

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

P.M., Appellant)
and) Docket No. 12-825
DEPARTMENT OF DEFENSE, DECA) Issued: November 6, 2012
SOUTHWEST REGION, Fort Lee, VA,)
Employer)
_____)

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2012 appellant filed an appeal of a February 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a February 16, 2007 wage-earning capacity determination.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that OWCP's February 16, 2007 loss of wage-earning capacity (LWEC) determination should be modified; and (2) whether OWCP should expand her claim to include stress, depression and back conditions.

¹ On August 29, 2012 the Board received correspondence from appellant indicating her disagreement with an overpayment decision issued subsequent to the filing of the instant appeal. This matter will proceed before the Board in a separate appeal.

² 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This is appellant's second appeal to the Board. By decision dated November 5, 2010, the Board determined that appellant's July 3, 2009 claim for total disability compensation commencing December 20, 2007 should not be treated as a request for reconsideration but constituted a request for modification of a February 16, 2007 wage-earning capacity determination, which found that she could work in the selected position of a billing clerk. The Board set aside OWCP's October 27, 2009 finding that appellant had filed an untimely request for reconsideration and remanded the case for OWCP to evaluate whether modification of the February 16, 2007 wage-earning capacity determination was warranted.³ The facts of the case as set forth in the Board's prior decision are incorporated by reference herein.

In an April 14, 2008 report, Dr. Norman Kane, a treating Board-certified orthopedic surgeon, noted that appellant had bilateral knee pain and that left knee pain worsened. The examination of bilateral knees was unchanged with tenderness in the left knee medial joint line and mildly positive Finkelstein's test. Dr. Kane opined that appellant was totally disabled and recommended a magnetic resonance imaging (MRI) scan of the left knee. In a July 31, 2008 report, Dr. Kane evaluated appellant's right wrist and left knee. Examination showed full range of motion. MRI scan results revealed no meniscal tear, mild medial bursitis and a slight patella alta with a Grade II patellofemoral cartilage thinning. Right knee arthroscopy was recommended. Dr. Kane also noted that appellant was having pain and discomfort in the right forearm, but opined that the symptoms did not warrant any surgery of the right wrist. On May 29, 2009 appellant underwent a right knee arthroscopy to repair tears of the medial and lateral menisci. OWCP began paying appellant total disability compensation as of May 29, 2009.⁴

Subsequent reports from Dr. Kane indicated that appellant was totally disabled beginning May 29, 2009, due to the right knee surgery. In a May 27, 2009 disability report, Dr. Kane stated that she was totally disabled from December 20, 2007 to June 5, 2009 with a right knee injury. In his July 21, 2009 report, he reported on appellant's right knee and right wrist conditions and reported that she was working from home. In his January 8, 2010 and February 24, 2011 reports, Dr. Kane continued to report on her right knee symptoms and ongoing treatment. On January 8, 2010 he opined that there was no change in appellant's disability status.

In a January 13, 2010 report, Dr. Andrew P. Hartman, a Board-certified orthopedic surgeon and associate of Dr. Kane, reported symptoms and examination findings of appellant's right wrist condition. He opined that she was capable of returning to modified work with no

³ Docket No. 10-340 (issued November 5, 2010). Appellant had a January 3, 1996 work injury that OWCP accepted for a right wrist contusion, right de Quervain's tendinitis, right carpal tunnel syndrome and a consequential right knee condition. She has not worked since May 2007. In November 2007, appellant requested that her claim be expanded to include a back condition and on December 3, 2007, she claimed a recurrence of disability. In early November 2007, she was involved in a nonwork-related motor vehicle accident.

⁴ On November 13, 2008 OWCP accepted the additional condition of precipitation of right knee degenerative disease and approved the requested surgery.

forceful gripping, grasping, pushing, or pulling with the right hand and no lifting greater than five pounds. In the January 13, 2010 report and in an April 14, 2010 report, Dr. Hartman recommended right wrist surgery.

In a March 9, 2011 decision, OWCP denied modification of its February 16, 2007 wage-earning capacity decision and consequently denied appellant's claim for compensation beginning May 2007.

