

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 30-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that he twisted his left knee in the performance of duty on October 4, 1993. OWCP accepted his claim for left knee medial meniscus tear and a left knee femoral condyle, and patella fracture with a loose body. Appellant received supplemental and periodic rolls compensation benefits.

Appellant accepted a job offer as a modified clerk and began work on July 5, 1997. By decision dated September 5, 1997, OWCP adjusted his compensation to reflect his wage-earning capacity in the modified clerk position based on actual weekly wages of \$428.68. On November 12, 1997 it granted a schedule award for 15 percent loss of use of the left leg.

On April 9, 2002 appellant filed a claim for a recurrence of disability (Form CA-2a), commencing April 10, 2000, due to the October 4, 1993 employment injury. He explained that he was no longer working for the employing establishment because the modified clerk position ended on April 1, 1998. Appellant asserted that he was not rehired and when the job became available again in March 2001, he was unable to accept the position because he had just undergone surgery and moved from Florida. According to appellant, he was currently participating in a federal work-study program with the Department of Veterans Affairs. By decision dated June 13, 2002, OWCP denied his claim for recurrence of disability commencing in April 2000. Appellant filed a request for reconsideration. In a decision dated September 17, 2003, OWCP found his reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board on November 19, 2003. On June 3, 2004 the Board affirmed the September 17, 2003 OWCP decision. The Board found that the evidence from an attending Board-certified orthopedic surgeon, Dr. Frank Phillips, was not relevant to demonstrate clear evidence of error.⁴

Appellant underwent arthroscopic left knee surgery on April 22, 2003. The record indicates that he began receiving compensation for wage loss on the periodic compensation rolls as of April 20, 2003. Appellant continued to receive wage-loss compensation.

In a report dated September 3, 2004, Dr. Phillips indicated that appellant had reported bilateral knee pain, but his left knee showed improvement from preoperative status. He reported that it was unlikely appellant would be able to return to work requiring anything more than sedentary duties.

³ Docket No. 04-0327 (issued June 3, 2004).

⁴ *Id.*

OWCP referred appellant for vocational rehabilitation services. In a report dated May 25, 2005, a rehabilitation counselor indicated that the plan was for appellant to work as an employment interviewer (Department of Labor, *Dictionary of Occupational Titles* No. 166.267-010) or mortgage loan underwriter (DOT No. 186.267-026). A job classification for the employment interviewer position indicated it was a sedentary position with occasional lifting of 10 pounds. On May 31, 2005 the rehabilitation counselor indicated that the position was available in appellant's area with entry-level wages of \$583.20 per week.

In a letter of proposed reduction dated January 24, 2006, OWCP advised appellant that it found he was capable of performing the duties of the selected position of employment interviewer. It found that he was capable of earning \$583.20 per week in the selected position, which was greater than or equal to the current pay of his date-of injury position.

By decision dated February 28, 2006, OWCP reduced appellant's compensation to zero. It found he had no loss of wage-earning capacity based on his ability to work as an employment interviewer. OWCP indicated that the termination of wage-loss compensation benefits would take effect on March 19, 2006.

Appellant underwent left knee arthroscopic surgery on February 27, 2012. He filed a claim for compensation (Form CA-7) commencing February 27, 2012. OWCP began paying compensation for wage loss as of February 27, 2012.

In a report dated April 19, 2012, Dr. Phillips reported that the left knee surgery appeared to be successful although appellant was still using a walker. He indicated that appellant could do sedentary work with no squatting, kneeling, or bending, and he should be allowed to stand 15 minutes every 2 hours. In a report dated October 3, 2012, Dr. Phillips noted that he had been asked to comment on whether appellant could continue to perform the functional requirements of an employment interviewer. He reported that he had filled out a work tolerance form.⁵

OWCP prepared a statement of accepted facts (SOAF) dated December 20, 2012 and referred appellant for a second opinion examination by Dr. William L. Lehman, Jr., a Board-certified orthopedic surgeon. Dr. Lehman was asked whether appellant could perform the date-of-injury position, and if not, whether he could perform the functional requirements of the employment interviewer position.

In a report dated January 14, 2013, Dr. Lehman provided a history and results on examination. He opined that appellant could not work as a mail carrier, but it appeared the position of employment interviewer "would be possible." Dr. Lehman noted "the functional requirements of this position have not specifically been provided for me," but appellant had reported performing similar activity in 1999 and 2000.⁶ He completed a work capacity

⁵ It is not clear from the record of evidence what work tolerance form Dr. Phillips was referring to in this regard.

⁶ Dr. Lehman reported the employment interviewer position "falls within the South Carolina Employment Security Commission," without further explanation. The record contains a copy of the DOT No. 166.267-010 job classification for employment interviewer, but it is unclear whether Dr. Lehman reviewed the job classification.

evaluation form report with work restrictions. Dr. Lehman indicated that appellant could lift 10 pounds for one hour.

By decision dated August 19, 2013, OWCP terminated appellant's wage-loss compensation, effective August 25, 2013. It found that he was capable of "performing the position for which [he was] previously rated in."

In a letter dated October 20, 2014, OWCP advised appellant that it had "reinstated" the February 28, 2006 loss of wage-earning capacity determination. Appellant was advised to pursue appeal rights attached to that decision.

Appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on June 12, 2015. By decision dated August 11, 2015, the hearing representative affirmed the October 20, 2014 decision. He found that appellant had been off work only from February 27, 2012 for "a brief, closed period following the surgery" and therefore the February 28, 2006 loss of wage-earning capacity determination did not need to be modified and remained in effect. OWCP found that appellant had not established that modification of the 2006 loss of wage-earning capacity determination.

By letter dated January 26, 2016 and received by OWCP on February 3, 2016, appellant, through counsel, requested reconsideration. He submitted additional medical evidence regarding his continuing left knee condition.

In a decision dated April 25, 2016, OWCP reviewed the merits of appellant's claim and denied modification of the August 11, 2015 decision. It found that the evidence failed to establish a worsening of his condition such that he would be totally disabled from performing the duties of the constructed employment interviewer 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 and it remains undisturbed until properly modified.⁷

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, OWCP will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁸

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

⁷ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modifications of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4 (June 2013).

rehabilitated, or the original determination was, in fact, erroneous.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.¹¹ This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.¹² This narrow exception is only applicable for brief periods of medical disability.¹³ OWCP procedures provide, “If the claimant is off work for a brief period due to his/her temporary inability to perform the duties of the rated position, this period of medical disability can be paid without modification of the loss of wage-earning capacity determination, e.g., a brief recovery period after surgery or an injection with a subsequent day of disability.”¹⁴

ANALYSIS

OWCP issued a loss of wage-earning capacity determination in this claim on February 28, 2006. It found the selected position of employment interviewer represented appellant’s wage-earning capacity. On February 27, 2012 appellant underwent left knee arthroscopic surgery, and OWCP began paying compensation for total disability. OWCP continued to pay compensation for total disability through August 24, 2013.

OWCP determined that appellant’s loss of wage-earning capacity determination need not be modified as he was off work for a limited period of time and the medical evidence showed he could continue to perform the selected position of employment interviewer. The Board finds that the evidence of record, however, does not establish that this was a “brief period” of disability. As noted, appellant received wage-loss compensation for approximately 18 months from February 27, 2012.

OWCP did not properly develop the medical evidence on the issue. As noted above, if the medical evidence shows a temporary worsening of a condition, and a resultant inability to perform the duties of the constructed position, OWCP may deny modification of the loss of wage-earning capacity determination. The evidence in this case, however, does not clearly address whether there was a temporary worsening after the February 27, 2012 surgery, or whether there was a material change in the nature and extent of the employment-related condition.

⁹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁰ *Id.*

¹¹ *See Katherine T. Kreger*, *supra* note 8.

¹² *See supra* note 7.

¹³ *K.H.*, Docket No. 08-2392 (issued April 21, 2009).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1501.10 (June 2013). *See also Calvin G. Wilson*, Docket No. 97-1029 (issued March 8, 1999) wherein the claimant’s brief period of total disability was noted to encompass less than three weeks.

Appellant underwent left knee surgery on February 27, 2012 and there was no indication at that time how long disability would last. The attending physician, Dr. Phillips reported on April 19, 2012 that appellant was using a walker but could do some sedentary work. However, he did not specifically address the constructed position. In an October 3, 2012 report, Dr. Phillips indicated that he had been asked to comment on appellant's ability to perform the employment interviewer position. The record does not contain an opinion from Dr. Phillips that specifically addressed appellant's ability to work as an employment interviewer after the February 27, 2012 surgery.

OWCP sent appellant for a second opinion examination with Dr. Lehman. One of the issues presented to Dr. Lehman was whether appellant could perform the duties of an employment interviewer. In his January 24, 2013 report, Dr. Lehman noted that he was not provided with a job description that included the functional requirements of the employment interviewer position. He speculated the position "would be possible," but his report is of diminished probative value.¹⁵ In view of Dr. Lehman's assertion that appellant did not have the functional requirements of the position, OWCP should have requested that he review the available evidence and provide a clarifying opinion. The Board finds Dr. Lehman failed to provide a rationalized medical opinion, based on a complete background, that resolves the medical issues regarding modification of a loss of wage-earning capacity determination.

As OWCP had further developed the medical evidence, they should have properly resolved the issues with respect to the wage-earning capacity determination. When it refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues.¹⁶ OWCP requested that Dr. Lehman provide an opinion as to whether appellant could work as an employment interviewer, but his January 24, 2013 report did not resolve the issue presented.

The Board finds that OWCP did not properly deny modification of the loss of wage-earning capacity determination in this case. The case will be remanded to OWCP for further development. On return of the case record, OWCP should properly prepare a SOAF that includes a detailed description of the employment interviewer position. It should secure a rationalized medical opinion as to whether there was a temporary worsening after the February 27, 2012 surgery, or whether there was a material change in appellant's employment-related condition that prevented her from performing the employment interviewer position. After such further development as is deemed necessary, OWCP shall issue a *de novo* decision on the issue of modification of the loss of wage-earning capacity determination.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for additional development.

¹⁵ Medical opinions that are speculative and not supported by medical rationale are generally entitled to little probative value. *Carolyn F. Allen*, 47 ECAB 240 (1995).

¹⁶ See *Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2016 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 4, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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