

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

WILLIAM S. HILL, JR., Appellant

and

**U.S. POSTAL SERVICE, SOUTHEAST
STATION, Kansas City, MO, Employer**

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**Docket No. 04-146
Issued: November 24, 2004**

Appearances:
William S. Hill, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 14, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated October 28, 2002 and July 22, 2003, which terminated his compensation as the medical evidence did not support orthopedic residuals remaining as a result of his previous claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 28, 2002; and (2) whether appellant has established that he had any continuing disability after October 28, 2002.

FACTUAL HISTORY

On August 6, 1999 appellant, then a 52-year-old carrier, filed an occupational disease claim alleging that he sustained a torn meniscus as a result of the walking and climbing stairs that he performed in his federal employment. In support of his claim, appellant submitted an

April 5, 2000 medical report by Dr. Jeffrey B. Weaver, a family practitioner. In this report, he noted that the amount of walking appellant did as well as hill climbing has aggravated his degenerative arthritis symptomatology in the knee. Dr. Weaver recommended that appellant be employed in a more sedentary-type position. By decision dated July 27, 2000, the Office accepted his claim for aggravation of degenerative arthritis of the right knee and approved right knee surgery for August 18, 1999. A subsequent arthroscopy and partial medial meniscectomy were performed on July 12, 2000.

In a medical opinion dated September 11, 2000, Dr. Steven L. Hendler, appellant's treating Board-certified physiatrist, listed his impression as "internal derangement, right knee: miniscule tear with recurrence. Degenerative joint disease, right knee." Dr. Hendler opined that the aggravation of appellant's degenerative arthritis of the right knee had resolved 6 to 12 weeks following the surgery of August 18, 1999 and that additional treatment was not needed at this time. He further opined that appellant could not return to full duty as a mail carrier due to his significant degenerative joint disease and history of miniscule tear which would preclude him from prolonged standing and walking along with frequent squatting, crawling and kneeling. Dr. Hendler noted that the restrictions which he recommended were the result of the preexisting condition.

On August 19, 2002 the Office referred appellant to Dr. Daniel Weed, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated September 23, 2002, he stated: "I think this patient did have a meniscus tear and basically even though I believe that [he] is truly having pain there is no objective evidence to keep him off of work." Dr. Weed further indicated, "I believe [appellant's] condition is permanent and the aggravation is temporary and has ceased and quite frankly there are no objective findings to indicate that the aggravation is continuing." He believed that the underlying condition had returned to baseline and that appellant could return to his full duties with limited squatting, kneeling, crawling and climbing.

On September 27, 2002 the Office proposed terminating appellant's compensation and medical benefits for the reason that the weight of medical evidence of record establishes that he had no continuing disability as a result of the injury of July 31, 1999. By decision dated October 28, 2002, the proposed termination of compensation was made final.

In a report dated December 9, 2002, Dr. Washington S. Muro, a Board-certified internist, indicated that appellant suffered from severe arthritis in his knees and that he needed to continue working at the same level of exertion at all times in his new position. In a report dated December 13, 2002, Dr. T.S. Samuelson, appellant's Board-certified orthopedic surgeon, indicated that appellant had right knee degenerative joint disease and that he had a possible right recurrent medial meniscus tear. However, on January 24, 2003 Dr. Samuelson noted that appellant's examination did not indicate that he had a meniscus tear, although Dr. Samuelson did note right patellar tendinitis. On February 21, 2003 Dr. Samuelson examined appellant and indicated that he continued to be symptomatic and that due to persistent pain he wished to proceed with more aggressive measures. On February 25, 2003 appellant underwent surgery on his right knee. In a progress note dated March 4, 2003, Dr. Samuelson indicated that appellant noted that he was feeling better.

The Office referred appellant's record to the Office medical adviser for comment. In an opinion dated May 9, 2003, the Office medical adviser stated that, as the Office, perhaps inappropriately, accepted aggravation of degenerative arthritis of the right knee and permitted operative procedures on August 18, 1999 and July 12, 2000, "the Office has no choice but to accept a permanent aggravation of osteoarthritis in the right knee." He noted, "[T]he chondromacial changes and meniscal changes status post two arthroscopies would by orthopedic definition deteriorate faster than would be expected if for no other reason that the ill-advised authorized operative procedures." The Office medical adviser further noted that the Office would have to authorize a third arthroscopy of the right knee.

By letter dated May 29, 2003, the Office advised appellant that a conflict in medical evidence existed in his case and referred appellant to Dr. Dale Dennis Dalenberg, a Board-certified orthopedic surgeon, for an impartial medical examination. In a medical opinion dated July 20, 2003, he indicated that appellant had recovered from the effects of his work exposure, but had not recovered from his underlying disease and because of this, could not return to his letter carrier position. He noted that appellant had sustained a temporary aggravation of an underlying condition on July 31, 1999 and that this temporary aggravation was resolved with either or both of the first surgeries. Dr. Dalenberg specifically noted:

