



## ISSUE

The issue is whether appellant met his burden of proof to modify an October 11, 2016 loss of wage-earning capacity (LWEC) determination.

On appeal counsel asserts that the accepted conditions should have been expanded before an LWEC determination was made.

## FACTUAL HISTORY

On April 2, 2009 appellant, then a 46-year-old fitness and sports specialist, filed an occupational disease claim (Form CA-2) alleging his job duties caused low/middle back and bilateral knee pain. He did not stop work. On August 11, 2009 OWCP accepted left knee patellofemoral syndrome and left knee patella tendinitis. It additionally accepted bilateral chondromalacia patellae and left knee medial meniscus tear on November 18, 2010.<sup>3</sup>

On December 20, 2010 Dr. Samir Sharma, Board-certified in orthopedic surgery and sports medicine, performed arthroscopic partial medial meniscectomy, chondroplasty, and removal of loose bodies on the left knee.

In February 2011, appellant transferred to an Air Force Base in Montana and began work there as a recreation assistant.

Dr. Sharma performed a second left knee arthroscopic procedure on April 11, 2014.

On August 26, 2014 Dr. Sharma noted increasing symptoms in appellant's right knee. He diagnosed other and unspecified derangement of medial meniscus, and sprain and strain of unspecified site of knee and leg and requested authorization for right knee arthroscopy. An August 27, 2014 MRI scan of the right knee demonstrated prior partial meniscectomy with a vertical tear present and early chondromalacia patella. On November 3, 2014 Dr. Sharma performed authorized arthroscopic repair of the right medial meniscus tear, chondroplasty, and removal of loose body.

On January 28, 2015 Dr. Sharma opined that appellant could perform modified duty, mostly seated work, with no prolonged standing and minimal bending and squatting.

In February 2015, OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion evaluation.

By letter dated March 5, 2015, OWCP informed appellant that he would be placed on the periodic compensation rolls, effective March 8, 2015.

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<sup>3</sup> On November 2, 2010 appellant telephoned OWCP asking that his claim be expanded to include the back. OWCP advised him of the medical evidence needed to support causal relationship for a back claim. It further explained his burden to provide medical evidence in support of his claim in correspondence dated September 13, 2010. A September 15, 2010 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated mild degenerative disc disease at L4-5 and L5-S1. There was no significant degenerative disc disease, central canal stenosis, or neural foraminal stenosis seen.

In a March 26, 2015 report, Dr. Hanley described appellant's prior medical and surgical history. Examination of both knees demonstrated retropatellar crepitus of each knee, no effusion, and good range of motion. The knees were stable, and the patella tracked in a normal fashion in each knee. Appellant reported pain with knee movement. There was no quadriceps atrophy, and he was not able to squat comfortably. Dr. Hanley diagnosed bilateral meniscal tears and bilateral advancing degenerative chondromalacia in the retropatellar spaces. He opined that these conditions were clearly work related and advised that appellant had been fit for limited duty for a vast majority of the time since he last worked, but could not perform the duties of his prior position. Dr. Hanley provided permanent physical restrictions of pushing, pulling and lifting limited to four hours daily, walking and standing limited to three hours daily, and no squatting, kneeling, or climbing with a 30-pound weight restriction.

Dr. Sharma preformed an injection to appellant's right knee on March 24 and 31, 2015. Appellant began pain management with Dr. Venkat Aachi, a Board-certified physiatrist, on April 30, 2015. Dr. Aachi noted that appellant was last seen in June 2014. He described examination findings and diagnosed a flare of back pain, facet arthropathy, and bilateral knee pain.

On May 12, 2015 appellant was referred to Yanela Burke, a rehabilitation specialist, for vocational rehabilitation services. He underwent vocational testing. Ms. Burke identified the positions of receptionist and accounting clerk and completed labor market surveys for these positions. She prepared a vocational rehabilitation plan and recommended a 12-week brush-up course for needed computer skills. This was approved on August 5, 2015.

Dr. Sharma continued to submit treatment notes describing appellant's bilateral knee conditions. On July 28, 2015 he noted appellant's complaint of severe right knee pain with popping and recommended a right knee MRI scan. An August 11, 2015 right knee MRI scan demonstrated prior meniscal surgery with significant surface irregularity and multiple tear lines with associated areas of full-thickness cartilage loss and a horizontal cleavage tear within the posterior horn of the lateral meniscus.

Appellant began computer training on September 8, 2015. He completed the training on May 23, 2016, and Ms. Burke began job placement services.

