

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

DERRICK E. WEAVER, Appellant

and

**U.S. POSTAL SERVICE, WASHINGTON
TOWNSHIP BRANCH, Dayton, OH, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 04-1477
Issued: May 2, 2005**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 12, 2004 appellant's attorney filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated March 29, 2004, denying modification of the September 3 and October 1, 2003 decisions which denied appellant's claim for wage-loss compensation for the periods May 19 through June 11, 2003 and June 30 through August 8, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he is entitled to wage-loss compensation for recurrence of total disability for the period May 19 through June 11, 2003 causally related to his February 12, 2003 employment injury; and (2) whether appellant has established that he is entitled to wage-loss compensation for total disability for the period June 30 through August 8, 2003 causally related to his September 8, 2000 employment injury.

FACTUAL HISTORY

On September 18, 2000 appellant, then a 33-year-old window services technician, filed a traumatic injury claim assigned number 09-2001393 alleging that on September 8, 2000 he strained his left knee when he knelt down to pick up a pen while waiting on a customer. The Office accepted appellant's claim for a left knee strain. By letter dated April 19, 2002, the Office accepted that appellant sustained a recurrence of disability on January 30, 2002. On February 5, 2003 the Office granted him a schedule award for a seven percent impairment of his left lower extremity.

On February 12, 2003 appellant filed another traumatic injury claim assigned number 09-2030254 alleging on that date he felt his right knee pop while standing up from his stool to distribute customer packages. Appellant stopped work on the date of injury.¹ By letter dated March 7, 2003, the Office accepted the claim for a right knee strain.² Appellant returned to limited-duty work on April 15, 2003.

On June 11, 2003 appellant filed a claim for compensation (Form CA-7) for the period May 19 through June 11, 2003. He submitted an April 11, 2003 duty status report from a physician whose signature is illegible noting a date of injury of February 12, 2003 and that he could work eight hours a day, five days a week with the listed physical restrictions. In an April 22, 2003 outpatient report, a physician, whose signature is illegible, provided a diagnosis of right knee strain and a physical therapy treatment plan. Treatment notes from appellant's physical therapists addressed therapy during the period May 6 through June 6, 2003.

By letter dated June 30, 2003, the Office referred appellant, together with a statement of accepted facts, medical records and a list of questions, to Dr. Sheridan for a second opinion medical examination regarding his employment-related right knee strain.

In a June 11, 2003 treatment note, Dr. Saunders indicated that appellant could not drive to work due to right knee pain. Dr. Saunders stated that she was going to request that he be allowed to work at the window in a seated job at the nearest employing establishment facility due to his knee pain.

Dr. Sheridan submitted a July 9, 2003 medical report in which he reviewed a history of appellant's February 12, 2003 employment injury and medical treatment. Regarding his physical examination, Dr. Sheridan did not find anything except for old scars on appellant's right knee. He reported that a March 13, 2003 magnetic resonance imaging (MRI) scan of appellant's right knee did not identify any linear meniscal tears and stated that there was no clinical evidence of a medial or lateral meniscal tear. Dr. Sheridan stated that there was sufficient medical evidence to

¹ On August 25, 2003 the Office combined appellant's claims assigned 09-2001393 and 09-2030254 into a master claim assigned number 09-2001393 to avoid duplication of information and confusion.

² By letter dated January 28, 2004, the Office advised appellant that the acceptance of his claim had been expanded to include a torn meniscus of the right knee based on the resolution of a conflict in the medical opinion evidence between Dr. Jan E. Saunders, treating orthopedic surgeon, and Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon and Office referral physician, by Dr. Edward G. Fisher, a Board-certified orthopedic surgeon and impartial medical specialist.

support that appellant's work related right knee strain was neither present nor active and that it had resolved. He noted that appellant was disabled for work for approximately one month due to his accepted employment injury. Dr. Sheridan opined that appellant did not have any residuals of his employment-related right knee injury or limitations in his normal job duties. He reviewed an investigative videotape which showed appellant engaged in physical activity and opined that his actions correlated with his positive findings on physical examination.

