

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits, effective November 11, 2017, for failure to complete an EN1032 form as requested; and (2) whether OWCP properly determined appellant's loss of wage-earning capacity, effective June 10, 2014, based on his actual earnings as a peer support specialist.

FACTUAL HISTORY

On August 16, 1998 appellant, then a 43-year-old boatswain mate, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral knee osteoarthritis and lower lumbar back problems due to factors of his federal employment, including walking, climbing ladders, and working on his knees. OWCP accepted the claim for osteoarthritis of the lower legs, unspecified arthropathy of the lower legs, and bilateral chondromalacia patellae. It authorized an August 26, 1998 right knee arthroscopy due to a right knee meniscus tear. OWCP also authorized an August 25, 1999 left knee arthroscopy due to a left knee meniscus tear. Appellant stopped work and OWCP compensated him on the periodic rolls.

Appellant completed a vocational rehabilitation program and returned to work as an attendance technician with Norfolk Public Schools on February 26, 2001 and OWCP reduced his wage-loss compensation benefits based upon his actual wages in this position following a loss of wage-earning capacity (LWEC) determination. On March 20, 2007 OWCP subsequently awarded him a schedule award for 62 percent permanent impairment of the bilateral lower extremities and his wage-loss compensation benefits were interrupted for the period of the award. It authorized a June 8, 2009 right total knee replacement surgery. OWCP also accepted that he sustained a recurrence of disability on February 28, 2010 and authorized an April 12, 2010 left total knee replacement. Appellant's wage-loss compensation, based upon his LWEC, was reinstated effective August 28, 2011.

In an October 13, 2011 work capacity evaluation form (Form OWCP-5c), Dr. Wilford K. Gibson, a Board-certified orthopedic surgeon, advised that appellant was incapable of performing his usual job and noted that he was "unsafe for ship or sea duty."⁴ He determined that appellant had reached maximum medical improvement and opined that he was capable of working full time with permanent restrictions of walking up to two hours per day, standing up to one hour per day, twisting up to one hour per day, no bending/stooping, pushing, and pulling; lifting no more than 20 pounds up to two hours per day, and no squatting, kneeling, or climbing.

In a letter dated November 22, 2011, OWCP advised Dr. Gibson that the restrictions he had provided limited appellant to sub-sedentary employment, specifically the two-hour walking and one-hour standing restrictions which precluded sedentary work. It requested clarification regarding appellant's ability to perform either sedentary or light duties. In response, Dr. Gibson submitted a Form OWCP-5c dated February 3, 2012 that reiterated the work restrictions he provided on October 13, 2011.

⁴ Dr. Gibson had performed all of appellant's authorized surgical procedures.

On October 10, 2014 Dr. Gibson indicated that appellant's bilateral knee replacements were doing well with slight flexion laxity on the left. He recommended trying to maintain muscle tone and using a neoprene-type sleeve or patellofemoral brace to support the left knee.

In an October 14, 2014 Form OWCP-5c, Dr. Gibson opined that: appellant was capable of full-time, light-duty work with permanent restrictions of lifting up to 20 pounds occasionally; walking, standing, and bending/twisting for 20 minutes before a break; sitting for two hours before a break; keyboarding for four hours before a break; climbing for five minutes before a break; and operating a vehicle, reaching above the shoulder, handling/grasping, and pulling/pushing for eight hours per day.

On February 15, 2013 appellant returned to federal employment as a housekeeping aid earning \$10.33 per hour. Effective March 11, 2013 his wage-loss compensation benefits were terminated. OWCP thereafter calculated appellant's weekly pay rate as a housekeeping aid as \$414.59 and his total current date-of-injury pay rate was \$992.41 per week. On November 8, 2013 it determined that he would be placed on the periodic rolls and compensated in the amount of \$1,370.00 every 28 days.

OWCP periodically sent appellant a letter requesting that he complete an enclosed form (Form EN1032) with regard to his employment activity, if any, within the past 15 months.⁵

On a signed EN1032 form dated September 26, 2014, appellant indicated that he had been working as a housekeeping aid as of March 10, 2013 and a peer support specialist as of June 10, 2014 to present. He reported that he earned \$23,020.00 per year as a housekeeping aid and \$30,883.00 per year as a peer support specialist.⁶ On a signed EN1032 form dated September 9, 2016, appellant indicated that he continued to work as a peer support specialist and reported actual earnings of \$36,790.00 per year.

By decision dated June 5, 2017, OWCP issued a retroactive LWEC determination finding that appellant's earnings as a peer support specialist fairly and reasonably represented his wage-earning capacity. It noted that he had demonstrated his ability to perform the assigned duties of the job for 60 days or more, and therefore, the peer support specialist position was considered suitable to the limitations of his partial disability. OWCP explained that it had reduced appellant's monetary compensation effective June 25, 2017 based upon his actual earnings in the position, but because his actual weekly earnings as a peer support specialist (\$707.50) were less than the current wages of his date-of-injury position (\$992.41), it further determined that he had only been entitled to net compensation of \$54.50 every 28 days for the period June 10, 2014 to April 2, 2017. Appellant's periodic rolls payments were reduced to the new compensation rate effective June 5, 2017.

