

FACTUAL HISTORY

This case has previously been before the Board.² By order dated March 28, 2002, the Board dismissed appellant's appeal on the grounds that the record did not contain a final adverse OWCP decision issued within one year of the filing of the appeal on January 25, 2000.³ In a July 7, 2006 decision, the Board found that appellant had not established more than 50 percent right leg permanent impairment for which he previously received a schedule award, and that OWCP had properly refused to reopen his case for a merit review pursuant to 5 U.S.C. § 8128(a).⁴ In an April 14, 2011 decision, the Board found the medical evidence submitted by appellant had not established a material worsening of his injury-related right knee condition such that he could no longer perform the duties of the emergency services clerk position.⁵ In an order remanding case dated July 26, 2012, the Board found that OWCP should have adjudicated appellant's October 6, 2011 request for reconsideration as a request for modification of his wage-earning capacity determination.⁶ The law and the facts of the previous Board decisions and orders are incorporated herein by reference.

Following the Board's July 26, 2012 remand, appellant submitted duplicates of documentary and medical evidence previously reviewed by OWCP and the Board.⁷

² On October 16, 1980 appellant, a pipefitter, sustained a work-related right knee contusion and permanent aggravation of chondromalacia of the patella. On January 13, 1982 he was granted a schedule award for a 10 percent impairment of the right leg. By decision dated April 8, 1982, OWCP reduced appellant's compensation based on his capacity to earn wages as a customer service clerk, and in decisions dated August 2, 1982 and March 19, 1986, denied modification of the April 8, 1982 decision. Appellant returned to his regular pipefitter duties on June 15, 1992. His physician placed further restrictions on his physical activity and, effective May 2, 1993, he began a modified position as an emergency services clerk. On June 18, 1993 appellant underwent arthroscopy of the right knee. He returned to the emergency services clerk position and by decision dated December 20, 1993, OWCP determined that his actual wages as an emergency services clerk fairly and reasonably represented his wage-earning capacity with zero loss. On September 20, 1994 appellant was granted a schedule award for an additional three percent right leg impairment. He retired in November 1994. On April 16, 1997 appellant underwent a right total knee replacement. On April 24, 1998 OWCP granted him a schedule award for an additional 25 percent right leg impairment. Appellant had a revision of his right total knee replacement in October 2000.

³ Docket No. 01-618 (issued March 28, 2002). The Board had initially dismissed the appeal as untimely, by order dated February 23, 2001 and reinstated the appeal by order dated May 7, 2001.

⁴ Docket No. 06-548 (issued July 7, 2006). By decision dated December 29, 2003, appellant was granted a schedule award for an additional 12 percent which, when added to the 38 percent previously awarded, yielded a total right lower extremity impairment of 50 percent. By decision dated January 6, 2005, OWCP found that he was not entitled to an additional schedule award for his right lower extremity and in a November 4, 2005 decision, it denied appellant's reconsideration request.

⁵ Docket No. 10-1631 (issued April 14, 2011).

⁶ Docket No. 12-577 (issued July 26, 2012).

⁷ Appellant also submitted a February 22, 2013 report from Dr. Paul S. Camnitz, a Board-certified otolaryngologist, with an attached October 14, 2011 audiological evaluation. The record before the Board does not indicate that he has filed a hearing loss claim.

By decision dated May 2, 2013, OWCP denied modification of the April 16, 2010 wage-earning capacity determination.

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.⁸ OWCP procedures in effect at the time of the May 2, 2013 decision provided that it could make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.⁹

Chapter 2.814.11 of OWCP procedures indicates 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. It procedures further provided 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 was seeking modification, it had to establish that the original rating was in error, that the injury-related condition had improved or that the claimant had been vocationally rehabilitated.¹⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹¹

The procedures directed that a wage-earning capacity determination based on actual wages be made following 60 days of employment and provided for a retroactive determination where an employee had worked for at least 60 days, the employment fairly and reasonably represented the employee's wage-earning capacity, and work stoppage did not occur due to any change in the injury-related condition.¹² The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,¹³ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009). The procedure manual was revised, effective June 4, 2013. See FECA Transmittal No. 13-09 (issued June 4, 2013).

¹⁰ *Id.* at section 2.814.11 (October 2009).

¹¹ *Id.*

¹² *K.S.*, Docket No. 08-2105 (issued February 11, 2009); Federal (FECA) Procedure Manual, *id.* at sections 2.814.7(c) and 2.814.7(e) (October 2009).

¹³ 5 ECAB 376 (1953).

of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.¹⁴

ANALYSIS

Applicable case law and OWCP procedures require that once a formal wage-earning capacity decision is in place, 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.¹⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁶

The Board finds that appellant failed to establish that his wage-earning capacity should be modified. OWCP accepted that on October 16, 1980 he sustained a right knee contusion and permanent aggravation of chondromalacia patella. Although appellant is generally asserting on appeal that he could not perform the duties of his date-of-injury position as pipefitter, his wage-earning capacity is based on his modified position as an emergency services clerk that he performed from May 1993 until he retired in November 1994. The Board has previously held, in its April 14, 2011 decision,¹⁷ that appellant's wage-earning capacity position of emergency services clerk was not temporary, part-time or makeshift, the *Shadrick* formula was properly calculated to determine his loss of wage-earning capacity¹⁸ and that there was no other evidence to suggest error in the previous wage-earning capacity.¹⁹ There is no evidence to show, and it has not been asserted, that appellant has since been vocationally rehabilitated.

Appellant has failed to submit with his October 6, 2011 request for modification of this wage-earning capacity that there was a material change in his physical condition such that he could not perform the sedentary duties of the emergency services clerk position. The only medical evidence submitted, a May 18, 2011 treatment note from Dr. George J. Miller, an attending Board-certified orthopedic surgeon, described the right knee work injury and appellant's surgical history. Dr. Miller advised that appellant complained of constant right knee pain and that he used a cane and a motorized wheelchair. He noted additional medical conditions including asthma, chronic obstructive pulmonary disease, heart disease with previous bypass surgery and prostate cancer. Dr. Miller provided physical examination findings for both knees, noting negative laxity and meniscal tests bilaterally. He commented that appellant had anterior right knee skin sensitivity with excellent stability and strong extension of the right knee. Dr. Miller advised that, when observing appellant walk without his cane about the office, appellant did not fall but walked slowly and that balance without his cane was adequate. He

¹⁴ 20 C.F.R. § 10.403(c).

¹⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹⁶ *Id.*

¹⁷ *Supra* note 5.

¹⁸ 20 C.F.R. § 10.403(c).

¹⁹ *Supra* note 5.

diagnosed joint leg pain and status post knee joint replacement. Dr. Miller opined that appellant's right knee problems were work related. However, he did not address appellant's physical capacity for work or, in particular, any inability to perform the duties of the sedentary emergency services clerk position. Dr. Miller's report is therefore of little probative value on the issue of whether appellant's injury-related right knee condition materially changed such that the wage-earning capacity determination should be modified.²⁰ No other medical evidence was received.

As the medical evidence submitted by appellant fails to adequately describe a material worsening of his accepted work-related right knee condition, it is insufficient to establish that his wage-earning capacity decision should be modified.²¹

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that the April 16, 2010 wage-earning capacity decision should be modified.

²⁰ Rationalized medical opinion evidence is medical evidence based on a complete factual and medical background of reasonable medical certainty and supported by medical rationale explaining the opinion offered. *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

²¹ *P.C.*, 58 ECAB 504 (2007).

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2014
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