

FACTUAL HISTORY

In a claim adjudicated by OWCP under File No. xxxxxx661, OWCP accepted that appellant, then a 42-year-old customs and border protection officer, sustained injuries in a motor vehicle accident on February 27, 1990. The accepted injuries were: closed fracture of left rib(s); contusion of left shoulder and upper arm; closed fracture of right carpal bone; closed fractures of bilateral tibia and fibula; fractures of phalanges of left third and fourth toes of foot; and tear of medial meniscus of the right knee. Appellant returned to work following this injury.

In a claim adjudicated under File No. xxxxxx318, OWCP accepted that on July 24, 2007 appellant sprained his right ankle and the medial collateral ligament of his right knee when he fell down stairs. It later expanded File No. xxxxxx318 to include aggravation of degenerative arthritis of the right knee. Appellant subsequently returned to work for intermittent periods until he underwent a total arthroplasty of the right knee on October 31, 2008. He was placed on the periodic compensation roll in December 2008.³

In June 2009, appellant was referred for vocational rehabilitation. Based on labor market analysis prepared by the vocational rehabilitation specialist, by letter dated January 6, 2010, OWCP proposed to reduce appellant's entitlement to monetary compensation due to his ability to earn wages as a telecommunication dispatcher. By decision dated February 19, 2010, OWCP reduced appellant's compensation based on his ability to earn wages in the constructed position of telecommunication dispatcher.⁴

OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity on June 15, 2010. On June 24, 2010 it granted him a schedule award for 40 percent permanent impairment of the right lower extremity. On January 18, 2011 a hearing representative of OWCP's Branch of Hearings and Review affirmed the June 15, 2010 schedule award determination.

In a July 15, 2011 decision, OWCP denied appellant's claim to expand File No. xxxxxx661 to include back and gait conditions. Appellant requested an oral hearing. On February 2, 2012 an OWCP hearing representative vacated the July 15, 2011 decision and remanded the case for further medical development. Following further development, on August 9, 2012 OWCP additionally accepted abnormality of gait under File No. xxxxxx661.

On August 29, 2011 appellant also filed a claim for compensation (Form CA-7) for the period April 18, 2011 to August 29, 2011. By decision dated October 31, 2011, OWCP denied that appellant sustained a recurrence of disability commencing April 18, 2011. Appellant requested an oral argument. On May 25, 2012 an OWCP hearing representative set aside the October 31, 2011 decision and remanded the case to OWCP for further development of the medical evidence.

³ On January 29, 2010 OWCP administratively combined File Nos. xxxxxx661 and xxxxxx318, with the former serving as the master file.

⁴ The record at that time indicated that appellant had applied for Office of Personnel Management (OPM) retirement benefits and was receiving 30 percent disability from the Department of Veterans Affairs (VA). In OWCP EN1032 forms signed by appellant on September 12, 2010 and September 7, 2011, he affirmed that he was receiving both OPM and VA benefits.

In a *de novo* merit decision dated November 7, 2012, OWCP again denied that appellant sustained a recurrence of disability on April 18, 2011. The November 7, 2012 decision was affirmed by an OWCP hearing representative on May 30, 2013.

Appellant, through counsel, requested reconsideration on April 24 and December 15, 2014. In merit decisions dated July 23, 2014 and January 14, 2015, OWCP denied modification of the prior decisions, finding that appellant failed to establish a recurrence of disability commencing April 18, 2011.

Appellant, through counsel, again requested reconsideration on May 26, 2015. In a merit decision dated March 21, 2016, OWCP denied modification of its prior decision.

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.⁵ OWCP procedures provide, "If a formal loss of wage-earning capacity (LWEC) decision has been issued, and the claim is for recurrent disability, it should be processed in accordance with procedures for modifying a formal LWEC."⁶ 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.⁷

ANALYSIS

The Board finds that this case is not in posture for decision. In its March 21, 2016 decision, OWCP applied the standard for a timely request for reconsideration rather than the standard for modifying an LWEC decision.

In its March 21, 2016 decision, before the Board in this appeal, OWCP noted that in both its July 23, 2014 and January 14, 2015 decisions it had found the medical evidence insufficient to establish that appellant incurred a clinically-observable material worsening of the accepted conditions to establish a recurrence of disability. The March 21, 2016 decision concluded that the evidence presented was not of sufficient probative value to alter the January 14, 2015 decision. The proper issue in this case is whether the February 19, 2010 LWEC determination should be modified.

The Board has held that, when an LWEC determination has been issued and a claimant submits evidence alleged to show disability for work, OWCP must evaluate the evidence to

⁵ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (February 2013).

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

determine if modification of wage-earning capacity is warranted.⁸ As noted above, OWCP's procedures direct the claims examiner to consider the criteria for modification when a claimant alleges recurrent disability.⁹

The Board will therefore remand the case to OWCP for adjudication, under the proper standard of review for requests for recurrence of disability after a wage-earning capacity decision has issued, to be followed by an appropriate merit decision to preserve appellant's appeal rights.¹⁰

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: May 3, 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

⁸ *K.R.*, Docket No. 09-28 (issued September 16, 2009).

⁹ *Supra* note 6.

¹⁰ *R.L.*, Docket No. 16-72 (issued February 11, 2016).