U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KARL W. DUNN and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 01-19; Submitted on the Record; Issued October 17, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the residuals of appellant's November 30, 1989 employment injury resolved by August 22, 2000.

On December 8, 1989 appellant, then a 26-year-old pipefitter, filed a claim for a bruised right knee sustained on November 30, 1989 when his right leg went through a wood deck. The Office of Workers' Compensation Programs accepted that appellant sustained a right knee strain and, based on a July 21, 1990 magnetic resonance imaging (MRI) scan, a tear of the medial cartilage of the right knee. Appellant received continuation of pay for four hours on January 26, 1990 and from April 5 through 9, 1990. He performed limited duty until stopping work on August 13, 1990. Appellant's employment was terminated in 1991 in a reduction-in-force.

In a report dated September 21, 1992 appellant's attending physician, Dr. John C. Kofoed, stated that appellant had a 10 percent permanent impairment of the right leg due to pain and weakness. Dr. Kofoed's work tolerance limitations dated March 11, 1993 indicated appellant could walk two hours and stand two hours per day. In a report dated July 22, 1993, Dr. Kofoed noted that appellant's pain was "sort of wandering in nature," but concluded that "his present infrapatellar pain is related to his initial knee strain when he fell into a hole on November 30, 1989. It is my opinion that his condition is permanent and stationary."

By decision dated October 20, 1994, the Office reduced appellant's compensation based on his capacity to earn wages as a general clerk. Appellant appealed this decision to the Board, which, by decision dated February 20, 1997, found that the medical evidence showed that appellant was not totally disabled, but that the evidence showed that appellant lacked the necessary typing skills to be able to competitively perform the duties of a general clerk.[1] Appellant's compensation for temporary total disability was reinstated retroactive to the date it was reduced by the Office.

---

[1] Docket No. 95-625.

On April 18, 1997 appellant filed a claim for a schedule award.

Appellant submitted a report dated June 17, 1998 from Dr. Sandra Edwards, who stated that appellant had "right knee pain which is chronic in nature. He has problems with the knee locking on him, on occasion giving way. Appellant also states that when he lays down at night, he has problems with hypersensitivity in the leg, cannot bear even to have sheets on the leg." Dr. Edwards reported that appellant's right knee was quite tender on examination, but that she could not detect any loss of motor strength or range or motion. She concluded that appellant was "basically not able to engage in kneeling, bending, stooping or lifting activities for any sustained period of time. He is unable to endure prolonged standing, walking or even prolonged driving of a motor vehicle." On a work tolerance limitations form Dr. Edwards indicated that appellant could not work eight hours per day and that he had other medical conditions affecting his ability to work: disc disease of the cervical spine; recent surgery for carpal tunnel syndrome; chronic meniscal disease of the right knee and probable sciatica.

In a report dated July 7, 1998, appellant's attending physician, Dr. David LaRochelle, noted that appellant had multiple complaints, but no knee instability on examination. Dr. LaRochelle diagnosed internal derangement of the right knee with a meniscal tear, pain of the right foot and an element of chronic pain syndrome. He stated that appellant would eventually need surgery on his right knee and would not get better without this surgery. Dr. LaRochelle recommended another MRI scan of appellant's right knee, which was performed on July 23, 1998 and showed no tear of either meniscus. In a report dated December 11, 1998, he stated that this MRI scan was "entirely within normal limits," and recommended treatment "with the use of nonsteroidal anti-inflammatories and an exercise program. I see no surgical option for him presently for his knee." In a schedule award evaluation dated May 11, 1999, Dr. LaRochelle stated that appellant claims 8 out of 10 pain everyday without "doing" anything, that he had no other impairments of the right leg and that his "subjective complaints are greater than any objective findings."

The Office referred appellant, prior medical reports and a statement of accepted facts to Dr. John Lavorgna for an evaluation of any permanent impairment or residuals related to his November 30, 1989 employment injury. In a report dated July 11, 1999, Dr. Lavorgna noted that appellant complained that his entire right leg was numb and painful, but that the numbness was not in a root or peripheral nerve distribution. He also reported no atrophy of the right leg, a full range of knee motion from 0 to 150 degrees, motor strength within normal limits and no evidence of a meniscal tear on examination. In a schedule award evaluation, Dr. Lavorgna noted moderate knee pain with no loss of sensation, no weakness or atrophy, no ligament instability, and no evidence of post-traumatic irregularity or arthritis. He stated that maximum improvement occurred by December 30, 1989, as this was an "adequate healing time for knee sprain or torn cartilage."

The Office determined that there was a conflict of medical opinion, and referred appellant, the case record and a statement of accepted facts to Dr. Michael W. Shifflett, a Board-certified orthopedic surgeon. In a report dated October 8, 1999, Dr. Shifflett diagnosed "History of right knee injury, most consistent with contusion and subsequent patellar tendinitis and pes

anserinus bursitis" and "Regional pain disorder right upper extremity and right lower extremity." He stated:

