

ISSUE

The issue is whether appellant has met his burden of proof to modify a January 23, 2008 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 10, 2006 appellant, then a 44-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that, on February 9, 2006, he sustained a right knee injury when he tripped on a curb and fell while in the performance of duty. He stopped work on February 9, 2006.⁵ OWCP accepted appellant's claim for right patella chondromalacia and right knee medial/lateral meniscus tears. Appellant received disability compensation on the daily rolls commencing March 27, 2006 and on the supplemental rolls commencing September 3, 2006.

On February 27, 2007 appellant underwent OWCP-authorized right knee surgery, including arthroscopic right chondroplasty of his medial, lateral, and patellofemoral joints, and microfracture of his right trochlea, medial femoral condyle, and lateral femoral condyle.

In a July 13, 2007 work capacity evaluation form (Form OWCP-5c), Dr. Robert Loeffler, an attending orthopedic surgeon, indicated that appellant could work eight hours per day with restrictions for no more than one hour (per each activity) of squatting, kneeling, or climbing.

On April 18, 2007 appellant returned to work at the employing establishment in a full-time, limited-duty capacity. On July 23, 2007 he commenced work in the position of a modified security clerk with weekly wages of \$729.23. The position involved preparing correspondence/reports by hand or computer, and performing other clerical duties. The position was primarily accomplished at a desk and was predominantly sedentary in nature. It required some walking, standing, reaching, stooping, bending, and light lifting.

By decision dated January 23, 2008, OWCP adjusted appellant's compensation to reflect his capacity to earn wages in the modified security clerk position, finding that it fairly and reasonably represented his wage-earning capacity. It noted that he had performed the position for more than 60 days and provided a calculation of appellant's LWEC due to his February 9, 2006 employment injury.⁶

In a July 23, 2014 narrative report, Dr. Loeffler noted that appellant requested limited work hours due to his right knee pain. In another July 23, 2014 narrative report, he indicated that

⁴ Docket No. 17-1343 (issued December 4, 2017).

⁵ Appellant had preexisting arthritis in his right knee and underwent right anterior cruciate ligament reconstruction surgery in the 1980s due to that condition.

⁶ Appellant continued working as a modified security clerk and received wage-loss compensation based on the January 23, 2008 LWEC determination. He underwent heart valve surgery in October 2013 and was off work through early 2014.

physical examination of the right knee on that date showed extension lacking 10 degrees, flexion to 90 degrees, lack of Lachman sign, stable anterior and posterior drawer signs, and collateral ligaments with medial/lateral tenderness and trace effusion. In a July 23, 2014 duty status report (Form CA-17), Dr. Loeffler diagnosed severe degenerative joint disease of the right knee and indicated that appellant could not work for more than four hours per day.

On September 8, 2014 appellant began working a reduced schedule of four hours per day and, on September 11, 2014, he filed a notice of recurrence of disability (Form CA-2a) beginning September 8, 2014. He also filed a claim for compensation (Form CA-7) claiming partial disability for the period September 8 to 19, 2014.

In support of her claims, appellant submitted a September 26, 2014 attending physician report (Form CA-20) in which Dr. Loeffler listed the history of injury as “chronic” and diagnosed right knee chronic degenerative joint disease and anterior cruciate ligament instability. Dr. Loeffler checked a box marked “Yes” indicating that the diagnosed conditions were work related and provided the notation, “Ligament tear new, [degenerative joint disease] old.”

In an October 2, 2014 development letter, OWCP informed appellant that it appeared he was requesting modification of its January 23, 2008 LWEC determination. It advised him of the criteria for modifying a formal LWEC determination, including showing that there was a material change in the nature and extent of his injury-related condition, that he had been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous. OWCP afforded appellant 30 days to submit additional evidence in support of his claim. By separate development letter of even date, it also requested additional information from the employing establishment relevant to the claimed recurrence. Appellant subsequently submitted additional medical evidence. In an October 6, 2014 report, Dr. Loeffler indicated that appellant had anterior cruciate ligament instability in his right knee which necessitated total right knee replacement surgery. He noted that appellant requested that he work no more than six hours per day, but he advised appellant that he could not medically restrict his sitting due to the right knee problem. Dr. Loeffler indicated that the employing establishment advised that appellant could perform his job sitting in a wheelchair for eight hours per day and that he would not have to stand.⁷

