

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

<b>C.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 12-626</b>
	)	<b>Issued: September 20, 2012</b>
<b>DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>John E. Goodwin, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 26, 2012 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) August 17, 2011 merit decision denying his recurrence claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly determined that the issue presented was whether appellant sustained a recurrence of disability.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 28, 1997 appellant, then a 52-year-old welder, sustained an injury to his right knee in the performance of duty. OWCP accepted his traumatic injury claim for tear of the right medial meniscus and paid appropriate compensation benefits for lost wages.<sup>2</sup>

By decision dated March 18, 2008, OWCP determined that the position of an electronics worker fairly and reasonably represented his wage-earning capacity and reduced his compensation benefits accordingly. In a decision dated September 29, 2008, an OWCP hearing representative affirmed the March 18, 2008 loss of wage-earning capacity decision.

On November 13, 2010 appellant filed a claim for a recurrence of disability, alleging that residuals from his accepted injury caused him to stumble on December 5, 2009, thereby reinjuring his right knee. By decision dated March 14, 2011, OWCP denied the claim for a recurrence of disability. It found that appellant had not submitted sufficient medical evidence to establish that the claimed recurrence resulted from the accepted injury. By decision dated August 17, 2011, an OWCP hearing representative affirmed the March 14, 2011 decision.

## **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>3</sup>

OWCP's procedure manual provides 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 capacity.<sup>4</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>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

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<sup>2</sup> Appellant's October 23, 1995 traumatic injury claim was accepted for right knee contusion and right leg cellulitis (File No. xxxxxx248). File No. xxxxxx248 was combined with the instant case, which serves as the master file.

<sup>3</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>5</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>6</sup> *Id.*

### ANALYSIS

In the present case, OWCP determined that the issue was whether appellant sustained a recurrence of disability on or after December 5, 2009. Appellant alleged that he sustained a recurrence of disability when residuals from his accepted injury caused him to stumble, thereby reinjuring his right knee. The record, however, indicates that on March 18, 2008 OWCP determined that the position of an electronics worker fairly and reasonably represented his wage-earning capacity. When appellant subsequently claimed disability, OWCP was obligated to evaluate the evidence to determine if modification of the wage-earning capacity was warranted.<sup>7</sup> As noted above, appellant's entitlement to compensation is based on the wage-earning capacity determination and it remains undisturbed until modified.

OWCP did not address the issue of modification of the wage-earning capacity determination. The hearing representative noted that a wage-earning capacity decision had been issued, but did not consider the issue of modification. The case will be remanded to OWCP for an appropriate decision on this issue.

### CONCLUSION

The Board finds that appellant's claims for compensation raised the issue of whether a modification of the March 18, 2008 wage-earning capacity decision was warranted and the case must be remanded for a proper decision on the issue presented.

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<sup>7</sup> See *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 wage-earning capacity determination. *Id.*; see also *Sharon C. Clement*, *supra* note 3.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 17, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 20, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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