United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 17-1343**
	)	**Issued: December 4, 2017**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Key West, FL, Employer	)	

Appearances:
Stephen V. Barszcz, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 2, 2017 appellant, through counsel, filed a timely appeal from a December 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The record also contains a January 6, 2017 decision concerning an overpayment of compensation. The record reflects that on or about March 3, 2017, appellant repaid the debt in full. Neither appellant nor counsel has specifically requested review of the January 6, 2017 overpayment decision, therefore, the matter is not currently before the Board.

ISSUE

The issue is whether appellant met his burden of proof to establish a recurrence of disability beginning September 8, 2014, causally related to his February 9, 2006 employment injury.

FACTUAL HISTORY

On February 10, 2006 appellant, then a 44-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2006 he sustained a right knee injury when he tripped on a curb and fell while in the performance of duty. He stopped work on February 9, 2006.[4] OWCP accepted appellant's claim for right patella chondromalacia and right knee medial and lateral meniscus tears. Appellant received disability compensation on the daily rolls beginning March 27, 2006 and on the periodic rolls beginning September 3, 2006.

On February 27, 2007 appellant underwent OWCP-approved right knee surgery, including arthroscopic right chondroplasty of his medial, lateral, and patellofemoral joints, and microfracture of his right trochlea, medial femoral condyle, and lateral femoral condyle.

In a July 13, 2007 form entitled Work Capacity Evaluation (Form OWCP-5c), Dr. Robert Loeffler, an attending orthopedic surgeon, indicated that appellant could work eight hours per day with restrictions of squatting, kneeling, or climbing for no more than one hour (per each activity).

On April 18, 2007 appellant returned to work in a full-time, limited-duty capacity. As of July 23, 2007 he worked as a modified security clerk with weekly wages of $729.23. The position involved preparing correspondence and reports by hand or using a computer or electronic typewriter, mailing letters by registered mail, making travel arrangements, preparing travel orders, answering telephone calls, and receiving visitors. The position was primarily accomplished at a desk and was predominantly sedentary in nature. It required some walking, standing, reaching, stooping, bending, and light lifting.

OWCP referred appellant for a second opinion examination to Dr. Brad K. Cohen, a Board-certified orthopedic surgeon, and requested that he evaluate appellant's ability to work. In a September 10, 2007 narrative report and September 11, 2007 Form OWCP-5c, Dr. Cohen indicated that appellant could work for eight hours per day with restrictions including lifting up to 20 pounds, walking up to two hours, standing up to two hours, and no squatting, kneeling, or climbing.

In a January 23, 2008 decision, OWCP adjusted appellant's compensation to reflect his capacity to earn wages in the modified security clerk position. It found that the modified

[4] Appellant had preexisting, arthritis in his right knee and he underwent right anterior cruciate ligament construction surgery in the 1980s due to a nonwork-related right knee injury.

security clerk position fairly and reasonably represented his wage-earning capacity and noted that he had performed the position for more than 60 days.[5]

Appellant continued working as a modified security clerk and received FECA wage-loss compensation based on the January 23, 2008 loss of wage-earning capacity (LWEC) determination.[6]

In a July 23, 2014 narrative report, Dr. Loeffler noted that appellant requested limited work hours due to his right knee pain. In another July 23, 2014 narrative report, he indicated that physical examination of the right knee on that date showed extension lacking 10 degrees, flexion to 90 degrees, lack of Lachman sign, stable anterior and posterior drawer signs, and collateral ligaments with medial/lateral tenderness and trace effusion. In a July 23, 2014 duty status report (Form CA-17), Dr. Loeffler diagnosed severe degenerative joint disease of the right knee and indicated that appellant could not work for more than four hours per day.

On September 8, 2014 appellant began working a reduced schedule of four hours per day. On September 11, 2014 he filed a claim for recurrence of disability (Form CA-2a) beginning September 8, 2014.[7] Appellant noted that Dr. Loeffler provided an opinion that he could not work for more than four hours per day.

