

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

C.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Bellmawr, NJ, Employer)

**Docket No. 15-0239
Issued: September 3, 2015**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 12, 2014 appellant, through counsel, filed a timely appeal from an August 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits effective December 15, 2013; and (2) whether appellant has met her burden of proof to establish continuing residuals or disability after the termination of his compensation benefits.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant continued to submit medical evidence after OWCP's August 5, 2014 decision. However, the Board lacks jurisdiction to review new evidence for the first time on appeal.

FACTUAL HISTORY

On May 28, 2012 appellant, then a 50-year-old mail handler, filed a traumatic injury claim alleging that on May 27, 2012 he fractured his right knee when he tripped over a safety bar and fell down. His claim was accepted for right knee fracture. Appellant stopped work and received wage-loss compensation.

Initial emergency room records diagnosed a closed patella fracture and also noted that appellant had a history of multiple sclerosis. Thereafter, appellant was treated by Dr. David Bundens, a Board-certified orthopedic surgeon. On May 29, 2012 Dr. Bundens reported the history of the work injury and advised that the right knee was swollen and tender over the patella. X-rays showed an undisplaced patella fracture. Dr. Bundens recommended a knee immobilizer for six weeks and indicated that appellant could not work. He continued to submit reports noting appellant's status and indicating that x-rays showed the fracture was healing in a good position although he remained weak and unable to work. Appellant was also referred for physical therapy. Subsequent reports indicate that he sustained an unrelated fall on October 2, 2012 which resulted in a nonwork-related fracture of his right foot. As of December 12, 2012, Dr. Bundens advised that an x-ray of the right knee revealed that the patella fracture appeared to be healing in good position and that there were some mild degenerative changes.

In a May 23, 2013 report, Dr. Bundens advised that he began treating appellant in May 2012 for acute fracture of the patella after he tripped over a safety bar at work. He noted that initially appellant's knee had tenderness and swelling over the patella and that he could not extend his knee secondary to pain. Dr. Bundens advised that appellant's knee joint looked good and that his patella fracture had healed nicely. He noted that appellant's on-going disability for work was caused by extreme weakness secondary to an underlying neurologic condition. Dr. Bundens opined that appellant was not capable of any sustained standing, walking, or manual labor.

On August 15, 2013 OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's work-related condition. In an October 3, 2013 report, Dr. Askin advised that appellant fell on his right knee at work resulting in a fractured right patella. He noted that appellant fell at least four times following the work-related injury and that he currently complained of right knee pain and swelling. Dr. Askin reiterated that Dr. Bundens advised that appellant's fracture had healed "quite nicely" and yet he still had disability due to extreme weakness secondary to an underlying neurologic condition. On physical examination, he advised that appellant's right patella was not deformed and that he did not have any passive limitation of motion of the right knee as compared with the left. Dr. Askin also noted that he did not detect any effusion for either knee or any ligamentous laxity. He advised that appellant had profound weakness in both his lower and upper extremities. Dr. Askin opined that appellant's accepted condition healed and that he did not suffer from any residuals of that condition. He further opined that there was no work-related disability and appellant's accepted condition would not prevent him from returning to work. However, appellant's underlying neurologic condition may preclude him from work. Dr. Askin noted that he was unable to diagnose appellant's neurologic condition, but advised that it caused profound neuromuscular weakness of all four limbs. He opined that the neurologic condition was independent of the work injury. Dr. Askin

noted that appellant's tendency to fall and his incapacity for activity was related to his neurologic condition as opposed to the accepted work injury. In an accompanying August 30, 2013 work capacity evaluation, he advised that appellant had no work-related disability.

By letter dated October 8, 2013, OWCP advised appellant that it proposed a termination of wage-loss compensation and medical benefits. It advised that the weight of the evidence was represented by Dr. Askin who found that there were no residuals of appellant's accepted condition.

By letter dated October 30, 2013, counsel disputed the proposed termination. He argued that Dr. Bundens did not find that appellant had recovered from his injury and that there was a conflict in the medical record requiring referral to a referee physician.

By decision dated December 12, 2013, OWCP terminated appellant's wage-loss and medical benefits effective December 15, 2013. It found that the weight of medical opinion was represented by Dr. Askin.

By letter dated December 17, 2013, appellant through counsel, requested an oral telephone hearing. During the May 22, 2014 hearing, he advised that he worked for the employing establishment since 1996. Appellant noted that he currently had a neurologic condition that caused the nerves in his spine to deteriorate. He further noted that he did not know the name of his condition, but advised that it began four years prior. Appellant advised that his neurologic problems worsened following his work injury and noted that currently he could only stand for 15 minutes and that he had difficulty getting in and out of chairs. During the hearing, counsel argued that Dr. Askin should not have been the weight of the evidence. He argued that on examination Dr. Askin only looked at the right knee's passive range of motion as compared to the left knee without noting its active range of motion or taking into account that appellant also had a preexisting left knee injury. Counsel also argued that Dr. Askin contradicted himself with regard to his opinion on appellant's ability to return to work.

