

FACTUAL HISTORY

On October 19, 2006 appellant, then a 42-year-old truck driver, filed a traumatic injury claim (Form CA-1) alleging that he sustained a severe crush injury of his left ring finger on that date. He noted that he accidentally closed the rear door of a two-ton postal vehicle on his finger. In an effort to free his finger, appellant turned quickly and twisted his ankle. He sought medical treatment and received seven stitches in his finger on October 19, 2006. Appellant initially did not realize his ankle injury, but experienced swelling when he got home. OWCP accepted his claim for open fracture of left phalanges on November 15, 2006 and on December 7, 2006 accepted the additional condition of left foot sprain. Appellant returned to restricted duty.

Appellant filed a recurrence claim (Form CA-2a) on March 19, 2008 and alleged that he was unable to perform his duties as a truck driver due to his accepted left ankle condition. Appellant's supervisor indicated that appellant had returned to restricted duty following his October 19, 2006 employment injuries due to diagnosed conditions of bilateral foot pain, left knee pain, and plantar fasciitis. He noted that these conditions had not been accepted as employment related and the restrictions were considered personal. Appellant filed a claim for compensation (Form CA-7) for the period March 12 through April 4, 2008. Through a letter dated April 21, 2008, OWCP requested additional evidence in support of his claimed recurrence and afforded him 30 days for a response. In a letter dated May 2, 2008, the employing establishment indicated that appellant had been in a limited-duty status, but that his physician had released him to full-duty work. It was unable to find light-duty work for appellant and sent him home from March 12 through April 28, 2008. On June 10, 2008 OWCP accepted appellant's recurrence of disability beginning March 12, 2008, and authorized compensation benefits.

Appellant returned to limited-duty work eight hours a day on October 23, 2008 as a special delivery clerk. This position required him to work eight hours a day with off days on Saturday and Sunday. The physical requirements were standing periodically for two to three hours, sitting and standing for two to three hours, and sitting for one to two hours.

By decision dated February 10, 2009, OWCP found that appellant's actual earnings in the modified position of special delivery clerk, effective October 23, 2008, fairly and reasonably represented his wage-earning capacity. It noted that he had performed the duties of this position for more than two months and that it was suitable for his partially disabled condition. OWCP further noted that appellant's actual earnings met or exceeded the current wages of the job he held when injured. It therefore terminated his wage-loss compensation payments. Appellant thereafter continued to work in the position on which the February 10, 2009 decision was based.

Throughout 2009 and through January 15, 2010, Dr. Paul B. Kirchner, appellant's attending podiatrist, continued to evaluate appellant for gouty arthropathy, planter nerve lesion, and tenosynovitis of the foot/ankle. He completed a note on March 9, 2009 indicating that appellant was disabled through March 16, 2009 due to gout. Beginning January 2, 2009 Dr. Kirchner completed duty status reports continuing to support that appellant could work eight hours a day with increased restrictions of 1.5 hours of standing and 2 hours of walking. He later increased these restrictions to one hour of standing and two hours of walking on November 13, 2009. Dr. Kirchner completed a duty status report (Form CA-17) on January 15,

2010 and increased appellant's restrictions to no more than one hour of standing and one hour of walking.

In a letter dated January 27, 2010, OWCP advised appellant that if the employing establishment had no work available to meet the restrictions of his permanent limited-duty assignment, he must file a claim for recurrence of disability (Form CA-2a). Dr. Kirchner continued to diagnose tenosynovitis of the foot/ankle through March 15, 2010. On February 15 and April 15, 2010 he completed attending physician's reports (Form CA-20) diagnosing bilateral tenosynovitis of the feet. Dr. Kirchner indicated by checking a box marked "yes" on the form report that he believed that this condition was caused or aggravated by an employment activity. He also indicated that appellant had a concurrent non-employment-related condition of gout. Dr. Kirchner completed duty status reports (Form CA-17) on February 15, March 15, and April 19, 2010 and indicated that appellant could perform work with restrictions of only one hour of standing and one hour of walking, no climbing, two hours of bending and stooping, and no driving two-ton trucks. He also restricted appellant to lifting no more than 10 pounds.

Appellant stopped work and filed a claim for compensation (Form CA-7) on May 6, 2010 requesting compensation for leave without pay from January 19 through April 12, 2010. The employing establishment indicated that appellant was off work pending an OWCP decision on his recurrence claim. In a letter dated May 17, 2010, OWCP requested additional evidence supporting his claim for disability due to his accepted employment injuries. It afforded 30 days for a response. Dr. Kirchner continued to submit duty status reports (Form CA-17) diagnosing tenosynovitis and providing work restrictions. These included no lifting over 10 pounds, standing and walking for one hour each, no climbing, bending and stooping for two hours, grasping for two hours, and no driving two-ton trucks.

