

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

C.S., Appellant	)	
	)	
and	)	<b>Docket No. 19-0660</b>
	)	<b>Issued: August 13, 2020</b>
DEPARTMENT OF THE NAVY,	)	
COMMANDER U.S. PACIFIC FLEET-	)	
SHIPYARDS, Bremerton, WA, Employer	)	
	)	

*Appearances:*  
John Eiler Goodwin, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 2, 2019 appellant, through counsel, filed a timely appeal from a July 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated May 13, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 20-0660 (issued May 13, 2020).

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether appellant has met his burden of proof to establish that modification of a March 18, 2008 loss of wage-earning capacity (LWEC) determination was warranted.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 12, 1997 appellant, then a 52-year-old welder, filed a traumatic injury claim (Form CA-1) alleging that on October 28, 1997 he sustained injury to his right knee when he stepped off a rail car and jammed his knee while in the performance of duty.<sup>6</sup> He did not stop work. OWCP accepted the claim for right knee lateral collateral ligament sprain and right knee lateral meniscus tear and authorized a right knee lateral arthroscopic meniscectomy, which occurred on March 30, 1998.<sup>7</sup> The March 30, 1998 operative record indicated right knee findings of lateral compartment chondrocalcinosis of the lateral meniscus, tear of the lateral meniscus, and degenerative changes on the lateral and medial plateau. OWCP paid appellant wage-loss compensation on the periodic rolls as of November 8, 1998.

In a report dated July 17, 1998, Dr. David L. Schenkar, a Board-certified orthopedic surgeon, acting as an OWCP second opinion physician, diagnosed ongoing knee wear with degenerative and or traumatic-type injury. He opined that although appellant's condition "will improve a bit," he was stable and his right knee was permanently impaired. Dr. Schenkar noted

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the July 19, 2018 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.*

<sup>5</sup> *Order Granting Remand*, Docket No. 17-1816 (issued January 17, 2018); Docket No. 12-0626 (issued September 20, 2012).

<sup>6</sup> OWCP assigned OWCP File No. xxxxxx255. On October 30, 1995 appellant filed a traumatic injury claim alleging that on October 23, 1995 he injured his right knee when he tripped and fell on a stud on a deck. OWCP assigned OWCP File No. xxxxxx248 and accepted the claim for right knee contusion and right leg cellulitis. On December 29, 1997 OWCP combined OWCP File No. xxxxxx248 with the instant case, OWCP File No. xxxxxx255, the latter which serves as the master file. The record also reflects that appellant filed a claim on November 17, 2008 under OWCP File No. xxxxxx356 for shoulder and arm conditions due to use of power tools at work. Appellant alleged that he became aware of these conditions on August 8, 1995. OWCP denied this claim as untimely filed.

<sup>7</sup> OWCP noted concurrent conditions of heart attack, coronary artery disease, depression, and right knee chondrocalcinosis. The record also contains evidence of preexisting bilateral lower extremity severe venous insufficiency.

that appellant had a documented history in his chart, as far back as 1995, of bouts of cellulitis and chronic edema in the leg as a complication of chronic varicose veins.

Appellant was terminated from his position as a welder at the employing establishment as the employing establishment found appellant medically unable to perform the full range of functions required in his position effective March 7, 2003.

In a November 13, 2005 report, the vocational rehabilitation counselor determined that appellant was capable of working as an electronics worker assembling manufactured parts and that the position was available in sufficient numbers in his commuting area.

In an October 2, 2006 report, Dr. Michael S. McManus, a Board-certified occupational medicine physician, noted that appellant had permanent work restrictions due to the accepted employment injury. He reported that appellant's right knee work restrictions remained unchanged. Dr. McManus indicated that appellant was capable of performing the duties of an electronics worker. He was advised by appellant that he suffered upper extremity impairments, however, he was unsure how such permanent impairment would preclude him from the electronics worker position. In an attached work capacity evaluation form (Form OWCP-5c), Dr. McManus indicated that appellant had permanent work restrictions as of August 25, 1998. The restrictions included up to 40 minutes of sitting at a time up to 4 hours per day, up to 10 minutes of walking and standing at a time, up to 2 hours of bending/stooping, up to 2 hours of squatting, no lifting more than 40 pounds, no kneeling, climbing, running, or jumping and no pulling or pushing more than 50 pounds.

In a December 21, 2007 report, the vocational rehabilitation counselor noted that the position of electronics worker was currently available in sufficient numbers in appellant's labor market. He noted that appellant lives in Belfair, Washington and that there were sufficient jobs available in his labor market, which included King, Pierce, and Kitsap counties. Under physical demands, the vocational counselor noted the job required occasional exertion of up to 20 pounds of force, occasional-to-frequent exertion of up to 10 pounds, and generally provided the ability to alternate between sitting and standing.

By decision dated March 18, 2008, OWCP reduced appellant's wage-loss compensation, effective that day, as it found that he had the capacity to earn wages in the constructed position of an electronics worker.

On March 27, 2008 appellant requested a hearing before an OWCP hearing representative. By decision dated September 29, 2008, an OWCP hearing representative affirmed the March 18, 2008 LWEC determination.