In a July 22, 2003 letter, the Office requested that Dr. Saunders review Dr. Sheridan's report and state whether she agreed with his findings.

In a July 9, 2003 treatment note, Dr. Saunders allowed appellant to return to work although the employing establishment had denied her request to allow him to work in a facility closer to his home. In a July 23, 2003 treatment note, Dr. Saunders reported appellant's continuing pain in both knees. Appellant told her that Dr. Sheridan found that his injury were not work related. Dr. Saunders noted her findings on x-ray examination and her intention to refer appellant to Dr. Aviars Vitols, an osteopath specializing in orthopedic surgery, for another medical opinion. In a July 31, 2003 treatment note, Dr. Saunders indicated that Dr. Vitols had submitted a medical opinion to the Office. The Office received emergency treatment notes from Good Samaritan Hospital that were signed by a physician whose signature is illegible indicating that appellant's right knee was treated on July 18, 2003 and that he suffered from internal derangement of the right knee.

In a letter dated August 6, 2003, the Office denied Dr. Saunders' request to have Dr. Vitols conduct a second opinion medical examination. The Office again requested that she review Dr. Sheridan's July 9, 2003 medical report and respond by August 15, 2003. The Office also requested that she provide her reasons for referring appellant to Dr. Vitols.

In an August 6, 2003 decision, the Office denied appellant's claim for compensation for the period May 19 through June 11, 2003. By letter dated August 12, 2003, the Office issued appellant's appeal rights relating to the August 6, 2003 decision. The Office stated that it had inadvertently failed to include them with its decision. The Office indicated that the time limitation for an appeal started with the date of the August 12, 2003 letter and not the August 6, 2003 decision.

The Office received Dr. Saunders' August 6, 2003 treatment note in which she stated that appellant was experiencing left knee pain and that he had difficulty driving. She further stated that she reviewed Dr. Sheridan's report and did not agree with everything he said regarding appellant's right knee. Dr. Saunders' requested another opinion concerning appellant's right knee condition.

On August 7, 2003 appellant filed a Form CA-7 requesting wage-loss compensation for the period June 30 through August 30, 2003 due to his September 8, 2000 employment injury. In an August 18, 2003 letter, the Office advised him that the record was insufficient to process his claim. The Office requested that he submit supportive evidence of total disability during the claimed period within 30 days. The Office noted that appellant's claim for compensation for the period May 19 through June 11, 2003 had been denied which overlapped the period he was now seeking compensation. The Office stated that Dr. Saunders' medical reports found that he could

work in a seated job and concluded that there was no evidence of record to support total disability during the claimed period for either his employment-related right or left knee injury.

In an August 20, 2003 letter, appellant requested reconsideration of the Office's August 12, 2003 decision. On August 18, 2003 Dr. Vitols noted that appellant was treated for complaints regarding his right knee. Dr. Vitols provided a history of appellant's complaints and medical and social background. He reviewed Dr. Sheridan's July 9, 2003 medical report and the results of the March 13, 2003 MRI scan. Dr. Vitols opined that, based on the facts presented to him and the clinical objective findings of his examination, appellant sustained a torn medial meniscus of the right knee as a direct and proximal result of the February 12, 2003 employment injury. He noted that conservative treatment had failed and recommended diagnostic and surgical arthroscopy.

In an August 21, 2003 letter, appellant contended that Dr. Saunders had always diagnosed a torn medial meniscus tear. The Office received Dr. Saunders' August 20, 2003 treatment note reviewing Dr. Vitols' opinion and that appellant probably needed arthroscopy surgery.