On June 8, 2010 appellant again filed a recurrence of disability claim (Form CA-2a) alleging that on January 19, 2010 he stopped work because of pain in both feet, ankles, and knees. He claimed that, due to the increased restrictions imposed by Dr. Kirchner, the employing establishment had no light-duty work available for him.

Dr. Kirchner completed a note on June 14, 2010 and noted appellant's accepted left foot injury. He opined that appellant had developed gout within the dorsum of his left foot due to chronic inflammation of the tenosynovitis of the dorsum of the left foot. OWCP's medical adviser reviewed the record on August 15, 2010 and opined that the conditions of bilateral foot tendinitis and gout should be accepted as consequential to the October 19, 2006 work injury.

By decision dated August 23, 2010, OWCP accepted that appellant developed bilateral tenosynovitis of his feet and ankles as well as gouty arthropathy as a consequence of his employment injuries. It thereafter authorized wage-loss compensation benefits. The employing establishment offered appellant a limited-duty assignment on September 9, 2010 of special delivery which required eight hours of sitting, six to seven hours of driving, and one hour intermittent standing and walking. Appellant accepted this position.³

³ The record does not contain a signed acceptance of this position. However, appellant was performing limited-duty work in February 2011.

Appellant accepted a new untitled light-duty position offered by the employing establishment on October 26, 2011. This position required him to work from 8:00 a.m. until 4:30 p.m. with scheduled days off on Sunday and Wednesday. Appellant's duties entailed casing mail for one to six hours, delivering mail for one to six hours, delivering express and priority packages for one to six hours, and delivery confirmation scanning for one to three hours. The physical requirements were no lifting over 10 pounds, no walking or standing for more than one hour, no pushing or pulling over 15 pounds, and no climbing.

On October 16, 2012 appellant completed a claim for compensation (Form CA-7) for wage loss beginning October 4, 2012 as the employing establishment had no light-duty work available within his restrictions. OWCP authorized compensation benefits through March 22, 2013.

Appellant returned to part-time light-duty work at the employing establishment on March 21, 2013 in a modified carrier position. This job required appellant to work from 9:00 a.m. to 1:00 p.m. with scheduled days off Sunday and Wednesday. Appellant was to deliver mail within his restrictions for four hours, and perform other duties including express mail delivery for up to four hours. His physical requirements were sitting, driving, and lifting up to 10 pounds for four hours a day, bending up to two hours, and standing or walking up to one hour. Appellant accepted this position under protest on March 21, 2013. He claimed compensation for four hours a day beginning on March 23, 2013. OWCP authorized these benefits through December 27, 2013.

Dr. Kirchner completed a duty status report on July 8, 2013. He indicated that appellant could stand and walk for one hour a day each, bending and stooping for two hours each, could not drive two-ton trucks nor climb, and that he required two consecutive days off.

On December 3, 2013 the employing establishment offered appellant a modified-duty position as a modified carrier. This position required appellant to work 40 hours a week with scheduled days off Sunday and Wednesday. His duties included delivering mail for three hours, sorting mail for two hours, picking up mail for one hour, and performing parcel drops or delivery for two hours. The physical requirements were sitting for four hours, standing for one hour, walking for one hour, and driving for two hours. Appellant refused this position on December 10, 2013 alleging that it was not within his restrictions.

Appellant filed claims for compensation CA-7 forms beginning on February 14, 2014 and requested wage-loss compensation from January 30 through March 28, 2014. Dr. Kirchner completed a note dated February 3, 2014 and indicated that appellant was disabled from work on January 30 and 31, 2014 due to foot pain. On January 31, 2014 appellant sought treatment for bilateral knee pain. OWCP authorized compensation from January 30 through February 14, 2014. Appellant continued to file claims for wage-loss compensation (Form CA-7).

In a letter dated March 17, 2014, OWCP noted that appellant appeared to be claiming disability due to a consequential condition, bilateral knee pain. It requested additional information in support of this claim and afforded him 30 days for a response. Appellant completed a narrative statement and noted that he believed that his consequential knee condition

developed due to a change in his gait, as a result of his accepted foot conditions, which placed more stress on his knees.

Appellant underwent a magnetic resonance imaging (MRI) scan of his left knee on March 20, 2014 which demonstrated medial meniscal tear with high-grade chondromalacia likely related to meniscal insufficiency, tibiofemoral joint space narrowing, moderate joint effusion, and a Baker's cyst. He underwent left knee x-rays, which demonstrated moderate degenerative changes of his knees bilaterally and symmetrically.

