



position of receptionist reflected appellant's wage-earning capacity effective June 9, 2009. The facts and history contained in the prior appeal are incorporated by reference.

OWCP accepted a recurrence due to a May 25, 2010 surgery for a right total knee replacement and was totally disabled. Appellant received appropriate compensation and benefits.

On January 20, 2011 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon.

In a report dated February 11, 2011, Dr. Obianwu described appellant's history of injury and treatment and examined appellant. Regarding the right knee, he determined that it got stuck in position, especially when she woke up in the morning, the right knee was still painful, despite the total knee arthroplasty and there was discomfort present medially and laterally and nothing helped her pain. Dr. Obianwu advised that appellant related that she had pain in her low back, neck and discomfort on both sides which spread into both shoulder blades and there was no involvement of the upper extremities and there was no paresthesias and numbness of the fingers. He examined her and determined that she had full extension of the right knee, flexion of 95 degrees, no warmth, swelling, instability or tenderness and the Lachman's test was negative. Dr. Obianwu further noted that while sitting, appellant could bring both lower extremities up so that the hips were flexed at 90 degrees and the knees were fully extended and that she could maintain this position for some time. He determined that the only residual he attributed to the work injury was a right total knee arthroplasty and the prognosis was excellent as there appeared to be no need for ongoing treatment due to the work injury. Dr. Obianwu diagnosed post-traumatic osteoarthritis of the right knee, right total knee arthroplasty, normal cervical spine, normal lumbar spine, no evidence of cervical radiculopathy and abnormal illness behavior. He advised that appellant reached maximum improvement in January 2011, six months after her surgery. Regarding her ability to work as a receptionist, Dr. Obianwu indicated that her restrictions were permanent and included no walking and no more than a half hour of standing. He opined that appellant was capable of sedentary work for eight hours daily.

In a March 7, 2011 report, Dr. Jeffrey Shapiro, a Board-certified orthopedic surgeon, noted that for the right knee appellant was 10 months status post right total knee arthroplasty and continued to complain of pain. He examined her right knee and determined that she had a well-healed surgical incision, no joint effusion, full knee extension and 120 degrees of flexion. Dr. Shapiro also noted that appellant had good stability to varus and valgus stress at 0, 30 and 90 degrees of flexion. He reviewed right knee x-rays that showed maintenance position of all prosthetic components and determined that she had no objective findings to substantiate her complaints of continued pain. Dr. Shapiro advised that appellant related that she was walking with difficulty and had back pain. He recommended physical therapy.

On March 22, 2011 OWCP notified appellant that it proposed to reduce her compensation for wage loss due to her accepted injury. It found that the factual and medical evidence established that she was no longer totally disabled for work but was instead partially disabled and she had the capacity to earn wages as a receptionist at the rate of \$440.80 a week. OWCP provided appellant 30 days to submit evidence or argument concerning her ability to earn wages.

OWCP provided a calculation sheet regarding appellant's salary. It indicated that her pay rate when injured on August 3, 2000 was \$257.81 a week; the current adjusted pay rate for her job on the date of injury was \$347.42 a week, she was currently capable of earning \$440.80 a week, the pay rate for a receptionist. OWCP determined that appellant had no loss of wage-earning capacity. It concluded that based upon a three-fourths compensation rate, her compensation would be \$0.00 a week or \$0.00 every four weeks. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

In a March 30, 2011 work capacity evaluation, Dr. Shapiro indicated that appellant could work from June 24 to December 24, 2011 with restrictions that included: no prolonged standing or walking, no operating a motor vehicle, no squatting, kneeling or climbing.

In a letter dated April 25, 2011, OWCP advised Dr. Shapiro that it had received his March 7, 2011 medical report in which he found no complaints of pain or objective findings. It also noted that he provided a March 30, 2011 work capacity form stating that from June 23 to December 24, 2011, appellant had restrictions of no prolonged standing or walking, no operating a motor vehicle, no squatting, kneeling or climbing. OWCP requested that Dr. Shapiro review the enclosed job description for a receptionist and provide an opinion as to whether appellant was currently capable of performing the position. No response was received.

In an April 18, 2011 disability certificate, Dr. Shapiro opined that appellant was unable to work.

In a letter dated May 13, 2011, OWCP advised appellant that a conflict of medical opinion had arisen between her physician, Dr. Shapiro, who advised that she was unable to work at all, and Dr. Obianwu, who advised that she was able to work with restrictions.

On June 7, 2011 OWCP referred appellant along with a statement of accepted facts, and the medical record to Dr. Marty Kosinski, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between appellant's physician, Dr. Shapiro and Dr. Obianwu, the second opinion physician, regarding the physical limitations/restrictions imposed by residuals of her work injury.

In a June 15, 2011 report, Dr. Shapiro advised OWCP that he had reviewed the job description for a receptionist. He opined that apart from her complaints of chronic pain, appellant should be able to perform this position.

In a June 20, 2011 report, Dr. Kosinski noted appellant's history of injury and treatment and examined her. He further noted that she complained of pain on the lateral side of the knee, that she had diminished sensation on the skin lateral to the incision which was standard occurrence after a total knee arthroplasty. Furthermore, Dr. Kosinski indicated that appellant moved deliberately getting on and off the foot stool, she had a well-healed scar about the right knee and mild swelling about the right knee, a well-healed scar about the left knee. He advised that it was difficult if not impossible to obtain a reliable neurological examination. Dr. Kosinski diagnosed post-traumatic arthritis, right knee, status post right total knee arthroplasty and a normal examination of the neck and back. He opined that he could not offer an opinion

regarding the closed head injury as that was not his specialty. Dr. Kosinski opined that there was no evidence of any cervical radiculopathy and the right knee residuals continued to the extent that appellant had a total knee arthroplasty, which was related to the initial diagnoses of anterior cruciate ligament (ACL) tear and meniscal tears of the right knee. He opined that her current condition was attributable to the August 3, 2000 work injury. Dr. Kosinski advised that appellant was capable of performing the job duties of a receptionist and she could perform the job listed in the job classification. Furthermore, appellant's restrictions were permanent. Dr. Kosinski indicated that she continue with her treatment for the right knee and advised that no further treatment was warranted for the neck or back.