In a July 15, 2014 incident report, a police officer with the Key West Police Department advised that he had been called to a private pool at the Truman Annex in Key West, Florida due to a fight. The officer advised that witnesses indicated that they saw appellant knock the pool security guard to the ground and that appellant then continued to fight him when he was on the ground.⁸ Appellant was arrested for battery and was initially taken to the hospital after he complained about a heart condition. In a November 20, 2014 work capacity evaluation form, Dr. Robert Catania, an attending Board-certified orthopedic surgeon, diagnosed degenerative joint disease of the right knee and indicated that appellant was totally disabled.⁹

In a December 11, 2014 narrative report, Dr. Catania indicated that appellant reported that he sustained a right knee injury on February 9, 2006 and that his chief complaint was right knee pain. He noted that, upon physical examination, appellant had varus presentation and full

⁷ On October 6, 2014 appellant returned to an eight-hour workday.

⁸ The witnesses also indicated that it was unclear which man was the initial aggressor in the altercation.

⁹ Appellant stopped work again on November 24, 2014.

extension of his right knee with pain and crepitus. Dr. Catania diagnosed degenerative joint disease of the right knee tricompartmental joint space (mostly medial) with varus presentation and progression of pain and arthritis status post February 9, 2006 work-related injury. He advised that appellant's best option was total right knee replacement and noted that appellant was totally disabled from work. Dr. Catania indicated that, according to the history, appellant was "doing fine and well up" until appellant's February 9, 2006 injury and advised that he experienced progressive changes to his knee which ultimately led to surgery. He noted that appellant now had worsening arthritis almost nine years after the February 9, 2006 injury and indicated, "I do feel from records and from history that appellant's injury is the major cause of his need for total right knee replacement."

In a January 5, 2015 narrative report, Dr. Catania indicated that, upon physical examination, appellant exhibited varus presentation of his right knee with no gross signs of instability. He opined that appellant could not perform even sedentary work due to the pain medications he required for his right knee condition. In a January 5, 2015 attending physician's report, Dr. Catania listed the date of injury as February 9, 2006 and the mechanism of injury as tripping on a curb. He diagnosed degenerative joint disease of the right knee and checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by the employment.

On January 20, 2015 appellant filed another notice of recurrence (Form CA-2a) claiming disability beginning November 14, 2014. On this Form CA-2a, appellant's supervisor indicated that he had been arrested on July 15, 2014 for committing assault on that same date. The supervisor indicated that appellant had been absent from work for several days after July 15, 2014 and he opined that appellant's increased disability was caused by an injury he sustained while committing the assault.

Appellant submitted a February 3, 2015 narrative report in which Dr. Catania indicated that he could perform light-duty work for four hours per day with restrictions of no climbing and no lifting more than 10 pounds. In a Form OWCP-5c and a Florida State workers' compensation form, both dated February 3, 2015, Dr. Catania provided the same work restrictions.¹⁰

By decision dated March 10, 2015, OWCP denied appellant's claim for a recurrence of disability beginning September 8, 2014 because he had not submitted sufficient medical evidence in support of his claim.

In a March 10, 2015 development letter, OWCP again informed appellant that it appeared that he was requesting modification of its January 23, 2008 LWEC determination and again noted the criteria for modifying a formal LWEC determination. It afforded him 30 days to submit additional evidence in support of his claim.

By decision dated April 14, 2015, OWCP denied appellant's claim for a recurrence of disability.

In an August 18, 2015 report, Dr. Catania noted that comparison of appellant's October 2, 2014 magnetic resonance imaging (MRI) scan to his March 10, 2006 MRI scan showed significant

¹⁰ In the Florida State workers' compensation form, Dr. Catania checked a box indicating that appellant's injury was work related, but he did not provide a diagnosis.

progression of his right knee arthritis.¹¹ He advised that appellant was only capable of working four hours per day with restrictions, including no walking or standing for more than 15 minutes at a time, and no sitting for more than an hour at a time. Dr. Catania opined that these restrictions were necessitated by right knee degenerative joint disease related to the February 9, 2006 employment injury. On an August 18, 2015 Florida State workers' compensation form, he checked a box indicating that appellant's injury was work related, but he did not provide a diagnosis.

On September 10, 2015 appellant, through counsel, requested reconsideration.