Dr. Kirchner completed a note of February 26, 2014 and reported that appellant had recently been compensating for pain in both feet, thus developing pain in both knees.

On April 4, 2014 Dr. David M. Burt, Board-certified in orthopedic surgery and orthopedic sports medicine, examined appellant and diagnosed left knee osteoarthritis. He noted that appellant's left knee pain began eight years earlier. Dr. Burt further noted that appellant was a mailman, that he injured his feet in 2006, and that after that appellant developed knee pain.

In a telephone memorandum, appellant reported that the employing establishment removed his light-duty assignment on February 5, 2014. He filed claims for total disability.

By decision dated April 30, 2014, OWCP denied appellant's claim for recurrence of disability finding that he had not established a recurrence of total disability due to his alleged consequential injury. Counsel requested an oral hearing before OWCP's Branch of Hearings and Review on May 21, 2014.

Dr. Kirchner completed a note on May 20, 2014 and diagnosed tenosynovitis of both feet and gouty arthritis. He noted that he could not evaluate or treat appellant's knee pain, but reported that, due to his chronic conditions of gout and tenosynovitis, "excessive and prolonged weight bearing that [appellant] has done during the past several years can and will affect other joints within the lower extremities due to altered gait patterns while standing or walking." Dr. Kirchner provided a report dated October 10, 2014 diagnosing bilateral tenosynovitis, gout, and knee pain. He reported that appellant developed tenosynovitis due to his injury in 2009, and developed knee pain from the tenosynovitis and checked a box marked "yes" on the form report to indicate that appellant's diagnosed condition was caused or aggravated by an employment activity.

In a report dated August 22, 2014, Dr. Burt diagnosed severe bilateral knee arthritis and indicated by checking a box marked "yes" that this condition was aggravated by appellant's employment activity. He noted that appellant, a mailman, injured his feet in 2006 and "therefore began to have knee pain." Dr. Burt indicated that knee arthritis was aggravated by standing, walking, bending, and kneeling at work.

Dr. Neil Allen, a Board-certified neurologist of professorial rank, completed a report on November 19, 2014 and described appellant's history of injury on October 19, 2006. He noted that appellant crushed his finger in the rear door of a vehicle, and began to feel woozy looking at his injured finger. Appellant then stepped backward and lost his balance inverting his left ankle and twisting his left knee. Dr. Allen opined that appellant developed a limp due to his left ankle injury causing his left knee pain to worsen. He reviewed appellant's diagnostic studies and

diagnosed tear of the left medial meniscus, internal derangement of the left knee, sprain of the left knee and leg, chondromalacia, Baker's cyst, and osteoarthritis of the left knee. Dr. Allen concluded, "In my medical opinion, the facts of the injury are the direct and proximate cause of the diagnosis that I cited above.... There may be other causes for this medical problem, but one cause is clearly the accident at work on October 19, 2006...."

Appellant testified at the oral hearing on January 5, 2015. He noted that on January 29, 2014 he was performing his limited-duty assignment and could not walk due to pain in his knees and swelling in both feet. Appellant indicated that he stopped work on February 5, 2015 due to new symptoms. He described his duties of delivering express mail by walking and making more than 40 to 50 stops a day.

In a decision dated March 24, 2015, OWCP's hearing representative found that appellant had not submitted sufficient medical evidence to establish causal relationship between his alleged consequential knee injury and his accepted employment injuries. He remanded the case for OWCP to address the issue of whether appellant had met his burden of proof to modify the 2009 wage-earning capacity determination and afforded 30 days for development of the evidence in support of his claim.

In a letter dated April 7, 2015, OWCP requested additional evidence in support of appellant's claim for modification of his 2009 wage-earning capacity determination.

By decision dated July 23, 2015, OWCP denied modification of the February 10, 2009 wage-earning capacity decision. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on July 28, 2015.

In a report dated December 31, 2015, Dr. Demitri A. Adarnes, a Board-certified physiatrist, reviewed appellant's history of injury as well as his accepted conditions. He provided work restrictions including no lifting over five pounds and no walking or standing more than 20 minutes at a time.

Appellant testified at the oral hearing held on March 7, 2016. He related that he stopped work in January 2014 and reported to his supervisor on February 5, 2014. Appellant claimed that the supervisor told her that she would not honor his new work restrictions and that he had refused light-duty work in December 2013. He contended that the December 2013 job offer was outside his work restrictions. Appellant retired from the employing establishment on disability retirement in March 2015.