By decision dated September 3, 2003, the Office denied appellant's request for modification of the August 12, 2003 decision. The Office found Dr. Vitols' report insufficient to establish that appellant was totally disabled during the period May 19 through June 11, 2003 due to his February 12, 2003 employment injury.³

By letter dated September 9, 2003, the Office again referred appellant together with medical records, a statement of accepted facts and list of questions to be addressed to Dr. Sheridan for a second opinion medical examination regarding the diagnosis of a degenerative tear and surgery request.

In an October 1, 2003 decision, the Office denied appellant's claim for compensation for the period June 30 through August 8, 2003 on the grounds that the medical evidence of record failed to establish that he was totally disabled during the claimed period due to the September 8, 2000 employment injury. The Office noted that the only medical evidence received was Dr. Vitols' August 18, 2003 report which did not discuss appellant's inability to work during the claimed period.

In an October 8, 2003 report, Dr. Sheridan noted appellant's complaints of pain in his right and left knees. He provided appellant's medical background, his findings on physical examination and a review of appellant's case record including Dr. Vitols' reports and his own July 9, 2003 report. Dr. Sheridan opined that appellant had residuals of the September 8, 2000 employment-related left knee strain and subsequent surgery which included crepitus and positive grind and Frieberg tests. He further opined that the left knee strain had resolved but the aggravation of chondromalacia was still present and active. Regarding appellant's February 12,

³ In the September 3, 2003 decision, the Office noted that appellant had requested reconsideration of its decisions concerning his September 8, 2000 and February 12, 2003 employment injury. The Office stated, however, that the September 3, 2003 decision only related to appellant's February 12, 2003 employment-related right knee strain. The Board notes that at the time the Office issued the September 3, 2003 decision, no decision had been issued regarding appellant's claim for total disability compensation during the period June 30 through August 8, 2003 causally related to the September 8, 2000 employment injury.

2003 right knee injury, Dr. Sheridan opined that the right knee strain had resolved. He noted that the MRI scan of the right knee demonstrated a degenerative-type tear but he opined, based upon objective findings, that appellant did not sustain a torn medial meniscus of the right knee as a result of the February 12, 2003 employment injury. He stated that the degenerative-type tear was due to the degenerative process combined with appellant's exogenous obesity and not the February 12, 2003 employment injury. Dr. Sheridan opined that appellant was not currently disabled from performing the duties of a window clerk as described in the statement of accepted facts. He noted that appellant could return to this position with certain restrictions. In an accompanying work capacity evaluation, Dr. Sheridan provided these restrictions along with his finding that appellant could work eight hours a day.

On October 29, 2003 the Office requested that Dr. Sheridan clarify his October 8, 2003 second opinion regarding the nature and extent of appellant's employment-related left knee injury.

In an October 17, 2003 report, Dr. Saunders noted appellant's February 12, 2003 employment injury and her treatment of his injury. She stated that, during the period May 19 through June 11, 2003, appellant complained of right knee pain that prevented him from driving to work. She noted her recommendation that appellant be placed in a seated job at an employing establishment facility closer to his home. Dr. Saunders concluded that appellant's right knee problems were causally related to the February 12, 2003 employment injury. The Office also received Dr. Saunders' treatment notes covering the period July 23 through October 1, 2003 regarding appellant's right and left knee problems.

In a December 16, 2003 report, Dr. Sheridan noted that the aggravation of appellant's left knee chondromalacia was permanent. He neither believed this condition would cease nor that appellant would be able to return to his baseline condition. Dr. Sheridan explained the nature of chondromalacia and imposed permanent work restrictions on appellant citing that it is a progressive condition which becomes worse over time due to a mechanical wearing away of the cartilage on the back of the kneecap. He stated that these restrictions were attributable to the aggravation of chondromalacia and not the underlying condition of chondromalacia because the latter was "preexisting, nondisabling, dormant prior to his injury and became permanently aggravated as a result of the injury." Dr. Sheridan concluded that "the restrictions are for the injury which caused the permanent aggravation for the chondromalacia."