Following the hearing, appellant submitted multiple reports from Dr. Laura Ross, a Board-certified osteopath specializing in orthopedic surgery. In a February 21, 2014 report, Dr. Ross advised that he had a fall at work that resulted in a fractured right kneecap. She noted that the fracture healed well, but appellant still complained of right knee pain. On physical examination Dr. Ross found right knee tenderness and palpation along the joint line, no gross instability of the knee, and pain with pressure of the patella. She also advised that appellant had a history of Charcot Marie Tooth disease. In a March 7, 2014 report, Dr. Ross advised that he had mild crepitus with range of motion of the right knee and tenderness along the joint line. She assessed internal derangement of the right knee consisting of chondromalacia patella, tibial plateau, and distal femur contusions. In an April 18, 2014 report, Dr. Ross evaluated appellant's left knee and advised that he also complained of right knee pain. In a May 30, 2014 report, she assessed degenerative joint disease of the right knee and tenderness along the joint line. Physical therapy reports were also received.

By decision dated August 5, 2014, an OWCP hearing representative affirmed the December 12, 2013 decision terminating appellant's medical and wage-loss benefits.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

ANALYSIS -- ISSUE 1

OWCP accepted appellant's traumatic injury claim for a fractured right patella. Appellant received wage-loss compensation and medical benefits based on the accepted conditions. In his May 23, 2013 report, Dr. Bundens advised that appellant's right patella fracture had healed and that his on-going disability was attributable to his underlying neurologic condition. OWCP then referred appellant to Dr. Askin for a second opinion regarding the status of appellant's accepted condition.

In his October 3, 2013 report, Dr. Askin set forth the history of appellant's accepted right knee condition, reviewed the medical treatment records related to appellant's conditions, and reviewed the statement of accepted facts. He opined that appellant's fractured right patella healed and that he did not suffer from any residuals of that condition. Dr. Askin further opined that, although appellant's accepted condition would not prevent him from returning to work, his preexisting neurologic condition may preclude work. He noted that he was unable to diagnose appellant's neurologic condition, but advised that it caused profound neuromuscular weakness of all four limbs. Dr. Askin opined that the neurologic condition was independent of the work injury. He opined that appellant's tendency to fall and incapacity for activity was related to his neurologic conditions as opposed to the accepted work injury.

The Board finds that Dr. Askin represents the weight of the evidence. Dr. Askin's report was based on a full and accurate history, a review of the medical records, and provided a rationalized medical opinion addressing the basis for his conclusion that appellant's on-going disability was no longer related to the work-related accepted condition.

On appeal counsel argues that Dr. Askin, as an orthopedic surgeon, was unable to adequately address whether the work incident aggravated appellant's preexisting neurologic condition. The Board notes that OWCP only accepted an orthopedic condition, a fractured patella, and did not accept any neurological condition.⁵ As explained, Dr. Askin examined

³ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁴ *Furman G. Peake*, 41 ECAB 361 (1990).

⁵ See *Jaja K. Asaramo*, *supra* note 3 (where an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

appellant and clearly explained that the work-related orthopedic fracture had resolved without residuals. Based on the findings and reasoning stated above, the Board finds that counsel's arguments are not substantiated. Dr. Askin found no basis on which to attribute any continuing condition or residuals to the accepted injury. The Board also finds that there was no conflict in the record between Dr. Bundens and Dr. Askin. At the time of Dr. Askin's report, Dr. Bundens May 23, 2013 report opined that appellant's accepted right patella fracture had healed and that on-going disability was attributable to an underlying neurologic condition.

LEGAL PRECEDENT -- ISSUE 2

It is well established that after termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative, and substantial evidence that she had an employment-related disability or residuals which continued after termination of compensation benefits.⁶

ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained a fractured right patella. On December 12, 2013 it terminated his wage-loss and medical compensation benefits effective December 15, 2013 finding that the accepted fractured right patella ceased without residuals or work limitations. The burden now shifts to appellant to demonstrate that he continued to have residuals or disability for work on and after December 15, 2015 due to the accepted injury.⁷

After the termination of appellant's compensation benefits, he submitted several reports from Dr. Ross. In her February 21, 2014 report, Dr. Ross advised that he had a fall at work that resulted in a fractured right kneecap. She advised that the fracture was healed, but appellant still complained of right knee pain. In her March 7, April 18, and May 30, 2014 reports, Dr. Ross advised him of the status of his condition. These reports are insufficient to create a conflict with or to overcome the weight of Dr. Askin's report because they do not specifically address whether residuals of appellant's accepted condition remain or whether he remained disabled from work due to residuals of the May 27, 2012 work injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits and that he has failed to meet his burden of proof to establish any continuing disability or medical residuals on or after December 15, 2013.

⁶ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

⁷ *Virginia Davis-Banks*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board