"[Appellant] did not have a "permanent aggravation" of an underlying condition because there is nothing in his history to suggest that his condition was *materially* worsened by the workplace duties or the two scopes. *Material* worsening would have required that something at work injured his articular cartilage or meniscus (but we have already demonstrated how those changes were degenerative) or that something untoward would have happened as a result of the work comp-authorized knee scopes (but we have already demonstrated that those scopes were uncomplicated and that they actually helped him each time for a period of months). Instead of a "permanent aggravation," [appellant] simply had a natural progression of his underlying disease." (Emphasis in the original)

By decision dated July 22, 2003, the Office denied modification of its earlier decision, as it found that the weight of the medical evidence of record does not support orthopedic residuals remaining as a result of appellant's previously accepted claim. The Office explained that his current condition was the natural progression of his underlying disease process as there was no objective medical evidence to establish a material worsening of the underlying condition.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² When the aggravation is temporary

¹ *Betty Regan*, 49 ECAB 496, 501 (1998).

² *David W. Pickett*, 54 ECAB ____ (Docket No. 01-1950, issued, December 26, 2002).

and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁵

ANALYSIS -- ISSUE 1

In the instant case, as the Office accepted appellant's claim for aggravation of degenerative arthritis of the right knee, it was the Office's burden to prove that this aggravation had ceased. At the time the Office terminated his wage-loss and medical benefits on October 28, 2002 the medical evidence in the record established that he no longer had residuals from the employment-related condition. Dr. Hendler, appellant's physician, indicated that the aggravation of his degenerative arthritis of the right knee had resolved six to twelve weeks following the surgery of August 18, 1999. The Office referred appellant for a second opinion and in his August 19, 2002 report, Dr. Weed indicated that there were no objective findings to indicate that his aggravation was continuing. Specifically, Dr. Weed explained that there is no objective evidence to demonstrate that the meniscal tear should prevent appellant from returning to work, that the aggravation was temporary and had ceased and that the underlying condition had returned to base line. He noted that appellant could return to full duty with limited squatting, kneeling, crawling and climbing. As no physician opined that he continued to have an employment-related condition after October 28, 2002, the Board finds that the Office properly terminated wage-loss and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

Following the termination of his benefits, the burden of proof shifted back to appellant to support his claim of employment-related continuing disability with probative medical evidence.⁶ The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

³ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); see also *James L. Hearn*, 29 ECAB 278 (1978).

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

⁶ See *Talmadge Miller*, 47 ECAB 673 (1996).

⁷ *Joe L. Wilkerson*, 47 ECAB 604 (1996); *Alberta S. Williamson*, 47 ECAB 569 (1996).

Section 8123(a) of the Federal Employees' Compensation Act⁸ provides that, "[i]f there is disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

ANALYSIS -- ISSUE 2

In support of his claim that he continued to have a disability related to his work injury, appellant submitted a February 21, 2003 report by Dr. Samuelson, wherein he indicated that appellant continued to be symptomatic and that due to persistent pain he wished to undergo aggressive measures. Accordingly, on February 25, 2003 he had surgery on his right knee. The Office medical adviser then reviewed appellant's record and concluded that due to the fact that chondromacial changes and meniscal changes as a result of his two approved arthroscopies will deteriorate faster than would be expected the Office must accept permanent aggravation of the right knee due to degenerative arthritis. The Office, in a May 29, 2003 letter, had advised appellant of the referral to Dr. Dalenberg for resolution of a conflict in medical opinion. The Office medical adviser's opinion, however, is in accordance with appellant's treating physician, Dr. Samuelson and supports appellant's claim for continuing disability. Therefore, as there was no variance in opinion, the Board finds that there was no conflict in the medical evidence at the time of the referral to Dr. Dalenberg and he cannot be treated as the impartial medical examiner. The Board further finds that Dr. Dalenberg's opinion that appellant's temporary aggravation of his underlying condition had resolved with either or both of the first surgeries and that appellant did not sustain a work-related "permanent aggravation" but simply had a natural progression of his underlying disease, constitutes a second opinion which conflicts with the opinion of appellant's treating physician, as well as with the Office medical adviser. Accordingly, as there is an unresolved conflict in the medical evidence between appellant's attending physician, Dr. Samuelson, and Dr. Dalenberg, pursuant to 5 U.S.C. § 8123(a), this case should be referred to an impartial medical examiner to resolve the conflict as to whether he had any continuing disability as a result of his work-related injury. Therefore, the case must be remanded for the Office to refer appellant with the case record and a statement of accepted facts, to an impartial medical specialist to resolve the conflict. After further development that it deems necessary, the Office shall issue a *de novo* opinion.

CONCLUSION

Under the circumstances described above, the Board finds that the Office met its burden to terminate appellant's benefits on October 28, 2002. However, the Board finds that this case is not in posture for a decision with regard to the issue of whether appellant established that he was entitled to benefits after October 28, 2002 as the case needs to be referred to an impartial medical adviser to resolve a conflict in evidence.

⁸ 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 28, 2002 is affirmed.⁹ However, the Office decision dated July 22, 2003 is vacated and this case is remanded for further consideration consistent with this opinion.

Issued: November 24, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ The record contains additional evidence that was submitted after the Office issued its July 22, 2003 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997). Appellant may submit this evidence to the Office with a request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).