

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

S.A., Appellant)	
)	
and)	Docket No. 18-1353
)	Issued: May 22, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Lakewood, CA, Employer)	
)	

Appearances:
Manuel B. Madrid, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 27, 2018 appellant, through her representative, filed a timely appeal from a March 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).²

¹ 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.

² The Board notes that, following the March 21, 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.*

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met her burden of proof to establish modification of the October 8, 2013 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On September 29, 2009 appellant, then a 53-year-old city mail carrier, filed an occupational disease claim (Form CA-2) alleging that she had sustained pain in her low back and knees causally related to factors of her federal employment. OWCP accepted the claim for unspecified bilateral derangement of the medial meniscus and displacement of a lumbar intervertebral disc without myelopathy.⁵ On June 18, 2012 appellant underwent an OWCP-authorized left knee arthroscopy with partial medial and lateral meniscectomies.

By decision dated October 8, 2013, OWCP determined that appellant's actual earnings as a customer care agent, effective June 3, 2013, fairly and reasonably represented her wage-earning capacity. It reduced her wage-loss compensation to zero as her actual earnings as a customer care agent met or exceeded her earnings in her date-of-injury position.

On September 9, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for disability from work during the period August 29 through September 2, 2016.

In support thereof, appellant submitted a report dated August 24, 2016, from Dr. Basimah Khulusi, a Board-certified physiatrist. On examination of appellant for complaints of increased pain in her right knee, Dr. Khulusi noted that appellant had a significant limp and was currently using an ambulation aid. Dr. Khulusi found a "hot and swollen" right knee with marked tenderness of the medial aspect of the joint. She diagnosed left knee degenerative joint disease, status post left knee arthroscopy, other unspecified derangement of the bilateral medial meniscus, and displacement of the lumbar intervertebral disc without myelopathy. Dr. Khulusi noted that appellant had applied for disability retirement and opined that she was temporarily totally disabled from work.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Appellant timely requested oral argument before the Board. By order dated March 5, 2019, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1353 (issued March 5, 2019).

⁵ Appellant also has accepted claims for: lumbosacral and left ankle sprains due to a dog bite on March 14, 2000 under OWCP File No. xxxxxx556; a left ankle sprain due to twisting to avoid a dog on July 21, 2004 under OWCP File No. xxxxxx562; and right shoulder tendinitis, right shoulder bursitis, and right carpal tunnel syndrome under OWCP File No. xxxxxx251. OWCP File No. xxxxxx403 was administratively accepted for medical benefits related to a left arm condition sustained on August 17, 2000. Appellant's claims have not been administratively combined.

In a compensation claim development letter dated September 26, 2016, OWCP requested that appellant submit evidence establishing that she had sustained an increase in disability causally related to her accepted employment injury. It afforded her 30 days to submit additional evidence.

OWCP subsequently received a September 27, 2016 report wherein Dr. Charles Herring, a Board-certified orthopedic surgeon, noted that appellant ambulated using a walker. He diagnosed bilateral medial meniscal tears, bilateral degenerative joint disease, a right knee lateral meniscal tear, and status post left knee arthroscopy. Dr. Herring found that appellant was temporarily totally disabled from work.

In a report dated October 12, 2016, Dr. Khulusi noted that appellant was unable to sleep at night due to pain, which impacted her ability to drive or concentrate when she was at work. She found that her pain and inability to sleep prevented her from being able to work.

On October 20, 2016 Dr. Khulusi advised that she was treating appellant for the accepted conditions of bilateral medial meniscus derangement and displacement of the lumbar intervertebral disc without myelopathy. She indicated that appellant's condition had progressively worsened such that she had to take days off work in order to continue working. Dr. Khulusi noted that a magnetic resonance imaging (MRI) scan of appellant's knees dated June 2015 objectively demonstrated that her knees had worsened when compared to prior scans. She further noted that appellant's difficulty walking had increased the strain on her lumbar disc condition. Dr. Khulusi opined that, in spite of work restrictions, appellant's knee condition had progressed to the point that appellant had lesions on her bones and major ligaments, which resulted in her not being able to perform the duties of her position.

In a report dated November 22, 2016, Dr. Khulusi diagnosed unspecified bilateral derangement of the medial meniscus, displacement of the lumbar intervertebral disc without myelopathy, left knee degenerative joint disease, and status post left knee arthroscopy. In a duty status report (Form CA-17) of this same date, she found that appellant was temporarily totally disabled from work. Dr. Khulusi submitted a similar report and a Form CA-17 report on January 24, 2017.

On February 16, 2017 OWCP referred appellant to Dr. Joseph Klemek, a Board-certified orthopedic surgeon, for a second opinion examination regarding appellant's diagnosed conditions, treatment plan, and work restrictions.

