

duty on September 24, 2003. On the claim form he stated that he was pushing an over-the-road container into a trailer and felt a sharp pain in his left leg. Appellant described the injury as a hip strain.

OWCP initially accepted the claim for a left hip strain/sprain and appellant began receiving compensation for wage loss. The claim was later expanded to accept an aggravation of preexisting osteoarthritis of the left hip, consequential right posterior horn medial meniscal tear and a left knee strain. Appellant underwent a left total hip replacement on May 5, 2004 and a right knee arthroscopic surgery with partial medial and lateral meniscectomies on May 5, 2005.

In a report dated January 19, 2006, the attending orthopedic surgeon, Dr. Benjamin Tam, provided a history and results on examination. He diagnosed exacerbation of left hip degenerative joint disease secondary to Perthes disease,² status post left total hip replacement, status post right knee arthroscopy and partial medial and lateral meniscectomies. As to work restrictions, Dr. Tam recommended “work consisting primarily of sedentary work. [Appellant] is restricted [from] performing any work requiring excessive standing, walking, squatting, stair or ladder climbing or lifting greater than 25 pounds.”

Appellant was referred for vocational rehabilitation services. In a job classification form dated January 23, 2008, (Form OWCP-66), a rehabilitation counselor (RC) identified the position of Information Clerk (Department of Labor’s *Dictionary of Occupational Titles* No. 237.367-022. The position was described as a sedentary position with occasional lifting of 10 pounds. The RC indicated that appellant had the appropriate vocational background, and the position was reasonably available in appellant’s commuting area. The weekly wages were reported as \$500.00 to \$650.00 based on available wage information.

In a report dated May 29, 2008, Dr. Tam stated that appellant was in a permanent and stationary status since January 19, 2006. He indicated that appellant could work with the restrictions previously noted.

On June 7, 2008 appellant submitted an April 24, 2008 report from Dr. Marjorie Cohn, a psychologist, who provided a history and results on examination. Dr. Cohn diagnosed manic depressive disorder, single episode, moderate; insomnia related to depression and anxiety disorder. She opined that appellant was experiencing significant emotional distress, that he was “temporarily totally psychologically disabled” and the condition was employment related.

On July 10, 2008 OWCP advised appellant that it proposed to reduce his compensation pursuant to 5 U.S.C. § 8106 and 5 U.S.C. § 8115. It stated that the evidence established that he could work as an information clerk with wages of \$575.00 per week. According to OWCP, the depressive condition noted by Dr. Cohn was based on a fear of returning to the workforce and not the employment injury.

By decision dated August 19, 2008, OWCP reduced appellant’s compensation effective August 31, 2008. It found that the selected position of information clerk, with wages of \$575.00

² According to the American Academy of Orthopedic Surgeons, Perthes disease is a childhood condition characterized by a temporary loss of blood to the hips.

per week, represented appellant's wage-earning capacity. The record indicates that appellant received compensation pursuant to a schedule award from August 31, 2008 to February 1, 2012, at which time his compensation for wage loss based on loss of wage-earning capacity resumed.

In a report dated February 17, 2012, Dr. Tam provided results on examination, noting that appellant reported an onset of right knee pain several weeks earlier. He indicated that the etiology of the right knee pain was unclear, noting that radiographs demonstrated no evidence of osteoarthritis.

By letter dated July 9, 2012, appellant's congressional representative indicated that appellant wished to expand his claim to include a consequential emotional condition. On July 19, 2012 OWCP referred appellant for a second opinion examination with Dr. Stephen Simonian, a psychiatrist. It noted in the questions posed to the second opinion physician that information was requested as to whether an existing emotional condition would preclude gainful employment as an information clerk. The statement of accepted facts (SOAF) referred to appellant; date-of-injury job, without discussing the information clerk job or its duties.

In a report dated August 13, 2012, Dr. Simonian provided a history and results on examination. He diagnosed adjustment disorder with depression. Dr. Simonian stated that the diagnosis was due to the employment factors noted in the SOAF. He stated that appellant was capable of functioning in daily activities, to give or take supervision, cooperate with others and work under deadlines. Dr. Simonian completed a work capacity evaluation (OWCP-5c) and indicated by checkmark that appellant was capable of working eight hours per day in his "usual job."

By decision dated September 17, 2012, OWCP accepted a depressive disorder as employment related. It determined that the evidence was not sufficient to warrant modification of the wage-earning capacity, as the evidence from Dr. Simonian did not establish a change in appellant's condition that would disable him from employment as established in the August 19, 2008 decision.