By decision dated August 5, 2011, OWCP reduced appellant's compensation under 5 U.S.C. § 8115 to reflect her capacity to earn wages as a receptionist. It noted that she did not provide any additional evidence or argument.

On August 12, 2011 appellant's representative requested a telephonic hearing, which was held on November 15, 2011. During the hearing, appellant alleged that she was not working and had applied for social security benefits. She testified that she could not work as a receptionist as she could not sit for long periods due to pain. Furthermore, appellant had mental and physical conditions that precluded her from working.

On January 9, 2012 counsel submitted new medical evidence. In an October 5, 2011 report, Dr. Shapiro diagnosed osteoarthritis of the left knee and advised that appellant felt that she was "in too much pain to be able to stand up and perform the duties of her job."

In a report dated October 24, 2011, Dr. Shapiro indicated that appellant presented with complaints of severe pain all over her body. He indicated that she had pain in her left hip and left knee as well as a number of other locations and she believed that she was unable to work due to this severe pain. Dr. Shapiro examined appellant and determined that the right knee showed a well-healed surgical incision with full extension, no joint effusion and 125 degrees of flexion. He diagnosed: osteoarthritis, left knee; status post right total knee arthroplasty; probable mild osteoarthritis, left hip and advised that appellant was in severe pain and is disabled.

In letters dated November 17, 2011, counsel argued that the accepted statements of facts was defective as they did not clearly state that post-traumatic arthritis was accepted by work even though the impartial medical examiner opined that this was an indirect and proximate result of the knee injury. He advised that this would be another reason to vacate the wage-earning capacity decision. Counsel further noted that the number of hours that appellant was officially to work was based on a weekly rate; however, the date-of-injury job was 23 hours a week at \$13.75 an hour. He argued that OWCP should consider the 23 hours as a receptionist as not full-time work.

In a February 2, 2012 decision, OWCP affirmed its prior 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 procedures provide that, [i]f 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>

Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>5</sup>

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.<sup>6</sup> 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. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.<sup>7</sup>

### ANALYSIS

Appellant's claim was accepted for cervical radiculopathy, head contusion, headache and anterior cruciate ligament tear and medial meniscus tears of the right knee. She received compensation for total disability. OWCP issued a formal wage-earning capacity determination on June 9, 2009.

OWCP subsequently accepted that appellant sustained a recurrence due to a May 25, 2010 surgery for a right total knee replacement and was totally disabled. It subsequently provided her with compensation and benefits. The Board notes that when appellant claimed a recurrence of disability beginning May 25, 2010, this was for a closed or temporary period of disability, as the disability was for a scheduled surgery and postoperative recovery. As noted

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<sup>3</sup> *Katherine T. Kreger*, 55 ECAB 633 (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> *Id.* at Chapter 2.814.11 (June 1996).

<sup>6</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>7</sup> *K.R.*, Docket No. 09-415 (issued February 24, 2010).

above, OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.<sup>8</sup> Thus, the original wage-earning capacity determination remained in place.<sup>9</sup>

In this case, appellant was off for about six months and OWCP referred her for a second opinion on January 20, 2011 with Dr. Obianwu, who found that she was capable of performing the sedentary duties of a receptionist. Dr. Shapiro subsequently advised that she was unable to work and OWCP determined that a conflict existed. Section 8123(a) of FECA provides, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.<sup>10</sup> In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>11</sup> OWCP referred appellant to Dr. Kosinski, who in a June 20, 2011 report, examined appellant, provided findings and concluded that appellant could perform the duties of a receptionist and noted that he had reviewed the job duties in the job classification.

The Board finds that OWCP properly determined that the medical evidence established that appellant could perform the duties of a receptionist. The evidence establishes that appellant's employment injury no longer totally disables her for work. Appellant was able to resume earning wages as a receptionist.

Consequently, OWCP properly determined that appellant could perform the duties of a receptionist effective August 5, 2011. The Board notes that counsel made arguments regarding post-traumatic arthritis and noted that the impartial medical examiner indicated it was an indirect and proximate cause of the knee injury. The Board notes that the knee injury was accepted and appellant received appropriate compensation and benefits. The impartial medical examiner was accorded the special weight given to impartial medical examiners and he opined that appellant could perform the duties of a receptionist. He made further arguments about the receptionist position and the amount of hours she was able to work, but they were not supported by any additional new evidence. As noted in the prior Board decision, OWCP met its burden of proof in reducing appellant's compensation based on the constructed position of a receptionist. In this case, as the period of disability was a limited period, no modification of the previous wage-earning capacity determination was necessary.

The Board notes that appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at anytime before OWCP.

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<sup>8</sup> See *supra* note 6.

<sup>9</sup> As noted, *infra*, both wage-earning capacity decisions rated appellant's earning capacity based on her ability to perform the job of a receptionist.

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> *Barbara J. Warren*, 51 ECAB 413 (2000).

**CONCLUSION**

The Board finds that appellant was able to earn wages in the constructed position of a receptionist beginning August 5, 2011.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: September 11, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board