



\$253.07 for the period January 13 to 17, 2009.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on May 3, 1991, appellant, then a 31-year-old clerk, sustained a closed dislocation of the left patella, internal derangement of the left knee, chondromalacia of the left patella, osteoarthritis of the left knee, bilateral wrist sprains, a left shoulder sprain, and right plantar fibromatosis. It assigned the claim File No. xxxxxx814.

Under File No. xxxxxx530, OWCP accepted that, on or before February 4, 1997, appellant sustained bilateral carpal tunnel syndrome requiring left median nerve release. It also accepted that on August 23, 1999 she sustained cervical and lumbar strains, right hip, and right knee contusions due to a consequential fall related to the accepted left knee conditions.<sup>3</sup> Appellant received wage-loss compensation for periods of intermittent disability. She remained under treatment for the accepted orthopedic conditions, working light duty with intermittent absences.

Dr. Charles L. Johnson, an attending Board-certified orthopedic surgeon, provided permanent work restrictions on August 1, 2002. He limited appellant to working four hours a day sedentary duty, with walking, and standing limited to one hour.

On August 13, 2002 the employing establishment offered appellant a modified general clerk position with sedentary clerical duties. The position was classified as full time, but appellant would work only four hours a day due to her medical limitations. The job required sitting, walking, and standing up to four hours, no pushing, pulling, lifting, squatting, kneeling, or climbing. The position paid \$400.80 a week. Appellant accepted the position on August 16, 2002 and began work on August 19, 2002.

By decision dated January 14, 2003, OWCP found that appellant's actual earnings of \$400.80 a week as a modified general clerk since August 19, 2002 fairly and reasonably represented her wage-earning capacity. It reduced her wage-loss compensation effective August 19, 2002.

Appellant worked in a series of modified clerk positions under the same restrictions. She received compensation for intermittent work absences. Appellant remained under medical care for bilateral patellar grinding, lumbar radiculopathy, and bilateral carpal tunnel syndrome. OWCP placed her case on the periodic rolls effective October 1, 2006.<sup>4</sup>

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<sup>2</sup> Docket No. 09-1015 (issued March 8, 2010).

<sup>3</sup> OWCP assigned the August 23, 1999 injury claim File No. xxxxx853. It doubled File Nos. xxxxx853 and xxxxxx530 under File No. xxxxxx814.

<sup>4</sup> Appellant received treatment for a left shoulder injury sustained in an August 2007 consequential fall and left knee osteoarthritis. She claimed compensation for an absence from March 20 to 24, 2008. By decision dated December 30, 2008, OWCP denied the claim as appellant had failed to submit medical evidence documenting disability for the claimed period.

On October 16, 2008 appellant underwent a right median nerve release. She received compensation for postsurgical work absences on the periodic rolls. On January 13, 2009 appellant returned to work for four hours a day in a limited-duty position.<sup>5</sup> She received compensation for the remaining four hours a day. Appellant continued under medical care.<sup>6</sup> She continued working four hours a day light duty with periodic brief absences.<sup>7</sup>

A September 19, 2013 magnetic resonance imaging (MRI) scan showed a post-traumatic medical meniscus tear with loose body and ganglion cyst. Dr. Warren F. Bourgeois, III, an attending Board-certified orthopedic surgeon, recommended a left knee arthroscopy. He reduced appellant's work schedule to two hours a day from November 26, 2013 through March 30, 2014. OWCP issued compensation for the remaining six hours a day.

On March 31, 2014 Dr. Bourgeois performed an arthroscopic partial medial meniscectomy of the left knee with debridement, removal of loose body, removal of ganglion cyst, chondroplasty, and removal of a large osteophyte from the inferior patella. OWCP approved the procedures. It issued total disability compensation for the period March 7 to April 30, 2014.

On April 30, 2014 Dr. Bourgeois renewed appellant's permanent work restrictions. Appellant returned to work on May 1, 2014 for four hours a day in her prior modified-duty position. Dr. Bourgeois renewed her restrictions on September 13, 2014.

In December 4 and 18, 2014 reports, Dr. Bourgeois diagnosed a flare up of post-traumatic arthritis of the left knee. He held appellant off work from December 4, 2014 to January 5, 2015 as she had give-way weakness and falls. Dr. Bourgeois administered Synvisc and Kenalog injections. Appellant returned to work for three hours a day on January 7, 2015, increased to four hours a day as of January 14, 2015. On January 26, 2015 Dr. Bourgeois found that she had attained maximum medical improvement.

On March 6, 2015 appellant claimed wage loss for a period of total disability from November 29, 2014 to January 12, 2015 due to left knee pain and two falls.