In a report dated November 2, 2012, Dr. James Skalicky, a psychologist, stated that appellant remained distressed and unable to work. He provided results on examination and stated that appellant was "distressed with depression and anxiety because of his mental and physical condition. Dr. Skalicky stated that appellant's present condition was directly related to his work injury, "both mental and physical."

By report dated December 11, 2012, Dr. Tam stated that an MRI scan had indicated a right knee torn medial meniscus. In a report dated December 13, 2012, Dr. Perry Maloff, a Board-certified psychiatrist, provided a history and diagnosed mood disorder secondary to medical condition. He indicated that a return to work date was unknown.

In a report dated February 1, 2013, Dr. Tam stated that appellant had increasing low back pain over the last month. He provided results on examination and recommended physical therapy. Dr. Tam concluded, "[Appellant] had previously received vocational retraining to perform computer work, but this has been unsuccessful, this does not allow a return to any type

of meaningful work. He has therefore remained on a permanent disability and will be unable to work with his current medical and mental condition.”

In a report dated March 5, 2013, Dr. Skalicky referred to the “precipitating event” of appellant’s condition as being subject to “demands of management and unreasonable expectations, he was overworked, harassed and was working in a hostile environment.”³ He diagnosed adjustment disorder, mixed, major depression, mood disorder. Dr. Skalicky indicated that appellant continued to need treatment and was disabled.

By decision dated July 19, 2013, OWCP denied modification of the wage-earning capacity determination. It found the evidence was insufficient to warrant modification.

LEGAL PRECEDENT

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

ANALYSIS

In the present case, OWCP issued a wage-earning capacity decision on August 19, 2008, based on the selected position of information clerk at \$575.00 per week. Appellant seeks modification of the wage-earning capacity determination. With respect to medical evidence on this issue, the Board has indicated that the physician should address the duties of the selected position in support of the opinion.⁶ The physicians of record do not discuss the duties of the selected information clerk position. The attending orthopedic surgeon Dr. Tam, for example, stated in his February 1, 2013 report that appellant was unable to work, but does not discuss the selected position or explain whether there was a material change in appellant’s employment-related condition.

As noted above, it is appellant’s burden of proof to establish modification. However, in this case the Board notes that OWCP undertook development of the issue and referred appellant for a second opinion evaluation by Dr. Simonian. One of the stated reasons for the referral, which was noted by Dr. Simonian in his August 13, 2012 report, was whether appellant had an emotional condition that disabled him for the information clerk position. OWCP did not, however, properly resolve the issues presented.

³ It is not clear whether appellant has filed a claim for an emotional condition causally related to alleged harassment or overwork, but that issue is not before the Board on this appeal.

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ *See E.W.*, Docket No. 12-1961 (issued May 9, 2013); *Phillip S. Deering*, 47 ECAB 692 (1996).

The SOAF provided to Dr. Simonian did not discuss the position of information clerk or the duties required of the position. Dr. Simonian thus did not discuss the selected position or provide a rationalized medical opinion as to disability. His narrative report refers generally to the ability to give or take supervision or work under deadlines, and the form report contains a checkmark regarding the “usual” job.

OWCP should request clarification and additional explanation from Dr. Simonian. Since it has now accepted an emotional condition, this raises an issue with respect to the original wage-earning capacity determination on August 19, 2008. Dr. Cohn had indicated in an April 24, 2008 report that appellant was disabled due to a depressive disorder. At the time of the original wage-earning capacity determination OWCP had not accepted a consequential emotional condition, and it appeared the condition was subsequently acquired.⁷ Dr. Simonian should be asked to address whether appellant was disabled for an information clerk position as of August 19, 2008 due to the accepted psychiatric condition.⁸ If appellant was not disabled, then Dr. Simonian should address the issue of whether there was a subsequent material change in appellant’s conditions that would have disabled him for the selected position.

The case will be remanded to OWCP for preparation of a proper SOAF and referral for a supplemental report that provides a rationalized opinion on the modification of wage-earning capacity issues presented. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case must be remanded to OWCP for further development of the medical evidence.

⁷ OWCP considers employment-related and preexisting conditions with respect to the ability to perform the duties of the selected, not subsequently acquired conditions. *See R.F.*, Docket No. 13-1345 (issued September 19, 2013).

⁸ As noted above, a modification of a wage-earning capacity determination may be established if the original determination was erroneous.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 19, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 20, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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