MRI scan study findings of a loss of articular cartilage and edema. He recommended that appellant “continue with his 20[-]hour workweek to lessen the stress of this knee” and wear a brace.

In a decision dated June 5, 2009, OWCP denied modification of its May 5, 2009 decision. It noted that Dr. Witham did not address whether appellant’s right knee condition was related to the 1982 work injury or due to new exposure.

On June 24, 2009 appellant requested reconsideration. In a July 2, 2009 nonmerit decision, OWCP denied his request for reconsideration after finding that the evidence submitted was insufficient to warrant reopening the case for further merit review.

On July 13, 2009 appellant again requested reconsideration.<sup>3</sup> By decision dated September 11, 2009, OWCP reviewed the merits of the case and denied modification of its January 23, 2008 wage-earning capacity determination.

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<sup>2</sup> Docket No. 08-1148 (issued March 13, 2009). OWCP accepted that on June 16, 1982 appellant, then a 30-year-old heavy mobile equipment operator, sustained a crush injury of the left leg with comminuted fractures of the tibial plateau and ankylosis of the left ankle, foot and toes and left leg atrophy. It further accepted as a consequential injury a right medial meniscal tear and right knee osteoarthritis. Appellant resumed work in 1984 and retired on disability in October 1994. On November 21, 2000 he returned to work as a data entry clerk but resigned on May 18, 2001. OWCP paid him compensation benefits beginning April 20, 2002. It referred appellant for vocational rehabilitation in 2007 and on November 1, 2007 he began work as a customer service representative.

<sup>3</sup> In a June 22, 2009 progress report, Dr. Witham attributed appellant’s right knee arthritis to the June 16, 1982 work injury or surgery. He stated, “Because of the severe injury about the left leg, this has caused him to overuse the right lower extremity and put more wear on all joints, especially noted at the knee joint.” Appellant submitted chart notes dated June 29 and July 6, 2009 from Dr. Witham, who injected appellant’s right knee on both dates.

In a report dated October 19, 2009, Dr. Timothy P. Lovell, a Board-certified orthopedic surgeon, discussed appellant's 1982 crush injury. He listed findings on examination and stated, "Because of his severe left leg injury it is reasonable in my judgment that he decrease his work to 20 hours per week and again avoid prolonged standing or walking."

On October 28, 2009 appellant requested reconsideration. He argued that he was unable to work full time because of his pain and discomfort of the left leg and right knee.

By decision dated January 25, 2010, OWCP denied modification of its September 11, 2009 decision.

In a report dated April 21, 2010, Dr. H. Graeme French, a Board-certified orthopedic surgeon, reviewed appellant's history of injury of a crush injury to his left leg with a nerve and vascular injury. He noted that the leg was "salvaged" but that appellant had chronic coldness and had "multiple tenotomies performed on his left foot to control his clawing from his compartment syndrome." Dr. French discussed appellant's current employment working 75 percent of the time as a driver and 25 percent of the time at the counter. On examination he found "reddish color changes in the foot and no palpable pulses on the left...." Dr. French recommended postponing treatment of the left leg "because [appellant] is likely to end up with a below-knee amputation." He further recommended as part of the evaluation of appellant's crush injury, an MRI scan study of the lumbar spine due to his chronic limp and spondylitic changes. Dr. French asserted that appellant should reduce his work hours to 10 or less per week and stated, "I think that, with the combination of aging and the natural progression of his injuries, it would be unlikely that he would be able to do any work if he had to stand or walk on more than a rare occasion."

On June 9, 2010 Dr. French diagnosed right knee osteoarthritis, a possible torn meniscus and right sciatica. He noted that appellant was working 10 hours per week and that his "nerve symptoms in his legs are basically totally intolerable if he work[s] any more than 10 hours of work. I would recommend taking him off work until we have his diagnostic workup complete. The reason for loss of function (being able to work) is the natural progression of symptoms caused by his original work injury."

On July 21, 2010 Dr. French diagnosed right piriformis syndrome due to appellant's injury to his lower extremities and sensory loss in the feel and misalignment of the legs due to his injuries. In a form report dated July 21, 2010, Dr. French diagnosed right knee osteoarthritis and a sciatic nerve injury and checked "yes" that the condition was caused or aggravate by employment. He found that appellant was totally disabled beginning June 10, 2010.

On July 30, 2010 appellant requested reconsideration. In a report dated September 1, 2010, Dr. French diagnosed bilateral foot neuropathy, right knee arthritis and right sciatica and back pain. He attributed the sciatica, which he found to be piriformis syndrome, to overuse of his right leg to compensable for the severe left leg impairment. Dr. French also attributed appellant's degenerative lumbar changes to his injury. He concluded, "The natural progression of [appellant's] work injury and his aging have resulted in severe progression of his impairments. [Appellant] has been able to work for decades after he was presumable completely disabled, and I think he is now, in fact, disabled from reasonably continuous employment."