On June 18, 2011 appellant requested reconsideration of the March 9, 2011 decision. She stated that her knee was not injured in the November 15, 2007 motor vehicle accident. Appellant noted that Dr. Hartman placed her in a permanent and stationary status on May 11, 2011 but, until that date, she was totally disabled while authorization for her right wrist surgery was pending approval. She stated that due to stress and depression she had to go the emergency room at Tri-City Hospital and requested that the conditions of stress and depression be included in her claim. Appellant argued that she could not work at all in any position, including the constructed billing clerk position, from December 2007 through May 2009, and requested modification of the wage-earning capacity decision as her accepted work-related injuries had worsened. In a July 25, 2011 letter, she also requested that OWCP expand her claim to include her neck and back conditions.

Medical evidence included a November 15, 2007 report from Dr. Michael Alaynick, an emergency medicine physician from Tri-City Medical Center, who diagnosed acute exacerbation of chronic sciatica, status post motor vehicle accident. Dr. Alaynick noted that appellant had preexisting chronic back pain and hypertension and depression. He noted that she stated that her chronic back pain was aggravated by a motor vehicle accident. In an April 14, 2008 report, Dr. Kane opined that appellant was totally disabled from April 14 to May 12, 2008 due to right knee tricompartmental osteoarthritis and right wrist injury. On May 22, 2009 he stated that she was totally disabled from May 22 to June 5, 2009. Dr. Kane noted that right knee surgery was scheduled on May 29, 2009. Thereafter, he found appellant disabled from May 29 to October 16, 2009. On October 15, 2009 Dr. Kane noted that she was permanent and stationary. On November 4, 2009 Dr. Hartman opined that appellant was partially disabled due to her right wrist from December 4 to 16, 2009 and could work with restrictions. Dr. Kane reported that she was totally disabled from February 24 to July 22, 2011. On May 11, 2011 Dr. Hartman opined that appellant was permanent and stationary with regard to her right wrist and could return to modified work with restrictions. On May 26, 2011 Dr. Edward Ferrer, a Board-certified family practitioner, diagnosed cervicalgia and placed appellant off work from May 26 through 27, 2011.

On August 5, 2011 OWCP referred appellant to Dr. William Curran, a Board-certified orthopedic surgeon, for a second opinion to determine the relationship between her claimed conditions and factors of employment. Dr. Curran was also asked to address whether she was capable of working as a billing clerk during the period May 12, 2007 through May 28, 2009 prior to her May 29, 2009 right knee arthroscopic surgery and also her period of total disability after her May 29, 2009 right knee arthroscopic surgery. He was provided a copy of the billing clerk job description.

In an August 22, 2011 report, Dr. Curran noted the history of injury and that appellant last worked May 12, 2007. He stated that, while her records indicate a back injury on May 12, 2007, there was no record of that injury. Dr. Curran provided examination findings and diagnosed postoperative release of first dorsal compartment, right wrist; postoperative release of right carpal and canal of Guyon, right wrist; right lateral epicondylitis; congenital lunotriquetral coalition, right wrist; postoperative diagnostic and operative arthroscopy, right knee times three; osteoarthritis, right knee and lumbar strain aggravated by right knee osteoarthritis condition by gait alteration. He opined that the diagnosed back condition was medically connected by aggravation due to appellant's gait alteration due to her right knee osteoarthritis and was minimally symptomatic and temporary in nature. Dr. Curran noted that her subjective back complaints were not corroborated by objective findings and that he was unable to state when the aggravation would cease. He opined that the May 29, 2009 right knee arthroscopy allowed appellant to return to work during the period May 12, 2007 through May 28, 2009 as she was working during that time span with her complaints controlled with medical management and work modifications. Dr. Curran further opined that, after the May 29, 2009 right knee arthroscopy, she was temporarily and totally disabled from work through July 12, 2011. He stated that the prognosis to the right wrist was good and, if appellant's condition should worsen, the type of surgery should be left to her and her surgeon. Dr. Curran noted that he did not have the opportunity to review the job description of a billing clerk and therefore was unable to comment on whether she was capable of performing those duties. In an August 23, 2011 work capacity evaluation, he opined that appellant was able to work a six-hour day with permanent restrictions based on the diagnosed osteoarthritis of right knee and torn cartilage of the right wrist.

