United States Department of Labor
Employees' Compensation Appeals Board

D.Q., Appellant	)	
and	)	**Docket No. 17-1220**
	)	**Issued: May 18, 2018**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2017 appellant filed a timely appeal from a May 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that modification of his August 27, 2001 loss of wage-earning capacity (LWEC) determination is warranted.

FACTUAL HISTORY

On October 11, 1989 appellant then a 37-year-old painter, twisted his left knee while at work. OWCP accepted his claim for left knee meniscus tear, chondromalacia patella, medial collateral ligament sprain, lateral collateral ligament sprain, and unspecified left knee sprain.

[1] 5 U.S.C. § 8101 *et seq.*

Appellant stopped work on October 12, 1989 and returned to light duty on June 4, 1990. On September 9, 1990 he stopped work completely to undergo arthroscopic surgery on September 10, 1990. Thereafter, appellant was placed on the periodic compensation rolls.

Appellant was treated by Dr. John H. Wolf, Jr., a Board-certified orthopedist. On December 12, 1989 Dr. Wolf performed an arthroscopy of the left knee and medial meniscectomy and diagnosed meniscal tear of the left knee.

The employing establishment reemployed appellant as a light-duty painter on June 4, 1990. On August 22, 1990 OWCP notified him that he was recently employed as a light-duty painter effective June 4, 1990. It indicated that appellant's monetary benefits would be reduced, effective June 4, 1990 based upon his actual wages.

In a report dated September 5, 1990, Dr. Wolf noted appellant's continuing complaints of left knee pain and recommended surgery. On September 10, 1990 he performed a left knee arthroscopy and diagnosed internal derangement of the left knee. Thereafter, appellant stopped work completely. He underwent a magnetic resonance imaging (MRI) scan of the left knee on March 17, 1991 which revealed a possible residual small tear within the posterior horn of the medial meniscus. On April 30, 1991 Dr. Wolf performed an arthroscopy of the left knee, medial synovial debridement and lateral retinacular release, and diagnosed chondromalacia of the left patella. Appellant continued to be treated by Dr. Wolf, who found continued significant symptoms. Dr. Wolf opined that appellant could only perform sedentary duties.

Dr. Wolf reexamined appellant on January 22, March 17 and 9, 1998, and noted his continuing left knee complaints. He recommended a patellectomy. On May 8, 1998 Dr. Wolf performed a patellectomy of the left knee and diagnosed chronic patellofemoral pain of the left knee. In a December 14, 1998 report, he noted that appellant had difficulty bending his knee and required a brace. In a December 14, 1998 work capacity evaluation (OWCP-5c), Dr. Wolf noted that appellant could not work.

OWCP referred appellant to Dr. Steven J. Valentino, a Board-certified orthopedist, for a second opinion examination. In a January 6, 2000 report, Dr. Valentino noted findings consistent with symptom embellishment. He noted diagnoses and opined that appellant could return to work without limitations due to his work injury. OWCP determined that there was a conflict of medical opinion between Dr. Wolf and Dr. Valentino. It referred appellant to Dr. Thomas C. Peff, a Board-certified orthopedist, for an impartial medical examination. In a report dated June 8, 2000, Dr. Peff diagnosed status post meniscal tear, left knee, status post three arthroscopies and patellectomy of the left knee without evidence of significant ligamentous laxity. He opined that appellant recovered from his work-related injury of October 1989. However, Dr. Peff noted that appellant was not capable of returning to his previous job as a painter following the patellectomy. He further indicated that he found no significant objective findings to substantiate full disability and opined that appellant could return to sedentary work. Dr. Peff did not believe appellant required further treatment for his work injury of October 11, 1989.

In a work capacity evaluation (OWCP-5c) dated February 15, 2001, an OWCP medical adviser noted that, based on Dr. Peff's June 8, 2000 report, appellant was able to perform sedentary

work, eight hours a day, sitting, walking and standing limited to one hour a day, no pushing, pulling, squatting, or kneeling, and lifting limited to one hour a day and 10 pounds.