By letter dated January 28, 2004, the Office advised appellant that it had expanded the acceptance of his claim to include a torn meniscus of the right knee.⁴

In a February 1, 2004 letter, appellant requested reconsideration of the Office's September 3 and October 1, 2003 decisions. The Office received numerous medical reports. Dr. Saunders' May 14, 1998 operative report related to surgery performed on appellant's right ankle. An April 18, 2001 operative report addressed surgery on appellant's left knee. In a March 19, 2003 report, Dr. Saunders noted the findings of the March 13, 2003 MRI scan and

⁴ The record reveals that the acceptance of a torn meniscus of the right knee was based on the resolution of a conflict in medical opinion evidence between Dr. Saunders and Dr. Sheridan by the selected impartial medical specialist Dr. Fisher. The Office authorized surgery.

recommended physical therapy instead of surgery. In an April 22, 2003 report, Dr. Saunders indicated that range of motion of appellant's knee was better, that he was still undergoing physical therapy and that he could work half-time three days a week in a seated job. Treatment notes dated May 15 through November 20, 2003 addressed appellant's right and left knee problems. Dr. Saunders' December 24, 2003 report revealed that an injection into appellant's right knee did not help him at that time and that he could return to work with his previous restrictions. Her February 11, 2004 attending physician's report indicated that appellant sustained a torn medial meniscus on February 12, 2003. Dr. Saunders further indicated with an affirmative mark that appellant's condition was caused by the employment activity. She also indicated that appellant was totally disabled from February 23 through April 8, 2004. Dr. Saunders submitted a February 23, 2004 operative report regarding appellant's right knee surgery and hospital records regarding the surgery.

In a January 13, 2004 report, Dr. Wilfredo J. Suntay, a Board-certified radiologist, stated that duplex imaging of the left lower extremity venous system revealed no evidence of deep or superficial venous thrombosis. A February 17, 2004 disability slip from Dr. Shafik Ahmad, a Board-certified family practitioner, indicated that appellant was unable to work from January 30 through February 10, 2004.

By decision dated March 29, 2004, the Office denied modification of the September 3, 2003 decision. It found that appellant failed to submit sufficient medical evidence establishing that he was totally disabled from May 19 through June 11, 2003.

In another decision dated March 29, 2004, the Office denied modification of the October 1, 2003 decision. It found the medical evidence of record insufficient to establish that he was totally disabled during the period June 30 through August 3, 2003.⁵

LEGAL PRECEDENT -- ISSUES 1 and 2

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an employment-related right knee strain and a meniscus tear of the right knee on February 12, 2003. Following the February 12, 2003

⁵ The Board notes that the Office inadvertently stated that the claimed period of disability was June 30 through August 3, 2003 rather than June 30 through August 8, 2003 as indicated on appellant's August 7, 2003 Form CA-7 and in its October 1, 2003 decision.

⁶ *Barry C. Peterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

employment injury, appellant returned to limited-duty work on April 15, 2003. He claimed compensation for total disability for the period May 19 through June 11, 2003 due to the residuals of the February 12, 2003 employment injury.

The Board finds that appellant failed to establish that he sustained a recurrence of total disability during the period May 19 through June 11, 2003. The July 9, 2003 medical report of Dr. Sheridan, a second opinion medical specialist, provided an accurate factual and medical background. He conducted a thorough medical examination and reviewed appellant's medical records. Dr. Sheridan did not find anything on physical examination of appellant's right knee except old scars and that the employing establishment's investigative videotape of appellant's physical activity correlated with his positive findings on physical examination. He noted that the March 13, 2003 MRI scan of appellant's right knee did not identify any linear meniscal tears and, thus, he found no clinical evidence of a medial or lateral meniscal tear. Dr. Sheridan opined that there was sufficient medical evidence to support that appellant's work-related right knee strain was neither present nor active and that it had resolved. He noted appellant's disability for work for approximately one month due to his February 12, 2003 employment injury and stated that, as appellant did not have any residuals of his right knee employment-related injury, he could perform his normal job duties without any limitations.