Appellant requested reconsideration. By decision dated August 26, 2009, OWCP denied modification of the March 18, 2008 LWEC determination.

On November 13, 2010 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning December 5, 2009 due to his accepted October 28, 1997 employment injury.

By decision dated March 14, 2011, OWCP denied appellant's recurrence claim. On August 17, 2011 an OWCP hearing representative affirmed the March 14, 2011 decision denying appellant's recurrence claim.

On January 26, 2012 appellant, through counsel, filed an appeal with the Board. By decision dated September 20, 2012, the Board set aside OWCP's hearing representative's August 17, 2011 decision affirming the March 14, 2011 decision denying appellant's claim for a recurrence of disability.<sup>8</sup> The Board found that appellant's claim for wage-loss compensation raised the issue of whether the March 18, 2008 LWEC determination should be modified and the Board remanded the case for adjudication on the issue of modification.

In a report dated March 30, 2012, Dr. McManus opined that appellant had aggravated his right knee condition while walking.

On April 11, 2012 counsel requested reconsideration, asserting that a March 30, 2012 medical report established that walking aggravated his right knee condition.

In reports dated November 5 and 14, 2012, Dr. McManus diagnosed right lateral meniscus knee tear, right knee pain, and right chondrocalcinosis. He found appellant totally disabled from work.

By decision dated January 22, 2013, OWCP denied modification of the March 18, 2008 LWEC determination beginning December 5, 2009.

On January 29, 2013 appellant requested an oral hearing before an OWCP hearing representative, which was held on June 19, 2013.

By decision dated September 10, 2013, an OWCP hearing representative affirmed the January 22, 2013 decision denying modification of the March 18, 2008 LWEC determination.

Dr. McManus, in an October 15, 2013 report, diagnosed recurrent right knee lateral meniscal tear, which he attributed to the October 28, 1997 employment injury.

On November 22, 2013 appellant, through counsel, requested reconsideration.

By decision dated January 17, 2014, OWCP denied modification of the March 18, 2008 LWEC determination.

On February 4, 2014 OWCP expanded acceptance of appellant's claim to include recurrent right knee lateral meniscus tear.

In a February 11, 2014 report, Dr. McManus diagnosed recurrent right lateral meniscus tear, right knee chondrocalcinosis, and right knee post-traumatic osteoarthritis. He found appellant's work restrictions remained unchanged.

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<sup>8</sup> *Supra* note 5.

In reports dated February 26 and March 19, 2014, Dr. Nels Sampatacos, a Board-certified orthopedic surgeon, based on physical examination findings and review of diagnostic testing, diagnosed chondrocalcinosis and knee/patella/tibia/fibula arthralgia.

Dr. McManus, in an April 21, 2014 progress note, diagnosed recurrent right knee lateral meniscus tear with chronic pain, early osteoarthritis, and chondrocalcinosis.

By decision dated June 9, 2015, OWCP found the evidence insufficient to warrant modification of the March 18, 2008 LWEC determination. On January 28, 2016 an OWCP hearing representative affirmed the June 9, 2015 decision.

In a January 20, 2016 report, Dr. McManus diagnosed chronic pain due to osteoarthritis, right knee chondrocalcinosis, and status post two arthroscopic meniscectomies. He advised that appellant requires the use of narcotics to control his pain, which was a contraindication for driving and he advised that appellant was restricted from operating a motor vehicle.

On July 22, 2016 counsel requested reconsideration. He asserted that the LWEC determination should be modified based on the driving restriction from Dr. McManus.

Dr. McManus, in a January 25, 2017 report, summarized appellant's history and diagnostic tests and detailed examination findings. He diagnosed osteoarthritis and chondrocalcinosis secondary to right knee status post arthroscopic partial medial meniscectomy and arthroscopic partial medial and lateral meniscectomies. Dr. McManus reported no change in appellant's permanent work restrictions. He instructed appellant to continue using walking sticks or single point cane as necessary and his current medications of hydrocodone and acetaminophen.

By decision dated March 6, 2017, OWCP denied appellant's request, finding that it was untimely and failed to demonstrate clear evidence of error.

Dr. McManus, in a May 22, 2017 report, provided examination findings and diagnosed osteoarthritis and chondrocalcinosis secondary to right knee status post arthroscopic partial medial meniscectomy and arthroscopic partial medial and lateral meniscectomies. He reported no change in appellant's permanent work restrictions. Dr. McManus instructed appellant to continue using walking sticks or single point cane as necessary and with his current medications of hydrocodone and acetaminophen.

On August 24, 2017 counsel filed an appeal with the Board. On January 17, 2018 the Board issued an order granting the Director's motion to remand the case for a merit decision as appellant's July 22, 2016 request for reconsideration was timely filed.<sup>9</sup> The Board remanded the case to OWCP to apply the correct standard of review.

An October 12, 2017 report from Dr. McManus was unchanged from prior reports.

