

FACTUAL HISTORY

On January 20, 2015 appellant, then a 63-year-old third officer, filed an occupational disease claim (Form CA-2) alleging that he sustained arthritis of the knees and ankles causally related to factors of his federal employment. He noted that he first became aware of his condition and attributed it to his federal employment on December 29, 2010. Appellant was last exposed to the conditions alleged to have caused his condition on December 4, 2014. OWCP accepted the claim for an aggravation of bilateral knee osteoarthritis.³ It paid appellant wage-loss compensation on the supplemental rolls from January 28, 2015 to March 5, 2016 and on the periodic rolls beginning March 6, 2016.

In a report dated May 4, 2016, Dr. Branislav Behan, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed severe bilateral osteoarthritis of the knees. He opined that appellant was unable to work and recommended a total knee arthroplasty (TKA).

On December 2, 2016 Dr. Ryan M. Shephard, an osteopath and appellant's treating physician, diagnosed bilateral knee osteoarthritis and morbid obesity. He recommended weight loss likely followed by bilateral total arthroplasties. Dr. Shephard found that appellant could "work at a desk job where he is allowed to sit and rest his legs as needed."

In a January 17, 2017 work capacity evaluation (OWCP-5c), Dr. Shephard opined that appellant could perform sedentary work with no squatting, kneeling, or climbing.

On February 2, 2017 OWCP referred appellant for vocational rehabilitation.⁴

In a report dated February 28, 2017, the vocational rehabilitation counselor noted appellant's history as a flight deck officer and of serving in the Coast Guard for 20 years. He noted that he was interested in pursuing a career as a pilot and that he had a license to fly single engine aircraft.

In a July 17, 2017 rehabilitation action report form (Form OWCP-44), the vocational rehabilitation counselor advised that appellant had obstructed vocational rehabilitation by insisting that he submit a plan for training as a flight instructor and by refusing to identify another job goal.⁵

³ By decision dated March 3, 2015, OWCP denied appellant's claim as untimely filed. Following a preliminary review, by decision dated September 3, 2015, an OWCP hearing representative vacated the March 3, 2015 decision, noting that he continued to be exposed to the employment factors implicated in his occupational disease claim and thus his claim was timely.

⁴ Appellant was removed from the employing establishment effective December 6, 2016 for failing to maintain a regular work schedule. In a letter dated December 28, 2016, the employing establishment found him permanently unfit for duty at sea due to his medical condition.

⁵ In a vocational rehabilitation report dated April 30, 2017, the vocational rehabilitation counselor noted that he had contacted an aviation instructor who had advised that appellant would be unable to pursue a goal for a career as a pilot due to his age and weight. On August 28, 2017 an OWCP rehabilitation specialist advised that it would not approve the plan training him for work as a flight instructor due to his weight and age and as the job required light rather than sedentary work abilities.

On a July 31, 2017 the vocational rehabilitation counselor indicated that he had informed appellant that a position as a pilot was classified as light work and thus outside his restrictions.

On October 30, 2017 appellant signed a rehabilitation plan and award (Form OWCP-16) for direct job placement with a new employer as either a dispatcher or surveillance system monitor.

In a December 1, 2017 progress report, Dr. Shephard diagnosed obesity and localized osteoarthritis of the bilateral knees. He advised that appellant's work restrictions were unchanged. Dr. Shephard noted that he was trying to lose weight for future surgery. He treated appellant with steroid injections to both knees.

On March 2, 2018 Dr. Shephard discussed appellant's continued complaints of bilateral knee pain most noticeable when walking. He noted that he continued to pursue "employment options." Dr. Shephard diagnosed localized osteoarthritis of the knees bilaterally and found no change in work restrictions. He indicated that he had discussed the option of surgery which appellant had declined, even though he was "working to keep the weight off to allow for further surgery."

In a vocational rehabilitation report dated April 3, 2018, the vocational rehabilitation counselor advised that appellant had not obtained employment and asserted that he had applied for jobs largely beyond his physical limitations. He recommended case closure.