In a report dated October 13, 2010, Dr. French diagnosed bilateral foot neuropathy with “impending ulceration in both feet from his nerve injuries that occurred in both extremities at the time of his 1982 accident,” right sciatica, right knee arthritis. In a work restriction evaluation of the same date, he found that appellant was unable to work and provided physical limitations.

By decision dated October 28, 2010, OWCP denied modification of its September 11, 2009 decision.

On December 15, 2010 Dr. French related appellant’s sciatic to his work injury and found that he was disabled from employment. On January 26, 2011 he reviewed an electromyogram (EMG) and nerve conduction velocity (NCV) study and diagnosed a lesion of the right medial popliteal nerve, an injury to the femoral nerve of the right hip, a lesion of the right saphenous femoral nerve, a lesion of the right lateral popliteal nerve and an injury to the sciatic nerve right more than left with piriformis syndrome.

On January 27, 2011 appellant requested reconsideration. By decision dated April 7, 2011, OWCP modified its October 28, 2010 decision and expanded appellant’s claim to include bilateral sciatica. It further found that he was entitled to compensation for total disability beginning October 13, 2010. OWCP set aside the January 23, 2008 wage-earning capacity decision effective October 13, 2010. It found, however, that appellant had not established that he was unable to perform the duties of a customer service representative position prior to October 13, 2010.

On appeal appellant argues that his physicians decreased his work hours beginning January 2009 and that OWCP should expand acceptance of his disability to include the claimed periods prior to October 13, 2010.

### **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.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</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>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

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<sup>4</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>5</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>6</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>7</sup> *Id.*

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>8</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained a crush injury of the left leg with comminuted fractures of the tibial plateau, left ankle ankylosis and atrophy of the left ankle, foot and toes. It also accepted that he experienced a right medial meniscal tear and osteoarthritis of the right knee as a consequential injury.

The Board affirmed OWCP's January 23, 2008 reduction of appellant's compensation based on its finding that his actual earnings as a full-time customer service representative beginning November 1, 2007 fairly and reasonably represented his wage-earning capacity. Appellant subsequently began working as a driver/courier. He filed a claim requesting compensation for wage loss as of January 29, 2009. In reports dated January 29, April 20 and May 11, 2009, Dr. Witham recommended reduced work hours. On October 19, 2009 Dr. Lovell found that it was reasonable for him to work 20 hours per week given his extensive left leg injury.

In a report dated April 21, 2010, Dr. French discussed appellant's history of a June 16, 1982 left leg crush injury. He recommended delaying treatment of the left leg given the likelihood that it would result in an amputation below the knee. Dr. French reviewed appellant's work as a driver and behind a counter and opined that he was unable to perform work that required standing or walking more than on a rare occasion and asserted that he should reduce his hours to 10 or less.

In reports dated June 9, 2010, Dr. French diagnosed right knee osteoarthritis, a possible torn meniscus and right sciatica. He found that appellant should not work and attributed his disability to the "progression of symptoms caused by his original work injury." In a form report dated July 21, 2010, Dr. French diagnosed right knee osteoarthritis and a sciatic nerve injury due to employment and asserted that appellant was totally disabled beginning June 10, 2010. On September 1, 2010 he diagnosed sciatica which arose as a consequential injury. Dr. French advised that appellant was totally disabled from employment due to the progression of his work injury and aging and completed an October 13, 2010 work restriction evaluation. On January 26, 2011 he diagnosed multiple nerve impairments by EMG and NCS. Based on Dr. French's October 13 and January 26, 2011 reports, OWCP expanded acceptance of the claim to include a bilateral sciatic nerve condition. It further modified the established wage-earning capacity effective October 13, 2011, finding that appellant was entitled to compensation for total disability after that date.

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<sup>8</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>9</sup> 20 C.F.R. § 10.121.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>10</sup> In a report dated April 21, 2010, Dr. French reviewed appellant's job duties and opined that he was unable to work more than 10 hours per week due to the effects of his employment injury combined with aging. He based his opinion on a thorough review of the history of injury and findings on physical examination. Dr. French further rendered an opinion on disability consistent with the physical findings. While he did not directly address the issue of when appellant became disabled, his undisputed, supportive opinion is sufficient to require OWCP to further develop the issue of whether the established wage-earning capacity determination should have been modified prior to October 13, 2010.<sup>11</sup> Accordingly, the Board will remand the case to OWCP. On remand, it should request that Dr. French address whether appellant was disabled from work as a customer service representative prior to October 13, 2010. Following this and such further development as deemed, it shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant has established that the January 23, 2008 wage-earning capacity determination should be modified prior to October 13, 2010.

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<sup>10</sup> See Phillip L. Barnes, 55 ECAB 426 (2004); Jimmy A. Hammons, *supra* note 8.

<sup>11</sup> See Penelope C. Owens, 54 ECAB 684 (2003); John J. Carlone, 41 ECAB 354 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 7, 2011 decision of the Office of Workers' Compensation Programs is set aside on the issue of whether the January 23, 2008 loss of wage-earning capacity decision should be modified prior to October 13, 2010 and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 7, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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