In a September 26, 2014 Form CA-17, Dr. Jason M. Hardwick, an attending osteopath, indicated that appellant could work eight hours per day with specific restrictions including ambulating in a wheelchair for up to one hour per day.

In an October 2, 2014 development letter, OWCP informed appellant that it appeared he was requesting modification of its January 23, 2008 LWEC determination. It advised him regarding the three criteria for modifying a formal LWEC determination, including showing that there was a material change in the nature and extent of his injury-related condition, that the employee had been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous. OWCP provided appellant 30 days to submit additional evidence in support of his claim.

Appellant submitted a September 26, 2014 Form OWCP-5c in which Dr. Loeffler indicated that appellant could not work eight hours per day and could only perform certain tasks for two hours per day, including walking, standing, and lifting. He could not engage in any

[5] OWCP indicated that appellant began working as a modified security clerk on April 18, 2007, but he actually began working in the position on July 23, 2007.

[6] OWCP paid wage-loss compensation for loss of premium pay as a modified security clerk. Appellant underwent heart valve surgery in October 2013 and was off work through early 2014.

[7] Although appellant listed the date as September 5, 2014, it was not until September 8, 2014 that he began working reduced hours. He also filed a Claim for Compensation (Form CA-7) claiming partial disability for the period September 8 to 19, 2014.

squatting or kneeling. Dr. Loeffler indicated that the restrictions would remain in place until appellant underwent total right knee replacement surgery.[8]

In an October 6, 2014 report, Dr. Loeffler indicated that appellant had anterior cruciate ligament instability in his right knee which necessitated total right knee replacement surgery. He noted that appellant requested that he work no more than six hours per day, but he advised appellant that he could not medically restrict his sitting due to the right knee problem. Dr. Loeffler indicated that the employing establishment advised that appellant could perform his job sitting in a wheelchair for eight hours per day and would not have to stand.

On October 6, 2014 appellant returned to an eight-hour workday.

In a November 20, 2014 Form OWCP-5c, Dr. Robert Catania, an attending osteopath and Board-certified orthopedic surgeon, diagnosed degenerative joint disease of the right knee and indicated that appellant was totally disabled.

Appellant stopped work again on November 24, 2014.

In a December 11, 2014 narrative report, Dr. Catania indicated that appellant reported that he sustained a right knee injury on February 9, 2006 and that his chief complaint was right knee pain. He noted that, upon physical examination, appellant had varus presentation and full extension of his right knee with pain and crepitus. Dr. Catania diagnosed degenerative joint disease of the right knee tricompartmental joint space (mostly medial) with varus presentation and progression of pain, and arthritis status post February 9, 2006 work-related injury. He advised that appellant's best option was total right knee replacement and noted that appellant was totally disabled from work. Dr. Catania indicated that, according to the history, appellant was "doing fine and well up" until appellant's February 9, 2006 injury and advised that he experienced progressive changes to his knee which ultimately led to surgery. Appellant now had worsening arthritis almost nine years after the February 9, 2006 injury and Dr. Catania noted, "I do feel from records and from history that appellant's injury is the major cause of his need for total right knee replacement."

On January 5, 2015 Dr. Catania indicated that, upon physical examination, appellant exhibited varus presentation of his right knee with no gross signs of instability. He opined that appellant could not perform even sedentary work due to the pain medications he required for his right knee condition. In a January 5, 2015 Attending Physician's Report (Form CA-20), Dr. Catania listed the date of injury as February 9, 2006 and the mechanism of injury as tripping on a curb. He diagnosed degenerative joint disease of the right knee and checked a box indicating that the diagnosed condition was caused or aggravated by the employment.