In a March 30, 2015 letter, OWCP advised appellant that as there was a standing loss of wage-earning capacity determination in her case, it would develop her wage-loss claim as one for modification of the loss of wage-earning capacity determination. It noted that Dr. Bourgeois did not explain that the accepted conditions worsened such that she could no longer perform her modified general clerk position. OWCP afforded appellant 30 days to submit such evidence.

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<sup>5</sup> As of 1996, appellant's physicians restricted her to working four hours a day. As there was a loss of wage-earning capacity determination in place under File No. xxxxxx814 based on appellant's actual earnings working four hours a day, OWCP considered appellant's January 13, 2009 return to work as a resumption of full duty.

<sup>6</sup> OWCP accepted that appellant sustained a consequential left wrist sprain due to a December 14, 2009 fall when appellant's left knee gave way. Appellant was off work through January 3, 2010.

<sup>7</sup> OWCP accepted consequential right shoulder and right foot injuries sustained in April and May 2012 when appellant's left knee gave way again, causing her to fall. Appellant continued working light duty for four hours a day.

In response, appellant submitted an April 8, 2015 letter, explaining that she did not request modification of the loss of wage-earning capacity determination. She intended to claim wage-loss compensation for a brief period of disability caused by a July 23, 2014 fall when her right knee locked.<sup>8</sup>

By decision dated May 8, 2015, OWCP denied modification of the January 14, 2003 loss of wage-earning capacity determination, finding that appellant had not met any of the three criteria for modification. It found that she had failed to establish that the original loss of wage-earning capacity determination was in error, that she had been retrained or vocationally rehabilitated, or that her accepted conditions worsened such that she could no longer perform her modified carrier position.

### **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.<sup>9</sup>

OWCP's procedures provide that if a loss of wage-earning capacity determination has been issued, "[m]odification of such a determination is only warranted where the party seeking the modification establishes either that 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 erroneous." In this instance OWCP will need to evaluate the request according to these criteria.<sup>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs where 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.<sup>12</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained a closed dislocation of the left patella, internal derangement of the left knee, chondromalacia of the left patella, osteoarthritis of the left knee, bilateral wrist sprains, a left shoulder sprain, right plantar fibromatosis, bilateral carpal tunnel

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<sup>8</sup> Appellant noted that OWCP accepted the condition that caused her knee to lock under File No. xxxxxx853.

<sup>9</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004). *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.1501.1 (June 2013).

<sup>11</sup> *Sue A. Sedgwick*, *supra* note 9.

<sup>12</sup> *T.B.*, Docket No. 13-1772 (issued January 27, 2014).

syndrome, cervical and lumbar strains, a right hip contusion, and right knee contusion. Beginning on August 19, 2002, appellant worked as a modified clerk for four hours a day. By decision dated January 14, 2003, OWCP found that her actual earnings as a modified clerk properly represented her wage-earning capacity. Appellant received wage-loss compensation for partial disability.

On March 6, 2015 appellant claimed wage loss from November 29, 2014 to January 12, 2015 due to worsened left knee pain. OWCP issued a May 8, 2015 decision denying modification of the standing loss of wage-earning capacity determination. The Board has held that, when a loss of wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>13</sup>

Appellant claimed that her accepted left knee condition worsened from November 29, 2014 to January 12, 2015 such that she could not perform the modified clerk position on which the January 14, 2003 wage-earning capacity was based. She did not allege or establish that the original loss of wage-earning capacity determination was in error, or that she had been vocationally retrained or rehabilitated. Dr. Bourgeois, an attending Board-certified orthopedic surgeon, held appellant off work from December 4, 2014 to January 5, 2015 due to a flare up of post-traumatic osteoarthritis of the left knee with give-way weakness. He did not address her condition from November 29 to December 3, 2014. Also, Dr. Bourgeois did not explain the objective signs on clinical examination that indicated a worsening of the accepted osteoarthritis, or why these changes disabled appellant from her sedentary position. In the absence of such rationale, his opinion is insufficient to establish the claimed disability for work.<sup>14</sup>

OWCP advised appellant by March 30, 2015 letter of the necessity of submitting medical evidence explaining how and why the accepted conditions worsened such that she was disabled from her modified-duty job. As appellant did not provide such evidence, OWCP's May 8, 2015 decision denying modification of the January 4, 2003 loss of wage-earning capacity determination was proper under the law and facts of this case.

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

### **CONCLUSION**

The Board finds appellant has not met her burden of proof to establish that a January 14, 2003 loss of wage-earning capacity determination should be modified.

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<sup>13</sup> See *supra* note 9. The Board notes that consideration of the modification issue does not preclude OWCP from accepting a limited period of employment-related disability, without a formal modification of the loss of wage-earning capacity determination. *Id.* at n.10, slip op. at 5; Cf. *Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the loss of wage-earning capacity determination was warranted).

<sup>14</sup> *Sue A. Sedgwick*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 8, 2015 is affirmed.

Issued: January 15, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board