By decision dated May 5, 2016, OWCP's hearing representative denied modification of the February 10, 2009 wage-earning capacity decision. He found that appellant had not established that the original decision was in error, that there had been a material change in his injury-related condition, or that he was retrained or vocationally rehabilitated.

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.⁴ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁵ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁶

Modification of a standing wage-earning capacity 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 erroneous.⁷ OWCP procedures provides that, if 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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.¹⁰

ANALYSIS

The Board finds that this case is not in posture for a decision.

OWCP initially accepted appellant's October 19, 2006 traumatic injury claim for open fracture of left phalanges and left foot sprain. In its February 10, 2009 decision, it found that appellant's actual earnings in the modified position of special delivery clerk fairly and reasonably represented his wage-earning capacity and reduced his wage-loss compensation to zero based on these actual earnings. Appellant stopped work on January 19, 2010 and filed both claims for compensation and a June 8, 2010 recurrence of disability claim alleging that on January 19, 2010 he had stopped work because of pain in both feet, ankles, and knees.

By decision dated August 23, 2010, issued more than one year after the February 10, 2009 wage-earning capacity determination, OWCP accepted that appellant had developed the additional conditions of bilateral tenosynovitis of his feet and ankles as well as gouty arthropathy due to his accepted employment injury. Appellant then returned to work in a different light-duty

⁴ 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

⁵ *K.R.*, *id.*; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

⁶ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁷ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

⁹ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁰ 20 C.F.R. § 10.126.

position with more stringent restrictions on September 9, 2010. OWCP failed to contemporaneously address whether the February 10, 2009 wage-earning capacity determination should have been modified based on the additional employment-related conditions it had accepted in 2010. After a work stoppage from October 4, 2012 through March 21, 2013, appellant returned to a part-time limited-duty position on March 22, 2013. The employing establishment offered appellant a new position on December 3, 2013 which he refused. Appellant stopped work on January 30, 2014 requesting wage-loss compensation and alleging a material change in the nature and extent of his injury-related condition. Appellant asserts on appeal that the February 10, 2009 wage-earning capacity decision should be modified.

The Board finds that OWCP failed to adequately review the medical evidence of record in determining whether appellant has established a worsening of his accepted conditions rendering him incapable of performing the modified position of special delivery clerk, which OWCP determined represented his wage-earning capacity. OWCP failed to adequately consider all the accepted conditions.¹¹ While OWCP's hearing representative listed all of appellant's accepted conditions in his May 5, 2016 decision, he failed to discuss the timeline of the acceptance of these conditions in relation to the issuance of the February 10, 2009 wage-earning capacity determination. As noted above, following the February 10, 2009 wage-earning capacity decision, on August 23, 2010, OWCP accepted that appellant had developed additional conditions related to the initial employment injury including bilateral tenosynovitis of his feet and ankles and gouty arthropathy. The timing of OWCP's acceptance of the additional conditions is pertinent and crucial, as these conditions were not considered in the original wage-earning capacity determination issued on February 10, 2009. It is essential that OWCP fully evaluate whether the additional accepted conditions constitute a material change in the nature and extent of appellant's injury-related conditions which arose after the February 10, 2009 decision.

The Board therefore finds that OWCP did not provide an adequate decision with findings of facts and a statement of reasons as to whether appellant has provided sufficient evidence to support his claim for modification of his wage-earning capacity. OWCP failed to discuss or analyze the medical reports in 2010 and continuing regarding the additional accepted conditions. It further failed to address and discuss the additional work restrictions accepted after the February 10, 2009 decision. As such, OWCP has failed to adequately determine whether appellant has met his burden of proof to establish modification of his wage-earning capacity.

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹² Section 10.126 of Title 20 of the Code of Federal Regulations provide: The decision shall contain findings of fact and a statement of reasons. The Board has held that the reasoning behind OWCP's evaluation should be clear

¹¹ See *M.M.*, Docket No. 14-1166 (issued December 1, 2014).

¹² *Supra* note 2 at 8124(a).

enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹³

The case must be returned to OWCP for a proper decision to include findings of fact, an accurate timeline, and a clear and precise statement considering whether or not the additional accepted conditions of bilateral tenosynovitis of the feet and ankles and gouty arthropathy accepted on August 23, 2010, which also resulted in additional work restrictions, constituted a material change in appellant's injury-related condition such that appellant has met his burden of proof under the customary standards to establish modification of his February 10, 2009 wage-earning capacity determination. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds the case not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded in accordance with this decision.

Issued: August 17, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ *Supra* note 10; *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *L.C.*, Docket No. 12-978 (issued October 26, 2012); *supra* note 8 at Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).