Dr. Sharma and Dr. Aachi continued to treat appellant. On October 28, 2015 and June 7, 2016 Dr. Sharma injected appellant's right knee. In a report dated March 17, 2016, Dr. Aachi noted appellant's complaint of low back pain. He advised that this was caused by appellant's compensatory gait mechanics due to his knee injury. On June 16, 2016 Dr. Aachi advised that appellant's work status would be addressed by Dr. Sharma. On June 23, 2016 he advised that appellant had fallen on stairs, bruising his arm and knee, and noted that he continued to complain of back pain. On July 19, 2016 Dr. Sharma noted seeing appellant for follow-up of both knees and provided physical examination findings. He diagnosed bilateral knee osteoarthritis and recommended additional knee injections.

By letter dated July 29, 2016, OWCP asked Dr. Sharma to comment on Dr. Aachi's opinion that appellant's back condition was a consequence of his knee injury.

In an August 23, 2016 report, Dr. Sharma described examination findings of both knees and lumbar spine. He diagnosed osteoarthritis of both knees, noting traumatic osteochondral lesions of the medial condyles. Dr. Sharma also indicated that appellant's degenerative disc disease of the lumbar spine was aggravated by his antalgic gait. He advised that appellant could perform seated work with minimal bending, squatting, and climbing and recommended a work capacity evaluation to assess appellant's functional limitations.

On August 30, 2016 Ms. Burke updated the labor market survey information for the receptionist and accounting clerk positions, with weekly wages of \$502.00 to \$600.00 for the receptionist position and \$520.00 to \$600.00 for the accounting clerk position. She described appellant's work history and education, noting the recent training to update computer skills. The employing establishment provided updated earnings information.

On September 9, 2016 OWCP proposed to reduce appellant's compensation, based on his capacity to earn wages as a receptionist, (DOT No. 237.367-038), which required sedentary strength and no stooping, kneeling, or climbing. It noted that, based on Dr. Hanley's opinion, appellant had been referred for vocational rehabilitation services, and that the receptionist position was selected as being the most appropriate, based upon the rehabilitation counselor's review of appellant's work history and transferrable skills analysis. OWCP described the physical requirements of the receptionist position as sedentary and within the restrictions provided by both Dr. Hanley, OWCP's referral physician, and Dr. Sharma, appellant's attending orthopedist.<sup>4</sup> It indicated that, based on recent wage and position information, the receptionist position was reasonably available at an entry pay level of \$502.00 per week.

The only new evidence submitted after the proposed reduction was a June 16, 2016 treatment note in which Dr. Aachi noted seeing appellant for follow-up for his lumbar spine. He listed appellant's medications.

By decision dated October 11, 2016, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a receptionist. It noted that he was injured on May 30, 2012 and, by utilizing the *Shadrick* formula,<sup>5</sup> it found that appellant had a 58 percent LWEC, with a four-week compensation rate of \$2,007.00.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. In correspondence dated October 9, 2016, received by OWCP on October 24, 2016,

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<sup>4</sup> The Department of Labor's *Dictionary of Occupational Titles* job description for receptionist, DOT No. 237.367-038, is as follows: Receives callers at establishment, determines nature of business, and directs callers to destination. Obtains caller's name and arranges for appointment with person called upon. Directs caller to destination and records name, time of call, nature of business, and person called upon. May operate PBX telephone console to receive incoming messages. May type memos, correspondence, reports, and other documents. May work in office of medical practitioner or in other health care facility and be designated Outpatient Receptionist (medical ser.) or Receptionist, Doctor's Office (medical ser.). May issue visitor's pass when required. May make future appointments and answer inquiries. INFORMATION CLERK, clerical, 237.367-022. May perform variety of clerical duties. ADMINISTRATIVE CLERK, clerical, 219.362-010 and other duties pertinent to type of establishment. May collect and distribute mail and messages.

<sup>5</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

appellant maintained that he immediately reported his back condition. He indicated that he could not sit for long periods of time and requested that his medical benefits be continued.

In an October 4, 2016 report, Dr. Sharma described treatment for appellant's bilateral knee condition. He noted that appellant also continued to have low back pain. In reports dated October 3, November 14, and December 19, 2016, Dr. Aachi described appellant's pain management for both knees and low back pain. On February 2, 2017 Dr. Sharma noted appellant's complaint of increased left knee pain. He performed left knee injections on March 1, 8, 15, and March 21, 2017. On March 21, 2017 Dr. Sharma additionally diagnosed lumbar disc herniation.

On March 17, 2017 OWCP adjusted appellant's pay rate of April 2, 2009, the date disability began. It recalculated his LWEC, finding a 58 percent loss, with a four-week compensation rate of \$2,185.00.