In a report dated March 21, 2017, Dr. Klemek reviewed a statement of accepted facts (SOAF) and the medical evidence of record, noting that appellant's chief complaints were bilateral knee pain and low back pain. He provided findings on examination, including swelling of the knees bilaterally with effusion. Dr. Klemek indicated that appellant had sustained bilateral osteoarthritis of the knees as a consequential injury, as her knee derangement "had compromised [appellant's] natural protective cartilage and has advanced her wear and tear osteoarthritis." He opined that she was a candidate for a bilateral knee replacement given x-ray findings showing an almost complete loss of the medial compartment of both knees. Dr. Klemek noted that he was unable to identify a material change in appellant's orthopedic condition, because although her subjective complaints had increased, the objective findings were of a long-standing nature. He indicated that she had been diagnosed with vertigo that prevented driving. Dr. Klemek opined that

appellant's present disability was not related to her orthopedic condition, given that she was performing sedentary work. He found that she could perform the duties of a customer care agent.

In a progress report dated April 25, 2017, Dr. Khulusi noted that appellant's pain had continued to worsen. She found that appellant should remain off work.

By decision dated June 22, 2017, OWCP denied modification of the October 8, 2013 LWEC determination.

On July 11, 2017 appellant requested an oral hearing before an OWCP hearing representative. In a statement accompanying her request, she argued that there had been a material change in her medical condition.

Additional evidence from Dr. Khulusi was subsequently received. In a progress report dated July 24, 2017, she again noted that appellant's pain had continued to worsen and found that appellant should remain off work.

On October 5, 2017 Dr. Khulusi noted that Dr. Klemek had diagnosed a consequential injury. She explained that his finding of a consequential injury demonstrated that appellant's condition had materially changed. Dr. Khulusi maintained that a conflict in medical opinion existed between herself and Dr. Klemek with regard to appellant's ability to work in a sedentary position.

Following a preliminary review, by decision dated November 14, 2017, OWCP's hearing representative vacated the June 22, 2017 decision. She found that the case was not in posture for decision as a conflict existed between Dr. Khulusi and Dr. Klemek on the issue of appellant's work capacity. The hearing representative remanded the case for OWCP to refer appellant for an impartial medical examination. She further found that OWCP should confirm that the customer care agent position upon which it had based its LWEC determination was a permanent position.

OWCP subsequently expanded acceptance of the claim to include bilateral knee osteoarthritis.

On December 1, 2017 appellant returned to part-time employment as a customer care agent.

In a December 7, 2017 medical conflict statement, OWCP advised that a conflict existed between Dr. Klemek, who found that appellant could continue to work as a customer care despite her knee degeneration and Dr. Khulusi, who found that appellant was disabled from work beginning August 2016 due to the degenerative changes in her knees.

On December 7, 2017 the employing establishment confirmed that the customer care agent position was permanent and classified.

In a report dated December 14, 2017, Dr. Curtis W. Spencer, III, a Board-certified orthopedic surgeon, diagnosed bilateral degenerative knee arthritis and recommended a right total knee arthroplasty.

On December 18, 2017 OWCP referred appellant, along with an updated SOAF, the medical record, and a list of questions to Dr. James Fait, a Board-certified orthopedic surgeon, for an impartial medical examination.

On January 2, 2018 OWCP authorized a right total knee arthroplasty.

In a report dated February 16, 2018, Dr. Fait discussed appellant's history of employment injuries and reviewed the medical evidence of record. On examination he found tenderness to palpation of the lower lumbar spine, subjectively diminished sensation, and full muscle strength. Dr. Fait further found effusion, crepitus, and reduced motion of the knees bilaterally without warmth or erythema. He diagnosed multiple conditions, including bilateral knee osteoarthritis and multilevel degenerative disc disease of the lumbar spine. Dr. Fait noted that appellant also had accepted claims for her right shoulder, right wrist, left ankle, and both feet. He found mild degenerative changes of the feet and ankles, degenerative disc disease of the lumbar spine and osteoarthritis of the knees, but no evidence of carpal tunnel syndrome or lumbar radiculopathy. Dr. Fait opined that appellant had not experienced a progression of her right shoulder, right wrist, low back, or knee conditions as a result of her work as a customer care agent. He found, however, that her bilateral knee arthritis had worsened due to the natural progression of the condition unrelated to the duties of her employment. Dr. Fait advised that appellant "could have continued to work as a customer care agent in August 2016 despite the degenerative changes in the knees or back." He concurred with Dr. Klemek that she remained capable of working as a customer care agent, noting that the position was sedentary and had not required standing, lifting, pushing, pulling, or bending. Dr. Fait further agreed with Dr. Klemek that appellant was a candidate for bilateral total knee arthroplasties. In a February 22, 2018 work capacity evaluation (Form OWCP-5c), he found that she could work full time when walking, standing, reaching above the shoulder, and twisting for two hours per day, bending and stooping for one hour per day, and pushing, pulling, and lifting up to five pounds.