Following vocational rehabilitation, on July 18, 2001, OWCP proposed to reduce appellant's compensation, finding that he was partially disabled and had the capacity to earn wages as a check cashier. The position was found to be in compliance with Dr. Peff's June 8, 2000 restrictions. In an undated statement received on August 15, 2001, appellant asserted that it was unfair to reduce his compensation as he complied with vocational rehabilitation. He also asserted that the check cashier job required too much standing.

In an August 27, 2001 decision, OWCP reduced appellant's compensation to reflect his wage-earning capacity as a check cashier, effective September 9, 2001.

Appellant continued to be treated by Dr. Wolf for significant left knee pain which began in 1989. Dr. Wolf noted that appellant was unable to walk very far without having to sit because of left knee pain, he was limited in standing for any length of time, he could not squat or climb steps. He found appellant to be totally disabled from work. On March 2 and April 5, 2011 Dr. Wolf noted that appellant was status post arthroscopic left knee surgeries and a patellectomy with secondary painful hips and bilateral hip replacements. He opined that appellant was totally disabled from work. On December 6, 2011 appellant noted that x-rays revealed arthritis in the patellofemoral joint and Dr. Wolf attributed this condition to appellant's former employment, which required squatting and kneeling. Dr. Wolf continued to opine that appellant was totally disabled from work.

On January 15, 2013 Dr. Wolf saw appellant and diagnosed traumatic amputation of the left leg above the knee. In a January 15, 2013 work capacity evaluation (OWCP-5c), he noted that appellant had four prior left knee surgeries and was waiting for a total knee replacement and developed blood clots and vascular insufficiency. Dr. Wolf noted that appellant could not work eight hours a day due to lumbar disc disease, bilateral hip replacements, and partial left leg amputation.

On January 13, 2014 appellant was treated by Dr. David Junkin, a Board-certified orthopedist and associate of Dr. Wolf. Dr. Junkin diagnosed above the knee amputation and noted that appellant was totally disabled due to the amputation. In a January 13, 2014 work capacity evaluation, he noted that appellant had a failed vascularization of the left leg above the knee. Dr. Junkin advised that appellant was unable to stand for eight hours or climb steps due to the amputation. He noted that appellant's medical restrictions were permanent.

In a January 15, 2015 report, Dr. Mahshid Kamyab, a Board-certified family practitioner, noted that appellant was totally disabled due to his left leg amputation. He indicated that there were no treatment options to facilitate his recovery and return to work.

On January 20, 2016 Dr. Thomas E. Sabalaske, an osteopath, noted objective findings of above the left knee amputation and opined that appellant was unable to return to full- or part-time work. The treatment plan was to have him work with the prosthesis and preserve blood flow to the opposite leg.

On April 11, 2016 appellant filed a notice of recurrence (Form CA-2a) asserting that he had a recurrence of disability on October 11, 1989 causally related to his original injury. He noted that, after returning to work following the original injury, he could not walk. Appellant indicated that the recurrence occurred when he had pain in his left knee and then had his left leg amputated. The employing establishment noted on the Form CA-2a that appellant was on limited duty until September 9, 1990. It indicated that appellant believed he had a material worsening of his condition.

Appellant submitted an April 1, 2016 report from Dr. Sabalaske who noted that appellant had an above-the-knee amputation due to complications from a blood clot in his left leg. Dr. Sabalaske noted that appellant was totally disabled with chronic pain and ambulatory dysfunction.

In an April 13, 2016 letter, OWCP requested appellant provide a date that his disability increased due to a material worsening of his accepted work injuries. It informed him that, since a formal LWEC determination was issued in his case, his recurrence claim would be treated as a request for modification of the LWEC determination. Appellant was informed of the requirements for a modification of an LWEC. OWCP provided him 30 days to provide additional information.

In a May 18, 2016 decision, OWCP denied modification of the August 27, 2001 LWEC determination.

Appellant timely requested a telephonic oral hearing before an OWCP hearing representative, which was held on March 29, 2017. He submitted a discharge summary for a hospital admission from September 1 to 7, 2012 in which Dr. Gabor A. Winkler, a Board-certified vascular surgeon, diagnosed ischemic left leg and status post left femoral to posterior tibial bypass with a graft on September 4, 2012. Dr. Winkler noted that appellant presented on September 1, 2012 with a several week history of leg pain and received a duplex ultrasound which demonstrated occlusion of the superficial femoral artery and popliteal artery. On September 4, 2012 he performed a left common femoral to posterior tibial artery bypass with a bypass graft and diagnosed left leg occluded popliteal artery and occluded left distal superficial femoral artery with ischemic rest pain with hyperplasia of the greater saphenous vein. Dr. Winkler noted that appellant progressed postoperatively and was discharged to rehabilitation on September 7, 2012.