Dr. Kane continued to report on the condition of appellant's right knee, which was noted to have severe osteoarthritis be totally disabling. A total knee replacement was recommended. On September 26, 2011 an OWCP medical adviser reviewed the evidence and opined that, while surgery may be reasonable, another second opinion examiner should review the case given appellant's young age for a total knee replacement and the fact that the second opinion examiner did not address the case regarding future knee surgery in his August 2011 report. On January 9, 2012 Dr. Kane performed a right total knee replacement. Progress reports were submitted regarding appellant's condition.

By decision dated February 14, 2012, OWCP denied modification of the March 9, 2011 decision as the evidence failed to establish that appellant sustained a material change in her accepted work-related conditions during the period December 20, 2007 through May 28, 2009. It further denied her request to expand her case as the evidence was insufficient to support that her back, stress and depression conditions were work related.

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.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination. This narrow exception is only applicable for brief periods of medical disability.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right wrist contusion, right de Quervain's tendinitis, right carpal tunnel syndrome and a consequential right knee condition. On February 16, 2007 it found the constructed position of billing clerk fairly and reasonably represented her wage-earning capacity. Appellant has not worked since May 2007. She underwent authorized de Quervain's release surgery on July 18, 1996, right knee arthroscopy on May 26 and October 6, 1999, right carpal tunnel release and Guyon's canal release on December 22, 2000 and right knee arthroscopy on May 29, 2009.¹⁰

Appellant requested compensation for total disability beginning May 2007 asserting that she was unable to work as a result of her January 3, 1996 work injury. She did not contend and the evidence does not reflect that the original wage-earning capacity determination was in error or that she was retrained or otherwise vocationally rehabilitated. OWCP found that, although appellant was working 34 hours a week as a sales clerk beginning on October 27, 2006, she was medically capable of working eight hours a day, 40 hours a week in the constructed billing clerk position. Appellant stopped working entirely in May 2007. The relevant issue, consequently, is whether she has established that the February 16, 2007 wage-earning capacity determination should be modified. The medical evidence must establish that appellant sustained a material change in her condition such that she was unable to perform the constructed billing clerk which OWCP found represented her wage-earning capacity.

⁵ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ K.R., Docket No. 09-415 (issued February 24, 2010).

¹⁰ She also underwent a total right knee replacement on January 9, 2012, which OWCP has not yet authorized.

As noted, appellant had authorized right knee surgery on May 29, 2009, in which she began receiving compensation for total temporary disability caused by the surgery. Thus, she is seeking compensation for the period May 2007 through May 29, 2009. Appellant did not, however, submit evidence containing a rationalized medical opinion explaining why she was unable to work beginning May 2007 in the constructed billing clerk position due to a change in her January 3, 1996 work injury.

Multiple reports were received from Dr. Kane. In his December 20, 2007 report, Dr. Kane attributed appellant's work stoppage to low back pain sustained in a nonwork-related motor vehicle accident two weeks prior which did not cause injury to her knee. He also noted that she had a recurrence of her right knee pain and right wrist pain and that her conditions precluded her from performing the regular duties as a cashier due to prolonged typing and standing. In other reports, Dr. Kane attributed appellant's disability status to the combined effects of her knee, wrist and back conditions, her right knee condition or merely reported that she was temporarily totally disabled. In his January 8, 2008 report, he opined that the combined effects of her conditions precluded her from performing the regular duties of a store worker. In his April 14, 2008 report, Dr. Kane stated that appellant was totally disabled from April 14 to May 12, 2008 due to right knee osteoarthritis and right wrist injury. In his October 27, 2008 report, he explained why the requested right knee arthroscopy was due to her original injury. Dr. Kane did not, however, address whether appellant was disabled from performing the selected billing clerk position from December 20, 2007 through May 29, 2009. In other reports, he indicated that she was totally disabled prior to and after the knee surgery of May 29, 2009. In his August 11, 2009 report, Dr. Kane stated that appellant had been totally disabled since December 2007 as it took almost a year and a half to authorize the right knee surgery and she was unable to perform her regular duties during that period. In a September 1, 2009 report, he opined that she remained totally disabled because of the combined effects of appellant's back, right wrist, shoulder and right knee conditions. In his October 15, 2009 report, Dr. Kane reported that appellant could perform her regular duties with restrictions on her right knee but was not working as a result of her right upper extremity conditions and a nonindustrial back injury. However, he did not specifically find that she was unable to perform her constructed position of billing clerk but instead merely noted that she was on permanent disability due to several conditions. As Dr. Kane did not address whether appellant's condition materially changed such that she could not perform the position of billing clerk, his opinion does not establish a basis for modifying the wage-earning capacity determination.¹¹

In his January 13 and April 14, 2010 reports, Dr. Hartman recommended right wrist surgery but found appellant capable of returning to modified work with restrictions. He did not address the period in question or offer any opinion to explain how or why her work restrictions changed. Medical conclusions unsupported by rationale are of diminished probative value.¹²

¹¹ See *Elbert Hicks*, 55 ECAB 151 (2003).

