



## **FACTUAL HISTORY**

On September 12, 2006 appellant, then a 47-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on August 28, 2006 he experienced right-sided back pain while in the performance of duty. OWCP accepted his claim for lumbar and thoracic sprain, lumbar or thoracic neuritis or radiculitis, and lumbar spondylosis with myelopathy. Following his injury, appellant worked with restrictions.

OWCP accepted that appellant sustained a recurrence of disability on March 11, 2010. It paid him wage-loss compensation for total disability beginning March 17, 2010.

By decision dated August 1, 2011, OWCP reduced appellant's wage-loss compensation to zero as his actual earnings as a labor custodian, effective August 10, 2010, fairly and reasonably represented his wage-earning capacity. It noted that his current wages met or exceeded those of his date-of-injury position.

Appellant, on October 7, 2017, filed a claim for wage-loss compensation (Form CA-7) for the period September 16 to 28, 2017.

OWCP, on October 16, 2017, requested that appellant submit evidence supporting that he was disabled during the period claimed.

Thereafter, appellant submitted reports from a nurse practitioner dated September 25 and October 2, 2017. He also submitted an October 9, 2017 attending physician's report (Form CA-20) from Dr. Javaria Jabeen, an osteopath. Dr. Jabeen provided the International Statistical Classification of Diseases and Related Health Problems (ICD-10) diagnosis codes for chondromalacia patella of the left knee (M22.42) and an unspecified subluxation of the left knee (S83.102s). She checked the box marked "yes" that the condition was caused or aggravated by the described employment activity of appellant sustaining low back strain after lifting. Dr. Jabeen advised that he was totally disabled from October 9 to 22, 2017.

On October 19, 2017 appellant filed a CA-7 form requesting wage-loss compensation for the period September 30 to October 13, 2017.

By decision dated November 21, 2017, OWCP found that appellant had not established that he was unable to work beginning September 16, 2017. It determined that the medical evidence submitted was insufficient to establish that he was disabled from employment.

Appellant, by letter postmarked December 14, 2017, requested a review of written record by an OWCP hearing representative.

By decision dated May 10, 2018, OWCP's hearing representative affirmed the November 21, 2017 decision. She found that appellant had not submitted sufficient evidence to establish modification of the August 1, 2011 LWEC.

On appeal appellant requests payment for time lost from work, noting that his case remains open and he could not work due to his injury.

## 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.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

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.<sup>5</sup>

## ANALYSIS

The Board finds that appellant has not met his burden of proof to establish modification of the August 1, 2011 LWEC determination.

OWCP accepted that appellant sustained lumbar and thoracic sprain, lumbar or thoracic neuritis or radiculitis, and lumbar spondylosis with myelopathy. By decision dated August 1, 2011, it reduced his compensation to zero based on its finding that the position of labor custodian fairly and reasonably represented his wage-earning capacity and that the wages for the position met or exceeded those of his date-of-injury position. Appellant stopped work on September 16, 2017 and filed a claim for wage-loss compensation. He has the burden of proof to establish that modification of the LWEC determination is warranted.<sup>6</sup>

Appellant has not alleged that the original determination was in error or that he was vocationally rehabilitated. The issue is whether he has established a material change in his work-related condition that would render him unable to perform the duties of his position as laborer custodian.<sup>7</sup> The Board finds that the medical evidence submitted is insufficient to establish modification of the LWEC determination.<sup>8</sup>

Appellant submitted September 25 and October 2, 2017 reports from a nurse practitioner. These reports do not constitute competent medical evidence because a nurse practitioner is not

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<sup>3</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>4</sup> See *M.K.*, Docket No. 17-1852 (issued August 23, 2018).

<sup>5</sup> See *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>6</sup> See *L.P.*, Docket No. 17-1624 (issued March 9, 2018).

<sup>7</sup> OWCP is not precluded from adjudicating a limited period of employment-related disability when a formal LWEC determination has been issued. See *J.B.*, Docket No. 15-1817 (issued April 1, 2016).

<sup>8</sup> See *R.L.*, Docket No. 15-1337 (issued January 27, 2016); *J.I.*, Docket No. 15-0516 (issued September 21, 2015).

considered a physician as defined under FECA.<sup>9</sup> Consequently, this evidence is insufficient to meet appellant's burden of proof.<sup>10</sup>

In an October 9, 2017 form report, Dr. Jabeen diagnosed chondromalacia patella of the left knee and an unspecified subluxation of the left knee. She checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of appellant sustaining low back strain after lifting. Dr. Jabeen opined that appellant was totally disabled from October 9 to 22, 2017. OWCP, however, accepted appellant's claim for a back condition and not a left knee condition. Appellant has the burden of proof to establish that any condition not accepted by OWCP is causally related to the employment injury through the submission of rationalized medical evidence.<sup>11</sup> The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without supporting medical rationale, it is of diminished probative value.<sup>12</sup> Consequently, Dr. Jabeen's opinion is insufficient to meet appellant's burden of proof.<sup>13</sup>

As the medical evidence fails to establish that appellant sustained a material worsening of his accepted employment-related condition such that he was precluded from performing his duties as a laborer custodian, he has not met his burden of proof to show that his condition has materially changed or worsened such that the LWEC determination should be modified.<sup>14</sup>

On appeal appellant argues that he missed work due to his injury and notes that he has an "open claim." For the reasons noted above, however, the Board finds that he has not met his burden of proof to support a material change in the nature and extent of his injury-related condition.<sup>15</sup>

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish modification of the August 1, 2011 LWEC determination.

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<sup>9</sup> 5 U.S.C. § 8101(2); *see also* *R.A.*, Docket No. 17-1498 (issued August 1, 2018).

<sup>10</sup> *See P.D.*, Docket No. 17-1885 (issued September 17, 2018).

<sup>11</sup> *See C.S.*, Docket No. 18-0952 (issued October 23, 2018); *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>12</sup> *See C.M.*, Docket No. 18-0146 (issued August 16, 2018).

<sup>13</sup> *See D.R.*, Docket No. 18-0232 (issued October 2, 2018).

<sup>14</sup> *See S.J.*, Docket No. 17-0449 (issued May 7, 2018).

<sup>15</sup> *See J.A.*, Docket No. 17-0236 (issued July 17, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2018  
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board