Appellant submitted a March 31, 2017 report from Dr. Sabalaske who opined that appellant had an amputation above the left knee which was in part from damage sustained to the left knee after multiple arthroscopic surgeries. Dr. Sabalaske indicated that appellant developed blood clots in the left knee from the knee injury which left him totally disabled.

In a decision dated May 2, 2017, OWCP denied modification of its August 27, 2001 LWEC determination.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

wages.[2] Actual wages earned is generally the best measure of wage-earning capacity.[3] In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[4] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5]

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.[6] OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal LWEC.[7] The relevant part provides that a formal LWEC 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.[8]

The burden of proof is on the party attempting to show modification.[9] There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.[10]

ANALYSIS

Appellant twisted his left knee at work on October 11, 1989. OWCP accepted the claim for a left knee meniscus tear, chondromalacia patella, medial collateral ligament sprain, lateral collateral ligament sprain, and unspecified left knee sprain. On December 12, 1989 appellant underwent an authorized left knee arthroscopic surgery. In June 1990 he returned to work in a part-time capacity. On September 9, 1990 appellant stopped work completely and was paid wage-loss compensation on the periodic rolls. On September 10, 1990 and April 30, 1991 he underwent additional authorized left knee arthroscopic surgeries and on May 8, 1998 he underwent an authorized left knee patellectomy. On August 27, 2001 OWCP found that appellant could perform the duties of a check cashier and reduced his compensation to reflect his wage-earning capacity in

[2] 5 U.S.C. § 8115(a); *see Mary Jo Colvert,* 45 ECAB 575 (1994); *Keith Hanselman,* 42 ECAB 680 (1991).

[3] *Hayden C. Ross,* 55 ECAB 455, 460 (2004).

[4] *Id.*

[5] The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability from work, OWCP must evaluate the evidence to determine if modification of wage-earning capacity is warranted. *Katherine T. Kreger,* 55 ECAB 633 (2004); *Sharon C. Clement,* 55 ECAB 552 (2004).

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

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity,* Chapter 2.1501.3(a) (June 2013).

[8] *Id.*

[9] *Darletha Coleman,* 55 ECAB 143 (2003).

[10] *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland,* 54 ECAB 638 (2003).

that job. In its May 18, 2016 and May 2, 2017 decisions, it found that he had not established a basis to modify the LWEC determination.

After OWCP found that appellant could perform the duties of a check cashier, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties.[11] For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.[12]

On April 11, 2016 appellant filed a notice of recurrence as of October 16, 1989 and stated that his left leg had been partially amputated. He asserted that in 2012 he developed blood clots in his left leg and an unsuccessful left leg bypass required he undergo a left leg amputation above the knee. Appellant contends that the doctors attributed the blood clots to the 1989 work injury to his left knee and the multiple related surgeries. The Board finds that the record does not contain medical evidence establishing that his accepted work-related conditions, left knee meniscus tear, chondromalacia patella, medial collateral ligament sprain, lateral collateral ligament sprain, had materially changed that would render him unable to perform the check cashier duties.

On January 15, 2013 Dr. Wolf diagnosed traumatic amputation of the left leg above the knee. In a January 15, 2013 work capacity evaluation, he noted that appellant had four prior left knee surgeries and was waiting for a total knee replacement and developed blood clots and vascular insufficiency. Dr. Wolf noted that appellant was disabled due to lumbar disc disease, bilateral hip replacements and partial left leg amputation. However, he does not explain how the accepted conditions worsened such that appellant was unable to perform the duties of a cashier. Additionally, Dr. Wolf related appellant's disability to conditions not accepted as employment related,[13] including lumbar disc disease, bilateral hip replacements and partial left leg amputation. He further failed to address the job duties of the check cashier position or provide a rationalized medical opinion explaining how residuals of the accepted conditions had materially changed such that he no longer could perform check cashier duties. Thus, this evidence is insufficient to show a material change in the nature and extent of the injury-related condition.

