

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On May 1, 1992 appellant, then a 32-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a bilateral knee injury causally related to factors of her federal employment. She noted that she first became aware of the condition on April 20, 1989 and of its relationship to her federal employment on April 6, 1992. OWCP initially accepted the claim for bilateral genu varum, and later accepted bilateral chondromalacia patellae, and bilateral unspecified internal derangement of the knees. Appellant underwent bilateral knee arthroscopies on July 8, 1992 and left knee surgery on April 28, 1993.

On October 29, 1993 appellant accepted a position as a modified T6 letter carrier with the employing establishment, effective October 30, 1993. The duties of the position included filing, casing, and distribution of mail within physical restrictions. The position's work restrictions were based on those set forth by Dr. Claudia Thomas Carty, a Board-certified orthopedic surgeon, in a work restriction evaluation (Form OWCP-5) dated August 13, 1993.³

By decision dated January 13, 1995, OWCP determined that appellant's position as a modified letter carrier at the employing establishment fairly and reasonably represented her wage-earning capacity with zero LWEC.

On April 13, 1995 OWCP accepted appellant's claim for a March 6, 1995 recurrence of disability. It paid intermittent wage-loss compensation from March 6 to June 9, 1995. Appellant underwent a right knee lateral release and an abrasion arthroplasty on September 18, 1995. OWCP again paid her wage-loss compensation from September 18 to 29, 1995 following her right knee procedure. By decision dated August 14, 2000, it granted appellant a schedule award for 30 percent permanent impairment of the right lower extremity, and 20 percent permanent impairment of the left lower extremity. The period of the award ran from December 28, 1998 to September 30, 2001, a total of 144 weeks.

In correspondence dated January 8, 2007, appellant informed OWCP that her knee conditions had been stable since her resignation from the employing establishment in October 1998; however, she had recently developed recurrent severe knee pain and problems.

By letter dated June 22, 2016, appellant requested information regarding the status of her claim. In a development letter dated July 21, 2016, OWCP advised that her claim had been closed and sent to the Federal Records Center due to inactivity as no medical documentation or bills had been received since June 1, 2001. OWCP noted the deficiencies in her claim for a recurrence of

² *Order Remanding Case*, Docket No. 18-1081 (issued May 22, 2020).

³ The work restrictions included two hours of walking and standing per day, one hour of lifting and bending, no squatting, climbing, kneeling, lifting, pushing/pulling over 20 pounds, or use of a vehicle.

disability and need for medical treatment and informed her of the type of evidence necessary to establish the claim. No further action was taken on the recurrence claim at that time.

On January 25, 2017 appellant submitted a notice of recurrence (Form CA-2a) claiming disability due to her accepted knee conditions and a need for medical treatment. An additional copy of the claim form was submitted on June 25, 2017. Appellant indicated that her recurrence began on January 26, 2007. She also submitted an itemization of her medical treatment for her knees since 2007, a history of her employment since leaving the employing establishment, and physical evidence.

An x-ray of appellant's right knee obtained on January 23, 2007 demonstrated osteoarthritic changes. An x-ray of the right knee obtained on April 17, 2008 demonstrated moderate arthrosis of the knees. An x-ray of the right knee obtained on February 10, 2009 demonstrated no acute findings and extensive degeneration of the medial compartment with joint space narrowing. An x-ray of the left knee obtained on the same date demonstrated tricompartmental osteoarthritic changes, most prominent in the medial compartment though less severe than in the right knee.

Operative notes dated April 22, 2009 indicate that appellant underwent a right knee meniscectomy and right knee medial femoral condyle chondroplasty and medial proximal tibia chondroplasty on that day. Operative notes dated May 22, 2009 indicate that appellant underwent a left knee medial meniscectomy and left knee chondroplasty.

In a letter dated May 2, 2017, appellant related that she was concerned regarding OWCP's statement that she had not submitted documentation to her claim since June 1, 2001. She again related that after she left her position at the employing establishment, she had minimal issues with her knees other than expected degeneration until she resumed employment in 2006, she related her treatment through the years and noted that she had undergone bilateral knee replacements in 2012.

On September 24, 2017 appellant submitted a list of her medical treatment during the period January 26, 2007 through February 5, 2014.

By decision dated November 1, 2017, OWCP denied appellant's claim for a recurrence of disability. It found the medical evidence of record was insufficient to establish a change or worsening of her accepted conditions, without an intervening cause, to the point that she could no longer work. OWCP noted that this decision did not affect her entitlement to medical benefits for her accepted work-related conditions.