On January 20, 2015 appellant filed another Form CA-2a claiming a recurrence of disability beginning November 14, 2014. On this Form CA-2a, appellant's supervisor indicated that appellant was arrested on July 15, 2014 for committing assault with his hands and feet on that date. The supervisor indicated that appellant was absent from work for several days after

[8] Appellant also submitted reports, dated in late-September 2015 and early-October 2015, in which Dr. Loeffler discussed his treatment of right plantar fasciitis.

July 15, 2014 and he posited that appellant's increased disability was caused by an injury he sustained while committing the assault.

Appellant submitted a February 3, 2015 narrative report in which Dr. Catania indicated that he could perform light-duty work for four hours per day with restrictions of no climbing and no lifting more than 10 pounds. In a Form OWCP-5c and a Florida State workers' compensation form, both dated February 3, 2015, Dr. Catania provided the same work restrictions.[9]

In a March 10, 2015 decision, OWCP denied appellant's claim for a recurrence of disability beginning September 8, 2014 because he had not submit sufficient medical evidence in support of his claim. It noted that he had failed to substantiate with medical evidence the two criteria for recurrence defined in the development letter of October 2, 2014. As such, the decision did not affect its January 23, 2008 LWEC determination.

In response to the Form CA-2a appellant filed on January 20, 2015, OWCP sent him a March 10, 2015 development letter. It again informed him that it appeared that he was requesting modification of its January 23, 2008 LWEC determination and it discussed the three criteria for modifying a formal LWEC determination. OWCP provided appellant 30 days to submit additional evidence in support of his claim.

In an April 14, 2015 decision, OWCP denied appellant's claim for a recurrence of disability, as claimed in his January 20, 2015 Form CA-2a. It noted the development letter of March 10, 2015, but found that the medical evidence failed to meet the two criteria to establish a recurrence of disability.

Appellant submitted an April 2, 2015 report in which Dr. Catania noted that the physical examination showed that he lacked 20 degrees of right knee extension. Dr. Catania noted that appellant advised him that he could not work more than four hours per day, engage in climbing, or lift more than 15 pounds. He continued to indicate that appellant was in need of total right knee replacement.

In an August 18, 2015 report, Dr. Catania noted that comparison of appellant's October 2, 2014 magnetic resonance imaging (MRI) scan to his March 10, 2006 MRI scan showed significant progression of his right knee arthritis.[10] He advised that appellant was only capable of working four hours per day with restrictions including no walking or standing for more than 15 minutes at a time and no sitting for more than an hour at a time. Dr. Catania posited that these restrictions were necessitated by right knee degenerative joint disease related to the February 9, 2006 accident. In an August 18, 2015 Florida State workers' compensation form, Dr. Catania checked a box indicating that appellant's injury was work related, but he did not provide a diagnosis.

[9] In the Florida State workers' compensation form, Dr. Catania checked a box indicating that appellant's injury was work related, but he did not provide a diagnosis.

[10] The record contains reports of the March 10, 2006 and October 2, 2014 MRI scans.

In a September 21, 2015 decision, OWCP denied modification of its April 14, 2015 decision denying appellant's claim for a recurrence of disability. It found that he had not submitted medical evidence establishing a work-related recurrence of disability. OWCP posited that appellant's disability beginning in 2014 was due to a nonwork-related incident on July 14, 2014.[11]

OWCP subsequently received a September 11, 2015 report from Dr. Catania who indicated that appellant could not work and noted that he was in need of a total right knee replacement. In a September 11, 2015 Florida State workers' compensation form, Dr. Catania checked a box indicating that appellant's injury was work related, but he did not provide a diagnosis.

In a report dated February 24, 2016, Dr. Loeffler noted that appellant had right anterior cruciate ligament surgery in the 1980s and he made reference to his February 9, 2006 injury. He indicated that appellant complained of continual pain, mostly in the medial portion of his right knee with occasional swelling and the feeling of instability. Dr. Loeffler diagnosed right knee degenerative joint disease and advised that appellant would need a total right knee arthroplasty at some point in the future. He indicated that appellant was on work restrictions of working four hours per day with no repetitive squatting or lifting.[12] In another February 24, 2016 report, Dr. Loeffler diagnosed right knee osteoarthritis.