By decision dated September 21, 2015, OWCP denied modification of its April 14, 2015 decision. It found that appellant had not submitted medical evidence sufficient to establish a work-related recurrence of disability. OWCP found that his disability beginning in 2014 began after a nonwork-related intervening injury on July 15, 2014.

In an April 5, 2016 report, Dr. Catania opined that appellant's right knee condition was causally related to his February 9, 2006 injury and that he was now having left knee problems secondary to biomechanics of his right knee. He further opined that appellant was unable to work. Dr. Catania mentioned appellant's heart surgery in 2013 and noted that "he had an incident" on July 15, 2014 which did not affect his right knee.

In a report dated July 26, 2016, Dr. Peter Millheiser, a Board-certified orthopedic surgeon serving as an OWCP referral physician, opined that appellant continued to have residuals of his work-related right knee chondromalacia. He noted that appellant was physically unable to perform his date-of-injury position as a police officer, but that he was capable of performing sedentary work.

By decision dated December 5, 2016, OWCP denied modification of its September 21, 2015 decision. It found that appellant had not submitted medical evidence establishing a work-related recurrence of disability and that his disability beginning in 2014 was due to a nonwork-related incident on July 15, 2014.

Appellant appealed OWCP's December 5, 2016 decision to the Board and, by decision dated December 4, 2017,¹² the Board set aside the December 5, 2016 decision. The Board found that the proper issue of the case was not whether appellant had established a recurrence of disability commencing September 8, 2014 due to his February 9, 2006 work injury, but rather was whether the January 23, 2008 LWEC determination should have been modified. The Board remanded the case to OWCP to review appellant's claim under the standards for modifying LWEC determinations, to be followed by issuance of a *de novo* decision on the matter.

Additional evidence was submitted to the case record after the Board issued its December 4, 2017 decision. In a July 16, 2014 report, Dr. Sandy Shultz, an attending Board-certified radiologist, indicated that appellant presented on that date complaining of chest pain. She obtained chest x-rays and diagnosed "no active pulmonary disease."

¹¹ The record contains reports of the March 10, 2006 and October 2, 2014 MRI scans.

¹² See *supra* note 4.

In a January 20, 2018 statement, appellant asserted that he was not the aggressor in the July 15, 2014 altercation and that he was only treated for chest pain as a result of that incident. In a May 21, 2018 letter, an employing establishment official contended that appellant's restriction of working no more than four hours per day commencing in September 2014 was necessitated by an injury sustained in the July 15, 2014 nonwork-related altercation.

On remand, OWCP evaluated appellant's claim under the standards for modifying LWEC determinations and issued a June 12, 2018 decision in which it found that he had not met his burden of proof to modify the January 23, 2008 LWEC determination. It indicated that his need to work a limited work schedule, beginning in September 2014, was due to an intervening injury sustained on July 15, 2014 rather than due to the accepted February 9, 2006 employment injury. OWCP found that appellant had not submitted a rationalized medical report establishing that his February 9, 2006 injury-related condition worsened to the point that he could no longer work on a full-time basis as a modified security clerk, the position on which the January 23, 2008 LWEC determination had been based. It concluded that he had not established any of the criteria for modifying the January 23, 2008 LWEC determination.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹³ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁴

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.¹⁵ A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.¹⁶ Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.¹⁷

Once the wage-earning capacity of an injured employee is determined, modification of such determination is not warranted unless: (1) there is a material change in the nature and extent of the injury-related condition, (2) the employee has been retrained or otherwise vocationally

¹³ *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

¹⁴ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁵ *E.W.*, Docket No. 14-0584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

¹⁷ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

rehabilitated; or (3) the original determination was, in fact, erroneous.¹⁸ The burden of proof is on the party attempting to show a modification of the LWEC determination.¹⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the January 23, 2008 LWEC determination.