On April 13, 2018 appellant timely filed an appeal with the Board. By order dated May 22, 2020, the Board set aside the November 1, 2017 decision and remanded the case for further proceedings. The Board found that OWCP had adjudicated appellant's recurrence claim without proper consideration of the LWEC determination as a result of appellant's submission of evidence with respect to disability and worsening of the accepted conditions.

On remand, OWCP sent a letter to appellant dated July 31, 2020 advising her that she had not submitted sufficient evidence to support modification of the January 13, 1995 formal LWEC determination. It advised her of the three criteria necessary for modifying such decisions, *i.e.*, that there was a material change in the nature and extent of the injury-related condition, the employee

had been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. It afforded her 30 days to provide evidence substantiating that she had met any of the criteria.

By letter dated August 27, 2020, appellant requested additional time to prepare an adequate response and indicated that she would be out of town for approximately a week.

By decision dated September 10, 2020, OWCP denied appellant's request for modification of its January 13, 1995 LWEC determination. It found that she had not provided evidence substantiating that she had met any of the three criteria for modifying the LWEC determination.

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.⁴ Generally, wages actually earned are the best measure of 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.⁵ A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.⁶ Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.⁷

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

⁴ 5 U.S.C. § 8115(a); see *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁵ See *M.G.*, Docket No. 19-1659 (issued August 18, 2020); *J.A.*, Docket No. 18-1586 (issued April 9, 2019).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

⁷ See *M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *id.* at Chapter 2.815.5c (June 2013).

⁸ See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

⁹ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC].”¹⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to modify a January 13, 1995 LWEC determination.

With respect to the first basis for modifying an LWEC determination, appellant has not demonstrated that the January 13, 1995 LWEC determination was erroneous.¹² On October 30, 1993 she returned to work for the employing establishment as a modified letter carrier. The position was within the work restrictions recommended by Dr. Carty. It was not an odd-lot or make-shift position, and it was not an invalid temporary or seasonal position. Appellant worked in the position for more than 60 days prior to the issuance of the January 13, 1995 LWEC determination.¹³ Therefore, appellant has not presented evidence showing that the January 13, 1995 LWEC determination was erroneous when issued.

Further, the Board notes that appellant has alleged that her accepted condition had worsened such that she became totally disabled from all work as a result of the accepted employment conditions commencing January 26, 2007. Since OWCP found that appellant could perform the duties of a modified letter carrier, the issue is whether there has been a material change in her work-related condition that would render her unable to perform those prescribed duties.¹⁴ This is primarily a medical question.¹⁵ In reviewing the medical evidence of record, the Board finds that appellant has failed to provide sufficient medical evidence to establish that a modification of the January 13, 1995 LWEC determination is warranted due to of a worsening of her work-related condition, which disabled her from work in the modified position.¹⁶

Appellant has not submitted a rationalized opinion from a physician indicating that her accepted work-related condition had worsened such that she became unable to perform the modified position as a result of the accepted employment conditions commencing January 26, 2007. Appellant’s own statements on the matter are not medical evidence from a qualified physician and are thus of no probative value in establishing that modification of the

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.812.9(a) (June 2013); *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹¹ *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹² *See supra* note 9.

¹³ *See supra* notes 6 and 7.

¹⁴ *D.Q.*, Docket No. 17-1220 (issued May 18, 2018); *Phillip S. Deering*, 47 ECAB 692 (1996).

¹⁵ *R.S.*, Docket No. 15-1229 (issued October 2, 2015).

¹⁶ *See R.L.*, Docket No. 15-1337 (issued January 27, 2016).

January 13, 1995 LWEC determination is warranted on this basis.¹⁷ Appellant submitted diagnostic reports dated from January 23, 2007 through February 10, 2009. These reports do not address whether there had been a material change in her work-related condition that rendered her unable to perform her prescribed duties as a modified letter carrier. As such, they are of no probative value in establishing that a modification of the January 13, 1995 LWEC determination is warranted.¹⁸ Similarly, the operative reports of April 22 and May 22, 2009 do not address such a material change, and do not establish that modification of the LWEC determination is warranted.¹⁹ This evidence is therefore insufficient to establish appellant's claim.

The Board further notes that appellant has not alleged, as a basis for modification of the January 13, 1995 LWEC determination that she had been retrained or otherwise vocationally rehabilitated.²⁰

Thus, the Board finds that appellant has not met her burden of proof to modify the January 13, 1995 LWEC determination.

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to modify the January 13, 1995 LWEC determination.

¹⁷ See *R.S.*, *supra* note 15.

¹⁸ *Id.*; see also *D.T.*, Docket No. 18-0174 (issued August 23, 2019).

¹⁹ *Id.*

²⁰ See *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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