> "Based on the SOAF [statement of accepted facts] and the medical records of the patient's early evaluation and treatment, it seems established that he had a knee condition which is best described at this point as I have noted above under the first diagnosis.
>
> "This would represent a direct cause of the injury in question. It is my further opinion, that there is no continuing evidence of a meniscal tear. It is unclear whether there was ever actually a meniscal tear as the patient really had no symptoms of this and the initial MRI scan was somewhat equivocating in the determination of a true MRI signal consistent with an observable meniscal tear at arthroscopy. A subsequent scan done quite recently, suggests no evidence at all of meniscal tear, and it is generally well accepted that most meniscal tears do not heal. There is no suggestion that there was a preexisting, nonindustrial-related condition which was aggravated by this injury.
>
> "With regard to the accepted industrial injury, there is no objective finding of permanent disability. While there are multiple subjective factors of pain aggravated by standing, walking and stooping, and pain which is said to be constant in nature, these are, in my opinion, somewhat overstated by the claimant as there are no corroborating objective findings nor are there any corroborating physical findings noted throughout the medical record based on the observations of multiple examiners."
>
> * * *
>
> "With regard to his lower extremity pain syndrome, there is temporal historical evidence that these complaints arose in some proximity to the accident, separated perhaps by a few months. The nature of this by its description and the lack of true physical findings, again based on documentation by multiple examiners, suggests a questionable condition with a significant functional overlay. The lack of any consistent objective findings and the physical findings of normal EMG [electromyogram] and nerve conduction study, argue against a well-defined physical condition. A caveat in this regard is that some of these conditions related to nerve injury can be rather ill defined and difficult to describe with objective measurements, including physical exam[ination], electrodiagnostic studies and imaging tests.
>
> "Overall, however, my conclusion regarding the industrial nature of these complaints is that the overwhelming evidence suggests that there is no substantiated condition which could be considered industrial in nature as the result of the injury described.
>
> "The prognosis for this condition is poor, considering the duration of symptoms and the patient's concentration and fixation on his disability. I do not believe that

> any additional medical treatment is likely to change this. There is clearly no indication for additional orthopedic treatment for his right knee condition. The only additional suggestion that may shed light on the possibility that his diffuse pain complaints could be related to his knee injury as a result of a saphenous nerve contusion and resultant regional pain syndrome causalgia or reflex sympathetic dystrophy, would perhaps be a three-phase bone scan. It is my opinion that this would most likely be normal, but if it were positive, it might give some credence to the patient's longstanding symptomatic complaints.
>
> "With regard to total temporary disability, I would agree with Dr. Kofoed's early opinions regarding his permanent and stationary status based on the lack of need for further treatment of the knee, and initiation of vocational rehabilitation based on the conclusion that he was unlikely to return to his usual and customary occupation. This would place the end of his total temporary disability at some time in late 1991 or early 1992. He would then be considered permanently disabled from his usual occupation. His physical limitations would be based on purely subjective complaints and with regard to the accepted industrial condition, would consist of prolonged standing, walking, and stooping. He would be precluded from crawling and repeated climbing. These again are based not on objective, but mostly subjective findings.
>
> "Please see the enclosed OWCP-5 form. With regard to residuals of the injury, I would have to conclude from the above discussion and the opinions expressed therein, that Mr. Dunn's residuals related to the accepted knee condition are subjective only in nature with no corroborating objective findings to support them. His subjective complaints are out of proportion tot he lack of objective findings, with no atrophy, no significant loss of motion, and a normal MRI scan."

On an Office work tolerance limitations form (OWCP-5), completed on October 10, 1999, Dr. Shifflett indicated that appellant could not work eight hours per day and stated, "Because of high level of subjective factors ref[erable] to right leg, should be provided opportunity for frequent sitting or predominantly sedentary work."

By letter dated November 24, 1999, the Office authorized Dr. Shifflettt to perform a bone scan, and requested that he subsequently submit a supplemental report. In a report dated January 11, 2000, Dr. Shifflettt stated that a three-phase bone scan done on December 13, 1999 showed no abnormality of appellant's right knee. Dr. Shifflettt stated: "This study suggests that there is no residual bone remodeling activity nor any significant hypervascularity around the right knee. This study very strongly suggests that there is no evidence for a causalgia or reflex sympathetic dystrophy nor is there any evidence for residual post-traumatic arthritis affecting [appellant's] right knee."

On July 22, 2000 the Office issued a notice of proposed termination of compensation, on the basis that the weight of the medical evidence showed appellant had no residuals of his November 30, 1989 employment injury. Appellant replied to this notice with a July 25, 2000 letter.

By decision dated August 22, 2000, the Office terminated appellant's compensation on the basis that his right knee sprain had resolved and the medial cartilage tear was diagnosed in error. The Office found that the weight of medical opinion established that there were no objective medical findings to establish any continuing disability or permanent impairment resulting from appellant's November 30, 1989 injury, and, on this basis, also denied the claim for a schedule award.

The Board finds that the residuals of appellant's November 30, 1989 employment injury resolved by August 22, 2000.

There was a conflict of medical opinion on the question of whether appellant continued to have residuals of his November 30, 1989 employment injury. Appellant's attending physician, Dr. Kofoed, concluded that appellant had a permanent impairment and work tolerance limitations due to pain causally related to his November 30, 1989 employment injury. Another attending physician, Dr. Edwards, also set forth work tolerance limitations based on appellant's chronic right knee pain. Dr. Lavorgna, to whom the Office referred appellant for a second opinion evaluation, concluded that appellant had reached maximum medical improvement by December 30, 1999, as this was an adequate healing time for a sprain or a torn cartilage. A July 23, 1998 MRI showed no torn cartilage.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[2] referred appellant, the case record and a statement of accepted facts to Dr. Shifflettt. In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[3]

In a report dated October 8, 1999, Dr. Shifflettt concluded that "the overwhelming evidence suggests that there is no substantiated condition which could be considered industrial in nature as the result of the injury described." His opinion was based on a complete and accurate factual and medical background, and is supported by rationale, which addresses the absence of objective evidence of disability or impairment. Dr. Shifflettt's opinion constitutes the weight of the medical evidence and establishes that the residuals of appellant's November 30, 1989 employment injury resolved by August 22, 2000.

---

[2] 5 U.S.C. § 8123(a) states in pertinent part: "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."

[3] *James P. Roberts*, 31 ECAB 1010 (1980).

The decision of the Office of Workers' Compensation Programs dated August 22, 2000 is affirmed.

Dated, Washington, DC
October 17, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member