

**United States Department of Labor
Employees' Compensation Appeals Board**

<hr/>)	
J.B., Appellant)	
)	
and)	Docket No. 17-1190
)	Issued: February 26, 2019
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, Los Angeles, CA,)	
Employer)	
<hr/>)	

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 9, 2017 appellant filed a timely appeal from an April 28, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing February 7, 2016 causally related to a July 9, 2010 accepted employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 28, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On August 3, 2010 appellant, a 48-year-old criminal investigator/special agent, filed a traumatic injury claim (Form CA-1), alleging that she sustained a right knee injury on July 9, 2010 as a result of getting in and out of various positions while shooting, standing to prone, prone to kneeling to standing, and standing to kneeling. By decision dated November 30, 2010, OWCP accepted the claim for right knee strain. It later expanded the acceptance of the claim to include right chondromalacia patellae and old bucket handle tear of the right medial meniscus. OWCP authorized right knee surgery on May 13, 2013, which was performed by Dr. Daniel Kharrazi, a Board-certified orthopedic surgeon.

In a May 1, 2014 report, Dr. Kharrazi indicated that appellant had made slow and steady progress postoperatively, however, she continued to experience achiness, stiffness, and pain. Upon physical examination, he found normal gait, no swelling or ecchymosis, no observable spasm and no obvious malalignment of the knee. Dr. Kharrazi noted that appellant had a history of right ankle open reduction and internal fixation (ORIF) surgery status post fall on June 21, 2011. He determined that she had reached maximum medical improvement (MMI) and was released to full duty with no work restrictions. Dr. Kharrazi noted that pending the degeneration of her symptoms, appellant may require revision diagnostic and operative arthroscopy, but would likely ultimately require a total right knee arthroplasty.

In a report dated October 21, 2014, Dr. Matthew Chan, a Board-certified occupational medicine specialist, diagnosed cervical strain, lumbar sprain, bilateral shoulder strain, right hip strain, and left knee strain. He indicated that appellant reportedly injured her neck, back, and arms on April 18, 2014 when she was rear ended by another car while driving. Dr. Chan provided work restrictions of no lifting or carrying over 10 pounds, no defensive tactics, no stretching or working above the shoulders, no firearms usage, no participation in raids/arrest or any undercover surveillance activities, or reactive squad duty.

On November 12, 2015 the employing establishment offered appellant a full-time job as an operational management specialist. The duties included performing the administrative, investigative, and security responsibilities of the office, as well as budget and financial management, compliance management, and human resources forecasting and planning. The work was sedentary and the physical requirements included no lifting, pushing, or pulling greater than 10 pounds, no kneeling, no bending, no jumping, no twisting, no running, and no stretching or working above the shoulders.

The record reveals that on February 7, 2016 appellant was converted to the operational management specialist position.

In a February 29, 2016 letter, the employing establishment indicated that appellant had accepted the job offer and was converted from a special agent to an operational management specialist. It reiterated that the position was sedentary in nature with no special physical demands. The employing establishment stated that the offer was made in response to the permanent medical restrictions provided by Dr. Chan on October 21, 2014. It noted that as a result of the job acceptance, appellant would no longer be receiving Availability Pay (AVP) which she had

received as a special agent.³ The employing establishment advised that “[t]his constitutes a loss in wage-earning capacity, and a [Form] CA-7 was recently submitted to begin [l]oss of [w]age[-] [e]arning [c]apacity benefit payments *via* OWCP. The loss in earning capacity constitutes the 25 percent for AVP...”⁴

On February 29, 2016 the employing establishment filed on behalf of appellant a claim for wage-loss compensation (Form CA-7) for the period February 7 to 29, 2016 due to her loss of AVP after she was converted from a special agent to an operational management specialist.

