

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

B.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
WEAPONS STATION, Concord, CA, Employer**

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**Docket No. 12-1542
Issued: January 10, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2012 appellant filed a timely appeal from an April 3, 2012 merit 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 over the merits of this case.

ISSUE

The issue is whether appellant has established that a December 1, 1995 wage-earning capacity determination should be modified.

FACTUAL HISTORY

On April 19, 1991 appellant, then a 24-year-old stevedore, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury on that date when he slipped off a

¹ 5 U.S.C. § 8101 *et seq.*

ladder and fell to the deck. OWCP accepted the claim for right knee medial meniscus tear, osteochondritis dissecans (aggravation) and a consequential right knee osteoarthritis.

By decision dated December 1, 1995, OWCP determined that appellant's actual earnings in a medical assistant position fairly and reasonably represented his wage-earning capacity. It reduced appellant's compensation based on his actual earnings since October 2, 1995. Appellant continued to receive compensation for wage loss pursuant to the wage-earning capacity determination. He periodically submitted EN1032 reports regarding employment activity. An August 3, 2004 report indicated that appellant had worked from May 2003 to March 2004 for an asphalt maintenance company and a September 7, 2011 EN1032 indicated that appellant worked from March 21 to July 8, 2011 as a machine operator.

In a letter dated October 20, 2011, appellant advised that he was seeking modification of the December 1, 1995 wage-earning capacity determination. He stated that his right knee condition worsened considerably over the past several years and his physician was considering a total knee replacement.

With respect to medical evidence, appellant submitted an October 13, 2011 note from Dr. Norris Knight, a Board-certified orthopedic surgeon, noted a history that appellant had four prior surgeries on the right knee, the last in 1995. Dr. Knight provided results on examination and stated that appellant was a bit young for a total knee replacement. In a note dated November 28, 2011, he stated that appellant had a history from 1998 of "some sort of nerve pathology" in his right leg. Dr. Knight stated that appellant needed to be evaluated by a neurologist before any surgery could be performed.

In a report dated January 16, 2012, Dr. Darius Mitchell, a Board-certified orthopedic surgeon, provided a history and results on examination. He diagnosed osteoarthritis, post-traumatic of the right knee status post injury in 1991. Dr. Mitchell stated, "The findings are work related according to reports he brings into his history. [Appellant] has progressive osteoarthritis of this knee. I think he needs predominantly sedentary work."

OWCP prepared a statement of accepted facts and referred the case to an OWCP medical adviser. The February 13, 2012 statement of accepted facts stated that the medical assistant position appellant was performing in 1995 was "within his physical restrictions" without providing further detail. OWCP asked the medical adviser to provide an opinion as to whether the accepted conditions had "worsened and render[ed] [appellant] total[ly] disabled" as of July 9, 2011, when he stopped working. In a report dated March 5, 2012, the medical adviser stated that based on the evidence appellant would not be able to perform a full range of light-duty work. He stated that appellant would be able to perform "sedentary work and limited sedentary (light) work."

By decision dated April 3, 2012, OWCP denied modification of the December 1, 1995 wage-earning capacity determination. It found the medical evidence was insufficient to warrant modification.

LEGAL PRECEDENT

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

ANALYSIS

In the present case, OWCP issued a December 1, 1995 wage-earning capacity determination based on actual earnings in a medical assistant position. Appellant seeks modification of the wage-earning capacity determination on the grounds that his employment-related condition has worsened. He submitted medical evidence from Dr. Mitchell and Dr. Knight. In a January 16, 2012 report, Dr. Mitchell opined that appellant's condition was employment related and he recommended sedentary work. OWCP further developed the evidence and sought an opinion from an OWCP medical adviser.

The medical issue is whether there was a material change in the nature and extent of the injury-related condition. Although OWCP attempted to further develop the medical evidence, it did not properly develop the evidence or receive a probative medical opinion on the issue presented. The Board notes that the statement of accepted facts provided to the medical adviser did not adequately discuss the existing work restrictions at the time of the December 1, 1995 wage-earning capacity determination. It stated only that the medical assistant position was within the physical restrictions, without identifying those restrictions. A physician evaluating whether there was a material change in the nature and extent of employment-related condition must have a proper background as to the existing work restrictions in 1995.

OWCP asked the medical adviser for an opinion as to whether the employment-related condition had worsened and rendered appellant totally disabled as of July 9, 2011. But this is not a claim for compensation commencing on a specific date. Appellant argued that his employment-related condition progressively worsened and he sought modification of the wage-earning capacity determination. The medical issue is whether there was a material change in the nature and extent of an employment-related condition after December 1, 1995.

OWCP's medical adviser did not discuss the issue of a material change in the nature and extent of the employment-related condition after December 1, 1995. When it undertakes to further develop the medical evidence, it has the responsibility to secure evidence that properly addresses the medical issue presented.⁴ The case will be remanded to OWCP to prepare a proper

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

⁴ *See D.B.*, Docket No. 08-1136 (issued May 20, 2009); *D.H.*, Docket No. 08-1995 (issued April 22, 2009); *Mae Z. Hackett*, 34 ECAB 1421 (1983).

statement of accepted facts and secure a probative medical opinion on the issue presented. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2012 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 10, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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