Dr. Wolf's earlier reports from July 1, 2002 to August 7, 2012, do not establish a material change in the accepted conditions such that appellant would not be able to perform the duties of the constructed check cashier position. He noted that the accepted injuries limited appellant's ability to squat, kneel, stand or walk, but the check cashier job was sedentary and did not require stooping, kneeling, squatting, or prolonged walking or standing. In December 6, 2011 to August 7, 2012 reports, Dr. Wolf noted arthritis in the patellofemoral joint which he attributed to appellant's former employment. However, OWCP did not accept left knee arthritis as causally related to appellant's October 11, 1989 work injury.[14] Dr. Wolf has not otherwise provided sufficient medical rationale addressing how appellant's accepted left knee meniscus tear, chondromalacia

[11] *Phillip S. Deering,* 47 ECAB 692 (1996).

[12] *Id.*

[13] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury).

[14] *Id.*

patella, medial collateral ligament sprain, lateral collateral ligament sprain and unspecified left knee sprain, changed preventing him from performing the duties of the check cashier position.[15]

On January 13, 2014 Dr. Junkin noted appellant's amputation and diagnosed failed vascularization of the left leg above the knee. He advised that appellant could not stand for eight hours or climb steps due to the amputation. However, Dr. Junkin offered diagnoses of conditions not accepted as employment related[16] in asserting that appellant was totally disabled from work. His opinion does not address the job duties of the check cashier position or provide a rationalized medical opinion explaining how residuals of the accepted conditions had materially changed such that he not perform the duties of a check cashier. Thus, this evidence does not show a material change in the nature and extent of the injury-related condition. Similarly Dr. Kamyab, on January 15, 2015, noted that appellant was totally disabled due to his left leg amputation. However, this does not establish a material change in appellant's accepted conditions as Dr. Kamyab attributes his disability to the left knee amputation not accepted by OWCP as being employment related. Dr. Kamyab did not address how appellant's accepted conditions prevented him from performing the sedentary duties of a check cashier.

In reports dated January 20 and April 1, 2016, Dr. Sabalaske opined that appellant had a left knee amputation due to complications from a blood clot in his left leg. He noted that appellant was totally disabled. On March 31, 2017 Dr. Sabalaske opined that appellant had a left above the knee amputation which was in part due to damage sustained to the left knee after multiple arthroscopic surgeries. He noted that appellant developed blood clots in the left knee from the work injury which left him totally disabled. However, these reports are insufficient to establish a material change in appellant's accepted conditions as Dr. Sabalaske attributes appellant's disability to left knee amputation which was not accepted by OWCP as being employment related.[17] Further, Dr. Sabalaske did not specifically address the duties of a check cashier or explain any change in appellant's injury-related condition that would render her unable to perform the position of accounting clerk. His report is insufficient to meet appellant's burden of proof.

Reports from Dr. Winkler dated September 1 to 7, 2012, are of limited probative value as he failed to address appellant's disability due to his work-related injury.[18]

The Board finds that there is no medical evidence which establishes a material change in appellant's employment-related condition such that a modification of OWCP's LWEC determination would be warranted. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that the original rating was in error, or that he had been retrained or otherwise vocationally rehabilitated. Appellant has, therefore, not met his burden of proof.

[15] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[16] *See supra* note 13.

[17] *See supra* note 13.

[18] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

On appeal appellant references a workers' compensation physician who indicated that multiple surgeries could cause blood clots to develop in the knee. He indicated that he had no choice but to have his left leg amputated. The Board notes that appellant has not submitted sufficient evidence to support modification of the August 27, 2001 LWEC determination. As noted, modification of the LWEC determination is not warranted as appellant failed to establish a material change in the nature and extent of the injury-related condition, that he has been retrained or otherwise vocationally rehabilitated or that the original determination was erroneous. Appellant's physicians did not provide sufficient rationale to explain why appellant had a material change in the nature and extent of the injury-related conditions. Consequently, appellant has failed to carry his burden of proof to establish modification of the LWEC determination.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that modification of his August 27, 2001 LWEC determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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