By development letter dated March 3, 2016, OWCP advised appellant that it appeared that she was claiming disability and loss of AVP because she was offered a new job as an operational management specialist due to her permanent work restrictions. It accepted the claim as a recurrence of disability and requested additional evidence. OWCP afforded appellant 30 days to submit evidence, specifically explaining why she would have permanent work restrictions after Dr. Kharrazi released her to full duty on May 1, 2014.

The employing establishment sent a March 3, 2016 letter to OWCP indicating that it had attached a medical report from Dr. Kharrazi dated September 23, 2014 in which he opined that appellant’s permanent work restrictions were causally related to her accepted work injury.

In a September 23, 2014 report, Dr. Kharrazi stated that appellant was seen for reevaluation of her right knee. He indicated that she was previously declared permanent and stationary in May 1, 2014 and since then she was unable to run in regard to her right knee as she was status post-ORIF of the right ankle on June 21, 2011 and underwent a May 13, 2013 right knee arthroscopy. Appellant had attempted fast walking to potentially get to a running status, but in the past two weeks with just fast walking she was experiencing intense stiffness, achiness, and swelling in her right knee. Dr. Kharrazi opined that she would never be able to fully return to her customary work duties without permanent restrictions. He concluded that appellant was capable of sedentary work with restrictions of no defensive tactics, no firearms, no jumping, no kneeling, bending, or twisting, and no running.

On February 22, 2016 Dr. Kharrazi stated that appellant had “well-documented right knee patellofemoral chondromalacia/osteoarthritis.” Appellant stated that she continued to experience achiness, stiffness, and pain in her knee. She further indicated that she had switched positions at work and drove an hour and a half each way. Upon physical examination, Dr. Kharrazi found positive patellofemoral crepitation, positive grind, pain with deep squat, stable Lachman and anterior drawer, and stable varus and valgus testing. He reiterated his work restrictions of no running, jumping, firearms, or defense tactics.

In a March 17, 2016 report, Dr. Kharrazi stated that in September 2015 appellant was given permanent work restrictions due to her degenerative condition in her knee. He reviewed her

³ Eligibility for AVP is limited to criminal investigators who are properly classified in the GS-1811 (Criminal Investigations) and GS-1812 (Game Law Enforcement) series under Office of Personnel Management standards 5 U.S.C. § 5542(d) and (e), 5 U.S.C. § 5545a.

⁴ The employing establishment noted that appellant was not converted to her new position until February 7, 2016. Therefore the actual wages for her new position amounted to \$122,529.00, which explained “the difference between her actual wages on this letter and her signed job offer.”

medical history and indicated that on May 13, 2013 she was intraoperatively noted to have degenerative changes and osteoarthritis. Appellant had also previously received injections on her knee. Dr. Kharrazi stated that diagnostics studies prior to her surgery showed chondromalacia and degenerative changes and indicated that her current diagnosis was right knee osteoarthritis. He reported that appellant tried to return to her full and customary work, however, because of the nature of her condition and the degenerative changes in her knee, her condition worsened. Appellant was also not required to do any strenuous activities at work between May and September 2014. After being put through rigorous testing and training, it was made clear to her that she would be unable to perform any strenuous activities and work restrictions were needed.

In a narrative statement dated March 21, 2016, appellant indicated that her right knee injury worsened in mid-September 2014 when she was working out (fast walking) while on duty to prepare for an upcoming mandatory physical fitness test (PFT). She noted that special agents were authorized three one-hour exercise periods per week during their regularly scheduled work shift. Appellant stated that her knee was doing better when she was released from her work restrictions on May 1, 2014, but she still had some aching, stiffness, and pain. In early May 2014, she began preparing for an upcoming PFT by regularly walking short distances. Appellant increased her distance and pace in small increments, as long as she tolerated the increases without any problems. In mid-September 2014, before she had increased her pace to a jog, she stated that her knee injury had gotten worse. The pain had increased, appellant's knee became swollen, and the aching and stiffness had worsened. She immediately made an appointment with Dr. Kharrazi and saw him on September 23, 2014, at which time he put her on permanent work restrictions. Appellant alleged that due to her permanent work restrictions which resulted in her inability to meet some of the essential tasks of the special agent position, she was transitioned to a professional staff position, reassigned to a different squad, and also received a substantially lower salary.