In an April 5, 2016 report, Dr. Catania indicated that appellant's right knee condition was related to his February 9, 2006 accident and that he was now having left knee problems secondary to biomechanics of his right knee. He opined that appellant was not able to work at all. Dr. Catania mentioned appellant's heart surgery in 2013 and noted that "[appellant] had an incident" on July 15, 2014 which did not affect his right knee.

OWCP referred appellant for a second opinion examination by Dr. Peter Millheiser, a Board-certified orthopedic surgeon. It requested that Dr. Millheiser evaluate whether appellant continued to have residuals/disability due to the February 9, 2006 work injury. In a report dated July 26, 2016, Dr. Millheiser discussed appellant's factual and medical history and reported physical examination findings. He opined that appellant continued to have residuals of the work-related right knee chondromalacia. Dr. Millheiser noted that appellant was physically unable to perform his date-of-injury position as a police officer, but that he was capable of performing sedentary work.

In a December 5, 2016 decision, OWCP denied modification of its September 21, 2015 decision. It found that appellant had not submitted medical evidence establishing a work-related recurrence of disability and again posited that his disability beginning in 2014 was due to a nonwork-related incident on July 14, 2014.[13]

[11] OWCP referenced language regarding the criteria for modifying a formal LWEC determination, but it did not actually consider whether appellant had established modification of the January 23, 2008 LWEC determination.

[12] Dr. Loeffler provided similar work restrictions in a February 26, 2016 Duty Status Report.

[13] OWCP referenced language regarding the criteria for modifying a formal LWEC determination, but it did not actually consider whether appellant had established modification of the January 23, 2008 LWEC 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.[14]

OWCP's procedure manual provides, "If a claim for wage loss is received (Form CA-7 or CA-2a), the [claims examiner] should review the file to determine whether a formal [LWEC] determination is in place, and, if so, the claim should be developed, if necessary, as a request for modification of the [LWEC]."[15]

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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[16]

ANALYSIS

OWCP has adjudicated this as a matter of whether appellant had established a recurrence of disability on or after September 8, 2014 due to his February 9, 2006 work injury.[17] Under the circumstances of this case, however, the Board finds that the proper issue is whether his January 23, 2008 wage-earning capacity determination should have been modified. Appellant started working four hours per day in September 2014 and he submitted evidence which indicated that this increased disability was due to his February 9, 2006 work injury. It is clear that the claim in this case was that he could not work on a full-time basis in the modified security clerk position, the position that OWCP determined had represented his wage-earning capacity, for the foreseeable future. The Board has held that, when a 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.[18]

As noted above, OWCP's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage

[14] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.4 (June 2013).

[16] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[17] OWCP accepted that on February 9, 2006 appellant sustained right knee chondromalacia and right medial and lateral meniscus tears.

[18] *See Katherine T. Kreger*, 55 ECAB 633 (2004). The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *See id.*

loss."[19] This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability.[20] If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate.[21]

In this case, appellant submitted evidence of an increased disability that prevented him from either working in the modified security clerk position on a full-time basis or working in the position to any extent. He submitted numerous reports in which his attending physicians, including Dr. Loeffler and Dr. Catania, provided opinions that he was either totally disabled or could only work four hours per day due to the effects of the February 9, 2006 work injury.

CONCLUSION

The Board finds that OWCP should have considered the issue of modification of the January 23, 2008 LWEC determination. Appellant's claim for compensation raised the issue of whether a modification of the January 23, 2008 LWEC decision was warranted and the case must be remanded for a *de novo* decision on this issue.

[19] *See supra* 15.

[20] *See Katherine T. Kreger*, *supra* note 18.

[21] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: December 4, 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