In reaching its determination of appellant's LWEC, OWCP properly found that appellant had received actual earnings as a modified security clerk for more than 60 days in that he had been working in the position since July 23, 2007 when OWCP issued its January 23, 2008 LWEC decision.²⁰ It also properly found that appellant's actual wages fairly and reasonably represented his wage-earning capacity. The record does not establish that the modified security clerk position constituted part-time, sporadic, seasonal or temporary work.²¹ Moreover, the record does not reveal that the position was a make-shift position designed for appellant's particular needs.²²

Appellant asserted a material change in the nature and extent of his February 9, 2006 injury-related condition such that by September 2014 he could no longer work on a full-time basis as modified security clerk position.²³

In support of his claim, appellant submitted a July 23, 2014 report, wherein Dr. Loeffler diagnosed severe degenerative joint disease of the right knee and indicated that appellant could not work for more than four hours per day. However, this report is of no probative value as it did not provide an opinion regarding causal relationship.²⁴

In a September 26, 2014 report, Dr. Loeffler listed the history of injury as "chronic" and diagnosed right knee chronic degenerative joint disease and anterior cruciate ligament instability. Dr. Loeffler checked a box marked "Yes" indicating that the diagnosed conditions were work related and provided the notation, "Ligament tear new, [degenerative joint disease] old." Appellant's burden of proof includes the necessity of furnishing an affirmative opinion from a physician who supports his or her conclusion with sound medical reasoning. Dr. Loeffler only described appellant's work injury as being "chronic" in nature, and provided no rationale for his opinion on causal relationship. The Board has held that when a physician's opinion on causal relationship consists only of checking "Yes" to a form question, without more by the way of medical rationale, that opinion is of limited probative value and is insufficient to establish causal

¹⁸ *C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁹ *See T.M.*, Docket No. 08-0975 (issued February 6, 2009).

²⁰ *See supra* note 15.

²¹ *See supra* note 16.

²² *Id.* The Board notes that appellant's February 9, 2006 injury was accepted for right patella chondromalacia and right knee medial/lateral meniscus tears.

²³ *See supra* note 17.

²⁴ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

relationship.²⁵ As such, Dr. Loeffler's September 26, 2014 report is insufficient to discharge appellant's burden of proof.²⁶

In a December 11, 2014 report, Dr. Catania diagnosed degenerative joint disease of the right knee tricompartmental joint space (mostly medial) with varus presentation and progression of pain, and arthritis status post February 9, 2006 work-related injury. He indicated that, according to the history, appellant was "doing fine and well" up until appellant's February 9, 2006 injury and advised that he experienced progressive changes to his knee which ultimately led to surgery. Dr. Catania noted appellant's worsening arthritis almost nine years after the February 9, 2006 injury and indicated, "I do feel from records and from history that appellant's injury is the major cause of his need for total right knee replacement." In an August 18, 2015 report, he advised that appellant was restricted to working four hours per day due to right knee degenerative disease related to his February 9, 2006 accident. In an April 5, 2016 report, Dr. Catania indicated that appellant's right knee condition was related to his February 9, 2006 accident. He noted that "[appellant] had an incident" on July 15, 2014 which did not affect his right knee and opined that appellant was not able to work at all. Dr. Catania did not describe appellant's accepted conditions nor did he explain how they worsened to the point that appellant could not work on a full-time basis as a modified security clerk. Appellant had preexisting right knee arthritis since the 1980's and Dr. Catania did not explain why appellant's continuing right knee problems were not merely due to this nonwork-related condition or how the employment injury had aggravated the condition. In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.²⁷ In a report dated July 26, 2016, Dr. Millheiser opined that appellant continued to have residuals of his work-related right knee chondromalacia. He noted that appellant was physically unable to perform his date-of-injury position as a police officer, but that he was capable of performing sedentary work. However, Dr. Millheiser's opinion does not support modification of the LWEC determination as he did not provide a clear opinion that appellant could not work on a full-time basis as a modified security clerk, the position on which the determination had been based.²⁸

The Board thus finds that appellant has not established a material change in the nature and extent of his accepted right knee conditions. The Board further finds that appellant has not established that he was retrained or otherwise vocationally rehabilitated; or that the original LWEC determination was, in fact, erroneous. For these reasons, appellant has not met his burden of proof to modify OWCP's January 23, 2008 LWEC determination.

On appeal counsel asserts that the reports of appellant's attending physicians are sufficient to require modification of OWCP's January 23, 2008 LWEC determination. Counsel further contends that OWCP placed undue emphasis on the July 15, 2014 altercation and its possible

²⁵ *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

²⁶ *Id.*

²⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

²⁸ See *D.R.*, Docket No. 16-0528 (issued August 24, 2016) (a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining the relationship between a given employment activity and a diagnosed medical condition).

effects. However, the Board has explained herein why the medical evidence of record fails to require modification of OWCP's determination.

Appellant may request modification of the wage-earning capacity 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 modify a January 23, 2008 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2019
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