¹² *Jacqueline L. Oliver*, 48 ECAB 232 (1996).

While the record contains medical evidence from appellant, none of the medical evidence contains an opinion on their causal relationship to the accepted work injury or attributes such conditions to her disability during the period December 20, 2007 through May 29, 2009.

OWCP referred appellant to Dr. Curran to address appellant's disability status from 2007 through 2009 and to discuss whether she was capable of working as a billing clerk during the stated period due to her work-related conditions. Dr. Curran, however, failed to offer clear opinions to OWCP's questions within the framework of the statement of accepted facts. His opinion that May 29, 2009 right knee arthroscopy allowed appellant to return to work during the period May 12, 2007 through May 28, 2009 is not logically explained. Furthermore, contrary to the medical record and statement of accepted facts, Dr. Curran stated that appellant was working during the period May 12, 2007 through May 28, 2009. Despite being provided a copy of the billing clerk job description, he failed to offer an opinion as to whether appellant could perform her duties as a billing clerk during the period May 12, 2007 through May 28, 2009 as he stated that he did not have an opportunity to review the billing clerk job description. As OWCP undertook development of the issues of appellant's disability status from 2007 through 2009 and whether she was capable of working as a billing clerk during the stated period due to her work-related conditions by referring appellant to Dr. Curran for a second opinion, it has the obligation to secure a report that would resolve the relevant issues in the case.¹³ For this reason, the Board finds that the case is not in posture for decision as to whether OWCP's February 16, 2007 LWEC decision should be modified as a supplemental opinion is required from Dr. Curran.

LEGAL PRECEDENT -- ISSUE 2

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁴ To establish a causal relationship between the condition claimed, as well as any attendant disability, and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.¹⁵ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁶ Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based

¹³ See *Melvin James*, 55 ECAB 406 (2004) (once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010) (OWCP has a duty to seek clarification from a second opinion physician where the second opinion physician does not address the specified medical issues). See also *Mae Z. Hackett*, 34 ECAB 1421 (1983) wherein the Board has held that, once OWCP begins to develop the medical evidence, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.

¹⁴ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁵ *Jennifer Atkerson*, 55 ECAB 317 (2004).

¹⁶ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by rationalized medical evidence explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁷ Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.¹⁸

ANALYSIS -- ISSUE 2

Appellant requested that OWCP expand her claim to include her back, stress and depression conditions.

While some medical reports mention stress and depression, there is no medical opinion supporting that stress and depression are causally related to appellant's accepted conditions. Thus, appellant has not established the conditions of stress and depression should be included in her claim.

Regarding the claimed back condition, Dr. Alaynick's November 15, 2007 report diagnosed acute exacerbation of chronic sciatica, status post motor vehicle accident. However, the medical record makes no mention of a back condition before Dr. Alaynick's report. Additionally while Dr. Kane mentions in his notes that appellant was being treated for a back condition, the record does not contain medical evidence regarding her treatment of a back condition before the November 2007 motor vehicle accident or the May 29, 2009 right knee arthroscopic surgery.

Dr. Curran opined in his August 22, 2011 report that appellant's lumbar strain was medically connected by aggravation due to her gait alteration due to her right knee osteoarthritis and was minimally symptomatic and temporary in nature. While he offers some support for claim expansion on the back condition, he also stated that her back complaints were not corroborated by objective findings and he was unable to state when the aggravation would cease. A supplemental report from Dr. Curran is needed to clarify his conflicting statements.¹⁹ Thus, the case is not in posture to determine whether appellant's claim can be expanded to include a back condition.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether OWCP's February 16, 2007 LWEC decision should be modified and the claim expanded to include a back condition as further development is needed. The case is affirmed as to the denial of claim expansion for the conditions of stress and depression.

¹⁷ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁸ *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁹ See *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated February 14, 2012 is affirmed in part and set aside in part.

Issued: November 6, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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