On July 31, 2018 Dr. Joseph M. McGraw, a Board-certified orthopedic surgeon, discussed appellant's history of knee pain and recent symptoms of right hip pain. He diagnosed severe degenerative arthritis of the right hip. Dr. McGraw found that appellant could perform activity "to pain tolerance."⁶

On October 10, 2018 Dr. McGraw evaluated appellant for a possible total knee replacement. (RD 10-22-18) He noted that he was "becoming increasingly immobile and did not get much relief from the last injections." On November 2, 2018 he requested authorization from OWCP for a right TKA.

On November 13, 2018 Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), opined that the proposed TKA was causally related to the accepted employment injury and medically necessary.

On April 1, 2019 the vocational rehabilitation counselor completed a job classification (Form CA-66) for the position of dispatcher. The position was sedentary and required no climbing, stooping, or kneeling. The vocational rehabilitation counselor advised that appellant met the specific vocational preparation required for the position of three to six months based on the results of his intelligence testing, work experience using radio communications as a deck watch officer, and having a private pilot's license and sailing certificate. He opined that the position was reasonably available within his commuting area, noting that May 2017 employment data from the Bureau of Labor Statistics (BLS) and from a private source confirmed the number of positions

⁶ Dr. McGraw injected appellant's right hip with a steroid on August 8, 2018.

available both in the United States as a whole and in the state of Michigan. The vocational rehabilitation counselor advised that an entry level wage for the position was \$578.00 per week.

On June 26, 2019 OWCP advised appellant of its proposed reduction of his wage-loss compensation as the evidence established that he could earn wages in the selected position of dispatcher. It afforded him 30 days to submit evidence of argument regarding the proposed reduction of his compensation.

In a note dated July 10, 2019, Dr. Emad Mohammed, a dentist, advised that appellant was scheduled for implant surgery on a tooth on July 16, 2019. He asserted that within six to seven months he would have a functioning implant and “will be completely cleared for his double knee surgery.”

In a July 13, 2019 response, counsel asserted that the closest dispatcher job that he could find was almost 200 miles away from his residence. He requested a list of positions from 30 to 100 miles away for the selected position of dispatcher.

By decision dated August 7, 2019, OWCP reduced appellant’s wage-loss compensation effective August 5, 2019 as he had the capacity to earn wages of \$748.00 per week as a dispatcher. It found that the December 2, 2016 and January 17, 2017 reports from Dr. Shephard represented the weight of the evidence and established that he could perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*⁷ as codified in section 10.403 of OWCP’s regulations, to determine appellant’s loss of wage-earning capacity.

On September 4, 2019 appellant requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

In a report dated December 16, 2019, Dr. Neil Allen, a Board-certified internist and neurologist, examined appellant and reviewed his complaints of knee pain bilaterally and noted that he was waiting for clearance to undergo bilateral TKAs. He noted that he was searching for sedentary positions as a dispatcher within 30 miles of his home. Dr. Allen concurred that appellant required TKAs bilaterally due to his employment injury. He related, “It is also my opinion that [appellant] be compensated for his ongoing total disability. While a sedentary position itself is not strenuous, walking from his vehicle to his potential work space, operating his vehicle to and from work and the potential lack of elevation at his work space would result in increased pain, stiffness, and swelling.” Dr. Allen advised that appellant might be able to work after his bilateral TKAs.

A telephonic hearing was held on January 9, 2020. Counsel advised that appellant lived in a remote area of northern Michigan. He asserted that there were no positions as dispatcher available in his location. Counsel maintained that appellant was unable to commute as shown by Dr. Allen’s December 16, 2019 report.

By decision dated March 24, 2020, OWCP’s hearing representative affirmed the August 7, 2019 decision.

⁷ 5 ECAB 376 (1953).

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.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

Under section 8115(a) of FECA 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.¹⁰ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.¹¹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹² The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹³ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹⁴

When OWCP makes a determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service, local Chamber of Commerce, employer contacts, and actual job postings.¹⁵ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁶ as

⁸ See *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

⁹ See *S.N.*, Docket No. 17-1589 (issued January 3, 2018).