On June 30, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

⁵ The Form EN1032 also requested information with respect to dependents, receipt of other federal benefits, third-party settlements, and fraud offenses.

⁶ No formal LWEC determination was issued following appellant's reporting of his additional earnings from employment.

In a narrative statement dated June 25, 2017, appellant asserted that he had suffered financial hardship due to his employment-related disability and his loss of a career with the employing establishment. He also asserted that the LWEC determination failed to consider all elements and variables to make an informed decision.

On September 18, 2017 OWCP sent appellant a Form EN1032 and informed him that federal regulations required him to make an affidavit relative to any earnings or employment during the previous year. It notified him that he had to fully answer all questions on the form and return the statement within 30 days or his benefits would be suspended. The letter was mailed to appellant's address of record. OWCP did not receive a response within 30 days.

By decision dated November 1, 2017, OWCP suspended appellant's compensation benefits, effective November 11, 2017, for failing to complete an EN1032 form as requested. It explained that, if he completed and returned the form as requested, his compensation benefits would be restored retroactively to the date they were suspended.

Appellant subsequently submitted an EN1032 form dated October 14, 2017, which OWCP received on November 14, 2017. His wage-loss compensation benefits were subsequently reinstated retroactively to the date they had been suspended.

By decision dated December 14, 2017, an OWCP hearing representative affirmed the June 5, 2017 LWEC determination finding that appellant's actual earnings as a peer support specialist fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 1

FECA authorizes the Secretary of Labor to require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.⁷

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.⁸ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.⁹

ANALYSIS -- ISSUE 1

On September 18, 2017 OWCP provided appellant with an EN1032 form and notified him that federal regulations required him to complete the form and answer all questions concerning his

⁷ 5 U.S.C. § 8106(b).

⁸ 20 C.F.R. § 10.528. *See also* A.H., Docket No. 15-0241 (issued April 3, 2015).

⁹ *Id.*; *see also* 20 C.F.R. § 10.525.

employment or earnings within 30 days or his benefits would be suspended. The record reflects that OWCP's letter was properly sent to appellant's address of record.¹⁰

The record indicates that appellant failed to timely submit the EN1032 form as required. Appellant's failure to file an EN1032 form within 30 days properly resulted in the suspension of his wage-loss compensation until OWCP received the completed form.¹¹ Thus, the Board finds that OWCP properly suspended appellant's compensation benefits effective November 11, 2017 pursuant to 20 C.F.R. § 10.528.¹²

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹³

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.¹⁴ Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.¹⁵

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.¹⁶ 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.¹⁷ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. OWCP applies the principles set forth in *Albert C.*

¹⁰ Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule. See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018). There is no evidence of record to establish nondelivery of OWCP's September 18, 2017 notice such that the presumption of receipt would be rebutted.

¹¹ The record establishes that appellant submitted the form on November 13, 2017 and his compensation benefits were retroactively reinstated.

¹² See *M.W.*, Docket No. 15-0507 (issued June 18, 2015).

¹³ See *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

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

¹⁵ See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹⁶ 5 U.S.C. § 8115(a).

¹⁷ *Id.*; see also *Z.W.*, Docket No. 18-1000 (issued June 24, 2019).

*Shadrick*¹⁸ as codified in section 10.403 of OWCP's regulations,¹⁹ to determine the percentage of the employee's LWEC.²⁰

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.²¹ OWCP's procedures provide that, "[i]f a formal [LWEC] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC]."²² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined appellant's LWEC, effective June 10, 2014, based on his actual earnings as a peer support specialist.

In his reports, Dr. Gibson opined that appellant was capable of full-time, light-duty work and assigned work restrictions. In an EN1032 form dated September 9, 2016, appellant indicated that he had been working as a peer support specialist as of June 10, 2014. The Board finds that appellant successfully performed the duties of a peer support specialist for over two years (June 10, 2014 to September 9, 2016), which indicates that the position fairly and reasonably represented his wage-earning capacity. Appellant successfully performed the peer support specialist position for at least 60 days and the wages appellant earned beginning June 10, 2014 were less than the current wages of his date-of-injury job. Based upon the information provided by appellant, OWCP properly applied the *Shadrick*²⁴ formula and modified the LWEC determination based upon its calculations.

Accordingly, the Board finds that OWCP properly determined that appellant's earnings as a peer support specialist fairly and reasonably represented his wage-earning capacity and he was entitled to a net compensation of \$54.50 every four weeks. OWCP has therefore met its burden of proof to modify its LWEC determination.

¹⁸ 5 ECAB 376 (1953).

¹⁹ 20 C.F.R. § 10.403.

²⁰ See *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

²¹ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.812.9(a) (June 2013); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

²³ *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

²⁴ *Supra* note 18.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits effective November 11, 2017 for failure to complete an EN1032 form as requested. The Board further finds that appellant's actual earnings as a peer support specialist fairly and reasonably represented his wage-earning capacity as of June 10, 2014.

ORDER

IT IS HEREBY ORDERED THAT the December 14 and November 1, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 25, 2020
Washington, DC

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

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

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