



## **FACTUAL HISTORY**

On March 11, 2009 appellant, then a 44-year-old boiler plant operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury from a slip and fall in the performance of duty on March 5, 2009. OWCP accepted the claim for right knee torn medial meniscus, right knee internal derangement and right leg joint derangement. Appellant underwent right knee surgeries on January 12 and July 29, 2010, and May 12, 2011. He received compensation for wage loss commencing April 24, 2009.

The record indicates that the employing establishment offered appellant a position as a motor vehicle dispatcher. The position was described as mostly sedentary, with some walking carrying, bending or lifting up to 25 pounds. In a report dated October 26, 2012, Dr. Robert Alex Creighton, a Board-certified orthopedic surgeon, indicated that appellant had received a job offer that required lifting up to 25 pounds. He stated that appellant wanted to try the position. Dr. Creighton indicated that appellant continued to have right knee discomfort and diagnosed right knee early arthritis.

Appellant accepted the position on December 4, 2012, and began working on December 17, 2012. A memorandum of telephone call with the employing establishment indicated that appellant's current pay rate was \$36,384.00 annually. By letter dated January 23, 2013, OWCP advised appellant that it was reducing his wage-loss compensation based on actual earnings. The accompanying worksheet indicated the current pay rate for the date-of-injury job was \$1,081.63 per week, and his current actual earnings were \$699.69 per week.

In a report dated February 15, 2013, Dr. Creighton stated that appellant was complaining of increased knee pain. He reported that appellant "appears [to be] doing more than his restrictions guidelines stated." Dr. Creighton provided results on examination and diagnosed right knee early arthritis.

By decision dated April 17, 2013, OWCP determined that actual earnings as a motor vehicle dispatcher of \$699.69 per week fairly and reasonably represented his wage-earning capacity. It stated that pursuant to 5 U.S.C. § 8115(a) it was reducing appellant's wage-loss compensation based on an earning capacity of 65 percent of his date-of-injury position.

On May 2, 2013 appellant filed a recurrence claim (Form CA-2a) indicating that he had stopped working as of April 22, 2013. He asserted that the new position he had taken "did not meet the restrictions" provided by his physician and "what was supposed to be a sedentary position was not." Appellant stated that, as a result of being placed in the new job, he suffered increased pain and swelling. He also asserted that he had to see a physician for stress associated with "the entire ordeal that he had to endure during the last four years."

In a report dated April 19, 2013, Dr. Creighton stated that appellant was seen for continuing right knee issues and difficulty with his current work placement. He reported that appellant suffered from knee arthritis and received periodic steroid injections. According to Dr. Creighton, appellant was unable to do stairs or any type of manual labor such as washing buses, which appellant was currently performing. He diagnosed continued arthritis.

By report dated June 20, 2013, Dr. Creighton responded to specific questions from OWCP regarding appellant's condition. He diagnosed "osteoarthritis postinjury and surgeries," stated "yes" there was a material worsening of appellant's condition on April 22, 2013 from "increased pain due to activity beyond his work restrictions as prescribed." Dr. Creighton indicated that appellant had positive effusion and swelling with decreased range of motion, and walked with a limp. In a note dated July 17, 2013, he stated that appellant had been "lifting/walking beyond what a sedentary job entails."

In a decision dated July 25, 2013, OWCP denied modification of the April 17, 2013 wage-earning capacity determination. It found that the evidence was insufficient to warrant modification.

### **LEGAL PRECEDENT**

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>3</sup>

OWCP procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.<sup>4</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>5</sup> has been codified at 20 C.F.R. § 10.403. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.<sup>6</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>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

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<sup>3</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (February 2013).

<sup>5</sup> 5 ECAB 376 (1953).

<sup>6</sup> 20 C.F.R. § 10.403(d).

<sup>7</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>8</sup> *Id.*

## ANALYSIS

In the present case, appellant had begun work in the position of motor vehicle dispatcher as of December 17, 2012. By decision dated April 17, 2013, OWCP found that the actual earnings of \$699.69 a week fairly and reasonably represented his wage-earning capacity. When appellant stopped working on April 22, 2013, the issue was whether the wage-earning capacity determination should be modified.

A modification of the wage-earning capacity determination is warranted, as noted above, if there is a material change in the nature and extent of the employment-related condition. Although the attending physician, Dr. Creighton, stated in his June 20, 2013 report that “yes” there was a material change on April 22, 2013, this is not itself sufficient to establish a modification of the wage-earning capacity determination. The Board notes that Dr. Creighton continued to diagnose right knee arthritis. The accepted conditions in this case are right knee torn medial meniscus, right knee internal derangement and right leg joint derangement. Since the material change must be established in an employment-related condition, an arthritis condition must first be established as employment related. Dr. Creighton made no reference to the causal relationship between right knee arthritis and the March 5, 2009 employment injury. The issue presented on this appeal is whether there was a material change in a condition causally related to the March 5, 2009 employment injury. Dr. Creighton does not provide a medical report, with an opinion based on sound medical reasoning and an accurate background, establishing right knee arthritis as causally related to the March 5, 2009 employment injury.<sup>9</sup> The Board accordingly finds that appellant has not established a modification of the April 17, 2013 wage-earning capacity determination based on a material change in an employment-related condition as of April 22, 2013.

Another basis for modification of the April 17, 2013 wage-earning capacity determination is evidence that the original determination was erroneous. Appellant did not provide specific arguments with respect to error in the original wage-earning capacity determination. As noted above, wages actually earned are generally the best measure of wage-earning capacity and appellant did work in the position for more than 60 days. Appellant has stated that he felt the job was not a sedentary job, but the job description indicated that the position was not completely sedentary but did have physical demands that included bending and lifting. Dr. Creighton stated in a February 15, 2013 report that appellant appeared to be doing more than his “restriction guidelines,” but it is unclear what specific restrictions he was referring to, or how the job exceeded these restrictions. Based on the evidence of record, appellant did not establish that the original wage-earning capacity determination was erroneous.

It is appellant’s burden of proof to establish that a modification of the April 17, 2013 wage-earning capacity determination was warranted. Based on the evidence of record, appellant did not meet his burden of proof. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

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<sup>9</sup> Probative medical evidence is evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning. *See D.E.*, Docket No. 13-2104 (issued March 7, 2014); *S.S.*, 59 ECAB 315 (2008).

**CONCLUSION**

The Board finds appellant has not established that a modification of the April 17, 2013 wage-earning capacity determination was warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 25, 2013 is affirmed.

Issued: May 27, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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