¹⁰ 5 U.S.C. § 8115(a).

¹¹ *Id.*; see also *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

¹² See *M.P.*, Docket No. 18-0094 (issued June 26, 2018); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3 (June 2013).

¹³ See *M.K.*, Docket No. 17-0208 (issued April 17, 2018).

¹⁴ *C.M.*, Docket No. 18-0688 (issued November 15, 2018).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.816.6.a (June 2013).

¹⁶ *Supra* note 7.

codified in section 10.403 of OWCP's regulations,¹⁷ to determine the percentage of the employee's LWECE.¹⁸

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation, effective August 5, 2019, based on his capacity to earn wages as a dispatcher.

The issue of whether appellant has the physical capacity to perform a selected position is primarily a medical question that must be resolved by the medical evidence of record.¹⁹ The selected position of dispatcher is a sedentary position that requires no climbing, stooping, or kneeling. On December 2, 2016 Dr. Shephard found that appellant could work at a desk job resting his legs as needed. He noted that he would likely need bilateral TKAs. In a Form OWCP-5c dated January 17, 2017, Dr. Shephard found that appellant could perform sedentary work with no squatting, kneeling, or climbing. In progress reports dated December 1, 2017 and March 2, 2018, he found that his work restrictions had not changed.

OWCP relied upon the December 2, 2016 and January 17, 2017 reports from Dr. Shephard in its August 7, 2019 decision finding that the selected position was within his physical limitations. The medical evidence relied upon by OWCP was over two years old and thus not reasonably current.²⁰ In relying on the evidence, OWCP's hearing representative noted that in *M.A.*²¹ The Board held that in certain situations, a medical evaluation may be considered reasonably current if an attending physician continues to provide follow-up examinations, but keeps the same work restrictions.²² In *M.A.*, however, the Board found that the claimant's treating physician had consistently defined appellant's work restrictions and noted that there was no evidence submitted from any other physician. In this case, subsequent to Dr. Shephard's March 2, 2018 progress report, Dr. McGraw requested authorization from OWCP for a right TKA. On November 13, 2018 Dr. Kuhn, a DMA, opined that the proposed surgery was causally related to the accepted employment injury and reasonably necessary. In a December 16, 2019 report, Dr. Allen found that appellant was unable to walk from his vehicle to his work location or operate a motor vehicle to and from work pending bilateral TKAs.

OWCP's procedures provide that in assessing an employee's ability to perform a constructed position, if the evidence is unclear, equivocal, or old enough to be considered stale, which is generally greater than 18 months, the claims examiner should seek clarification from a

¹⁷ 20 C.F.R. § 10.403.

¹⁸ See *J.M.*, *supra* note 11.

¹⁹ *G.E.*, Docket No. 18-0663 (issued December 21, 2018); *Dennis D. Owen*, 44 ECAB 475 (1993).

²⁰ The Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation. See *E.D.*, *supra* note 8; *G.M.*, Docket No. 16-1032 (issued January 4, 2017); *John D. Jackson*, 55 ECAB 465 (2004).

²¹ 59 ECAB 624 (2008).

²² *Id.* See also Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.801.4(d) (June 2013).

physician regarding the suitability of the position.²³ The Board finds that the medical evidence of record is not clear and unequivocal in this case and that the evidence relied upon by OWCP was not reasonably current, especially given the possible progression of appellant's knee condition.²⁴ OWCP, consequently, failed to meet its burden of proof to reduce his compensation effective August 5, 2019 based on its finding that he had the capacity to earn wages as a dispatcher.²⁵

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective August 5, 2019 based on his capacity to earn wages as a dispatcher.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 31, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

²³ *Id.* at Chapter 2.816.4 (June 2013); *G.E.*, *supra* note 19.

²⁴ *See W.C.*, Docket No. 17-0562 (issued November 17, 2017).

²⁵ *Id.*