By decision dated August 4, 2016, OWCP denied appellant's claim for a recurrence of disability, finding that the evidence of record was insufficient to establish a material change or worsening of her accepted right knee conditions without an intervening cause. It found that her fast walking was not a spontaneous change in her medical condition, but an intervening cause. OWCP also noted that appellant's physician stated that she had a degenerative knee condition which continued to worsen, but it had not accepted an osteoarthritis condition in her claim.

On August 16, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 29, 2016 report, Dr. Kharrazi reiterated that appellant was previously diagnosed with right knee patellofemoral chondromalacia. He stated that she required permanent work restrictions which he found reasonable because she had a chronic degenerative disease. Dr. Kharrazi continued to provide the following work restrictions: no climbing or bending, no squatting or kneeling, no running or jumping, and no firearms or defensive tactics.

Appellant further submitted reports from Dr. Chan regarding her April 18, 2014 motor vehicle accident.

A telephonic hearing was held before an OWCP hearing representative on February 28, 2017. Appellant provided testimony, including her belief that Dr. Kharrazi had erroneously indicated that her work restrictions were causally related to her diagnosis of right knee

osteoarthritis, which was not an accepted condition by OWCP. The hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted a report dated February 15, 2017 from Dr. Kharrazi who stated that she had multiple injuries to her knee as well as patellofemoral chondromalacia of the right knee.

On March 23, 2017 Dr. Kharrazi stated that appellant's final diagnosis for her July 9, 2010 injury was patellofemoral chondromalacia. He reiterated his work restrictions and opinion that these restrictions precluded her from being able to return to her full duties as a special agent.

In a March 30, 2016 report, Dr. Kharrazi opined that appellant's July 9, 2010 work-related injury to the right knee was "specifically and strictly responsible for her current disability."

By decision dated April 28, 2017, OWCP's hearing representative affirmed the prior decision, finding that the medical evidence of record was insufficient to establish that appellant's inability to perform the duties of criminal investigator was causally related to the July 9, 2010 employment injury. It found inconsistencies in Dr. Kharrazi's medical opinions and noted that osteoarthritis had not been accepted as a work-related condition in appellant's case.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁵ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.⁶

Section 8115 of FECA provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally, wages actually earned are the best measure of a 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.⁷ OWCP's procedures provide that, if the injured employee is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula.⁸

ANALYSIS

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

The evidence of record shows that appellant experienced a loss of earning when she was converted from a special agent to an operational management specialist, effective

⁵ 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁶ *Id.* at § 10.5(f); *see e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁷ *J.G.*, Docket No. 12-1588 (issued August 20, 2013); *Don J. Mazurek*, 46 ECAB 447 (1995).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403(c)-(e).

February 7, 2016. By letter dated February 29, 2016, the employing establishment informed OWCP that she would no longer be receiving the AVP which she had received as a special agent. It advised OWCP that “[t]his constitutes a loss in wage-earning capacity...” and noted that it had submitted a Form CA-7 on appellant’s behalf to “begin [l]oss of [w]age-[e]arning [c]apacity benefit payments *via* OWCP.”

It is the responsibility of the claims examiner to review the case record for evidence that earnings do not fairly and reasonably represent the injured employee’s wage-earning capacity. The Board finds that OWCP did not do so in this case. Rather, OWCP improperly adjudicated appellant’s claim for compensation as one for a recurrence of disability as opposed to a loss of wage-earning capacity. Therefore, the case must be remanded for OWCP to determine whether her position as an operational management specialist position fairly and reasonably represented her wage-earning capacity. Following this and any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2017 decision of the Office of Workers’ Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: February 26, 2019
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