By decision dated March 21, 2018, OWCP denied modification of the October 8, 2013 LWEC determination. It found that Dr. Fait's opinion constituted the special weight of the evidence and demonstrated that appellant had not established a material change in her injury-related condition. OWCP further noted that there was no evidence that its original LWEC was in error or that she had been vocationally rehabilitated.

LEGAL PRECEDENT

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.⁶ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁷ If a formal LWEC determination has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total

⁶ 5 U.S.C. § 8115(a); *see C.C.*, Docket No. 18-1127 (issued January 29, 2019); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁷ *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

wage loss. In this instance, OWCP will need to evaluate the request according to the customary criteria for modifying a formal LWEC determination.⁸

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹¹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (IME) for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹³ If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.¹⁴

ANALYSIS

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

In seeking modification of the LWEC determination, appellant has not argued that the original determination was in error or that she has been retrained or otherwise vocationally rehabilitated. Rather, she argued that there has been a material change in the nature and extent of

⁸ *Katherine T. Kreger, id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501.4 (June 2013).

⁹ *Id.* at Chapter 2.1501.3(a).

¹⁰ *J.H.*, Docket No. 18-0535 (issued December 31, 2018).

¹¹ 5 U.S.C. § 8123(a); *J.B.*, Docket No. 18-1021 (issued December 4, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹² *See D.W.*, Docket No. 18-0123 (issued October 4, 2018); *see also Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ *K.C.*, Docket No. 19-1251 (issued January 24, 2020); *P.E.*, Docket No. 18-0745 (issued February 6, 2019).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.810.11(e) (September 2010); *see also R.W.*, Docket No. 18-1457 (issued February 1, 2019).

her injury-related condition. As noted above, a modification may be established by a material change in the nature and extent of the employment-related condition.¹⁵

OWCP properly determined that a conflict arose between appellant's treating physician, Dr. Khulusi, who found that appellant was totally disabled from employment, and Dr. Klemek, an OWCP referral physician who found that appellant could perform the sedentary position of customer care agent. It referred appellant to Dr. Fait, a Board-certified orthopedic surgeon, for resolution of the conflict.

As discussed, when OWCP has referred the case to an IME to resolve a conflict in medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁶ The Board finds, however, that Dr. Fait's opinion is insufficiently rationalized to be entitled to the special weight accorded an IME.

In a report dated February 16, 2018, Dr. Fait found that appellant had degenerative changes in the knees and back, and opined that her bilateral knee osteoarthritis had progressed, noting that she had a significant loss of range of motion in both knees. He found that the progression of her osteoarthritis was unrelated to her federal employment. Dr. Fait opined that appellant could have continued to work as a customer care agent at the time she stopped work in August 2016. However, he failed to provide any rationale for his opinion other than to note the position was sedentary. The Board has found that, when an IME fails to provide medical reasoning to support his or her conclusions about a claimant's condition, the opinion is insufficient to resolve a conflict in medical evidence.¹⁷ Thus, the Board finds that Dr. Fait's opinion is of insufficient probative value to carry the special weight of the evidence.¹⁸

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁹ When it obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.²⁰ As OWCP referred appellant to Dr. Fait for an impartial medical examination, it has a duty to obtain a report sufficient to resolve the issues raised and the questions posed to the specialist.²¹

On remand OWCP shall administratively combine appellant's accepted claims and thereafter obtain a supplemental report from Dr. Fait sufficient to resolve the conflict regarding

¹⁵ *Supra* note 13.

¹⁶ *D.O.*, Docket No. 17-0911 (issued February 2, 2018).

¹⁷ *B.J.*, Docket No. 18-1186 (issued July 9, 2019); *A.R.*, Docket No. 12-0443 (issued October 2, 2012).

¹⁸ *T.S.*, Docket No. 18-1702 (issued October 4, 2019).

¹⁹ *See K.S.*, Docket No. 18-0845 (issued October 26, 2018).

²⁰ *R.W.*, *supra* note 14.

²¹ *B.J.*, *supra* note 17.

whether appellant is able to work as a customer care agent and providing rationale for his conclusions. If Dr. Fait is unable to clarify or elaborate on his original report, or if his supplemental report is vague, speculative, or lacking in rationale, OWCP shall refer appellant to a new IME.²² Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 22, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²² See *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *R.H.*, Docket No. 17-1903 (issued July 5, 2018).