In a February 7, 2018 report, Dr. McManus diagnosed right knee osteoarthritis, chronic pain, and right knee chondrocalcinosis. He reported no change in appellant's condition since his

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<sup>9</sup> *Supra* note 5.

last visit on October 12, 2017. Appellant complained of night pain, start-up pain, stiffness, and limited range of motion. Physical examination findings included bilateral pretibial edema, bilateral lower extremity stasis dermatitis, and diffuse soft tissue swelling greater on the right. Negative Lachman's, positive Apley's compression test. Dr. McManus reported no change in appellant's permanent work restrictions and he recommended that appellant continue using walking sticks or single point cane, as necessary, and that he continue with his current medications of hydrocodone and acetaminophen.

By decision dated May 4, 2018, OWCP denied modification of the March 18, 2008 LWEC determination.

On June 25, 2018 appellant requested reconsideration and submitted evidence in support of his request.

Appellant, in a statement, asserted that his medication prohibited him from driving and there was no direct bus line where he lived. The nearest bus station is a three-mile walk, which is beyond his physical ability. In addition, the commute was a four-hour trip one way.

In progress notes dated April 11, 2018, Dr. Derek Edward Costa, a Board-certified family medicine physician, detailed appellant's prescriptions including hydrocodone, opioid, acetaminophen, and insulin. In a June 4, 2018 note, he advised that appellant takes two medications which increases the need for restroom breaks.

Dr. McManus, in progress notes dated June 6, 2018, provided examination findings. He reported no change in appellant's permanent work restrictions and that appellant should continue using walking sticks or single point cane, as necessary, and that he continue with his current medications.

On July 2, 2018 OWCP received a reconsideration request dated June 20, 2018 from appellant's counsel. Counsel asserted that the electronics worker position was not suitable as appellant cannot use public transportation or drive to a worksite within his commuting area. A copy of a bus schedule and map was attached in support of appellant's contention that he could not use public transportation in his commuting area to go to work. Counsel further asserted that the bus stop was located three miles from appellant's house and only went to Bremerton, Washington.

By decision dated July 19, 2018, OWCP denied modification of the March 18, 2008 LWEC determination.

### **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>10</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>11</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>12</sup> OWCP's procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.<sup>13</sup> 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.<sup>14</sup>

The burden of proof is on the party attempting to show a modification of the LWEC determination.<sup>15</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>16</sup>

### ANALYSIS

The Board finds that this case is not in posture for a decision as to whether appellant has established that OWCP's March 18, 2008 LWEC determination should be modified.

As was noted above, an LWEC determination can be modified if it was issued in error.<sup>17</sup> The Board finds that the current record does not establish that appellant's preexisting conditions were considered when determining that the constructed position was suitable. In finding that appellant was capable of performing the duties of an electronics worker, Dr. McManus only considered the accepted right knee conditions and provided restrictions limiting his sitting and standing. The record however establishes that OWCP had accepted appellant's October 1995 traumatic injury claim for right leg cellulitis. Furthermore, OWCP's second opinion physician, Dr. Schenkar, reported on July 17, 1998 that appellant had a documented history in his chart, as far back as 1995 of bouts of cellulitis and chronic edema in the leg as a complication of chronic varicose veins.

The Board also notes that Dr. McManus, in an October 2, 2006 report, reviewed and opined that appellant was capable of performing the duties of the constructed electronics worker position

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<sup>10</sup> 5 U.S.C. § 8115(a); *O.H.*, Docket No. 17-0255 (issued January 23, 2018).

<sup>11</sup> *O.H., id.*; *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>12</sup> *B.G.*, Docket No. 17-0477 (issued September 20, 2017); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013). See *J.M.*, Docket No. 18-0196 (issued July 12, 2018).

<sup>14</sup> *Id.* at Chapter 2.1501.3(a).

<sup>15</sup> *C.S.*, Docket No. 18-1610 (issued April 25, 2019); *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>16</sup> *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>17</sup> *Supra* note 14.

based on his permanent right knee restrictions. However, Dr. McManus also indicated that appellant informed him of some permanent impairment of his upper extremities, but he was unsure what restrictions appellant may have due to these impairing conditions or its affect on-the-job duties. In this regard, appellant had indicated on his claim form under OWCP File No. xxxxxx356 that he had been aware of shoulder and arm conditions since August 8, 1995.

OWCP did not request clarification from Dr. McManus as to whether appellant's upper extremity conditions were preexisting and, if so, whether they caused any further work restrictions. It also did not clarify whether appellant had any restrictions due to his other lower extremity preexisting conditions.

Any preexisting condition must be considered in determining an LWEC. This principle is evident in OWCP's procedures which instruct that the claims examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the selected jobs, taking into consideration medical conditions due to the accepted work-related injury or disease (including those accepted under other claims which may or may not have been doubled/combined with the instant case file), and any preexisting medical conditions.<sup>18</sup>

The Board finds that OWCP has not properly evaluated appellant's preexisting conditions and whether these conditions affected his ability to perform the constructed duties of electronics work. This case must therefore be remanded to OWCP for further findings. After such further development as necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>18</sup> See *supra* note 13 at Chapter 2.816.4(b) (June 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 19, 2018 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 13, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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