On April 25, 2017 counsel requested that appellant's claim be expanded to include left knee post-traumatic osteoarthritis, right knee osteoarthritis, and herniated lumbar disc. He attached March 8, 2017 correspondence in which Dr. Sharma opined that, each of these diagnoses were directly related to appellant's federal employment, noting that in compensating for his left knee injury, appellant aggravated his right knee condition, and that his work duties caused a disc herniation.

At the hearing, held on April 25, 2017, appellant sought modification of LWEC and testified that he could not perform receptionist duties because he could not walk very well, had chronic knee and low back pain, and could only sit for 10 minutes at a time and then had to get up and stretch. He also indicated that his medication made him drowsy and maintained that the computer training provided was inadequate. The record was held open for 30 days.

In a May 1, 2017 report Dr. Sharma noted appellant's complaints of left knee and low back pain. Lumbar spine examination demonstrated paralumbar and trigger point tenderness with a positive straight leg test, and positive tension signs. Dr. Sharma diagnosed low back pain and knee osteoarthritis. He performed an injection to the lumbar spine. Dr. Sharma indicated that appellant could function as a receptionist, but would probably need an hourly accommodation because he would tighten up in his knees and lumbar spine.<sup>6</sup>

By decision dated June 14, 2017, an OWCP hearing representative found that appellant did not meet his burden of proof to establish that the October 11, 2016 LWEC determination should be modified. The hearing representative noted that OWCP had correctly adjusted appellant's LWEC on March 22, 2017 to reflect a correct pay rate for compensation purposes. He found no evidence that appellant had been retrained or otherwise vocationally rehabilitated since the October 11, 2016 LWEC determination, and that the medical evidence of record established that appellant could perform the duties of the receptionist position, noting that both

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<sup>6</sup> On May 16, 2017 OWCP issued a preliminary determination that an overpayment of compensation had been created because appellant was incorrectly compensated at the augmented rate from July 2, 2015 through March 4, 2017.

Dr. Hanley and Dr. Sharma indicated that appellant could perform sedentary work such as that of a receptionist.

### **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.<sup>7</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.<sup>8</sup> OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.<sup>9</sup> The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.<sup>10</sup>

The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.<sup>11</sup>

### **ANALYSIS**

OWCP issued its LWEC determination on October 11, 2016. In that decision it reduced appellant's wage-loss compensation based on his capacity to earn wages as a receptionist, a sedentary position.

Counsel timely requested a hearing. In correspondence received by OWCP on October 24, 2016, appellant asserted that he could not sit for long periods. As a formal LWEC determination was in effect at that time, appellant must show a basis for modification of LWEC decision to be entitled to wage-loss compensation. The Board finds that the evidence submitted is insufficient to establish that the original LWEC determination was erroneous or to establish a material change in appellant's employment-related conditions.<sup>12</sup>

The accepted conditions are left knee patellofemoral syndrome, left knee patella tendinitis, bilateral chondromalacia patellae, and left knee medial meniscus tear. Dr. Aachi did not comment on appellant's work capabilities. Medical evidence that does not offer any opinion

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<sup>7</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>8</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>10</sup> *Id.* at Chapter 2.1501.3(a).

<sup>11</sup> *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>12</sup> *Supra* note 9.

regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>13</sup> Dr. Aachi's opinion is therefore insufficient to establish modification of the October 11, 2016 LWEC determination.

As to Dr. Sharma's opinion, on August 23, 2016 he advised that appellant could perform seated work with minimal bending, squatting, and climbing. He indicated on May 1, 2017 that appellant could function as a receptionist, but would probably need an accommodation because his knees and lumbar spine would tighten up. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.<sup>14</sup> The Board finds Dr. Sharma's opinion insufficient to establish a material change in the injury-related conditions such that the October 11, 2016 LWEC should be modified.

Counsel asserted on appeal that the accepted conditions should have been expanded before an LWEC determination was made. OWCP has not rendered a final decision regarding whether additional conditions are employment related. The Board's jurisdiction extends only to the review of final adverse decisions by OWCP.<sup>15</sup> Moreover, even had the additional conditions been accepted, the medical evidence of record is insufficient to establish that appellant could not perform the duties of a receptionist.

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that an October 11, 2016 LWEC should be modified.

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<sup>13</sup> *Willie M. Miller*, 53 ECAB 697 (2002).

<sup>14</sup> *Patricia J. Glenn*, 53 ECAB 159 (2001).

<sup>15</sup> 20 C.F.R. § 501.2(c); *see E.L.*, 59 ECAB 405 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 14, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2018  
Washington, DC

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

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

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