The Board finds that Dr. Sheridan's medical opinion constitutes the weight of the medical evidence in finding that appellant has not established that he sustained a recurrence of total disability during the period May 19 through June 11, 2003 as it is sufficiently rationalized and based on a proper factual and medical background.

The April 11, 2003 duty status report which indicated that appellant could work eight hours a day, five days a week with certain physical restrictions, the April 22, 2003 outpatient report which revealed a diagnosis of right knee strain and appellant's physical therapy treatment plan for this condition, Dr. Saunders' May 14, 1998 and April 18, 2001 operative reports regarding appellant's right ankle and left knee, her March 19, 2003 report which addressed the March 13, 2003 MRI scan results and her April 22, 2003 report regarding appellant's range of motion, do not overcome the weight given to Dr. Sheridan's report because they predate the claimed period of disability and, thus, fail to address whether appellant's disability during this period was causally related to his February 12, 2003 employment injury.

The treatment notes from appellant's physical therapists which covered the period May 6 through June 6, 2003 are of no probative value as a physical therapist is not a "physician" as defined under the Federal Employees' Compensation Act and, therefore, is not competent to give a medical opinion.⁷

The July 18, 2003 hospital emergency treatment notes indicated that appellant's right knee was treated on that date. These treatment notes, however, fail to address whether appellant was totally disabled during the period May 19 through June 11, 2003 due to her February 12, 2003 employment injury. Therefore, they are insufficient to satisfy appellant's burden of proof.

⁷ 5 U.S.C. §§ 8101-8193, 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994).

Dr. Saunders' treatment notes dated June 11, July 9, 23 and 31 and August 6 and 20, 2003 indicated that appellant could not drive to work due to right knee pain, that the employing establishment should allow him to work closer to home and that he needed to undergo a second opinion medical evaluation and arthroscopy surgery on his right knee. In the August 6, 2003 treatment note, Dr. Saunders stated that she did not agree with everything Dr. Sheridan stated about appellant's right knee condition. Dr. Saunders' treatment notes failed to address whether appellant's inability to drive to work was caused by the February 12, 2003 employment injury and, thus, they do not establish appellant's burden of proof.

In her treatment notes covering the period May 15 through November 20, 2003, Dr. Saunders reported appellant's right and left knee problems but she did not address whether appellant was disabled during the claimed period due to the February 12, 2003 employment injury. Similarly, in her December 24, 2003 report, Dr. Saunders did not address whether appellant was disabled during the claimed period. She noted that an injection into appellant's right knee did not help him at that time and stated that he could return to work. Further, Dr. Saunders' February 23, 2004 operative report regarding appellant's right knee surgery, hospital records regarding the February 23, 2004 surgery, the January 8, 2004 emergency room treatment notes addressing appellant's right knee problems, Dr. Suntay's January 13, 2004 finding of no evidence of deep or superficial venous thrombosis of the left lower extremity and the February 11, 2004 blood test results, do not address the relevant issue whether appellant was totally disabled during the period May 19 through June 11, 2003 due to her February 12, 2003 employment injury.

In an October 17, 2003 report, Dr. Saunders stated that during the period May 19 through June 11, 2003 appellant complained of right knee pain that prevented him from driving to work. She stated that appellant should be placed in a seated job at an employing establishment facility closer to his home. Dr. Saunders concluded that appellant's right knee problems were causally related to the February 12, 2003 employment injury. Dr. Saunders did not provide a rationalized medical opinion explaining how or why appellant's February 12, 2003 employment injury caused him to be totally disabled during the claimed period. Therefore, her opinion is insufficient to overcome the weight accorded to Dr. Sheridan's second opinion.

Dr. Saunders' February 11, 2004 attending physician's report indicated that appellant sustained a torn medial meniscus on February 12, 2003. She further indicated with an affirmative mark that appellant's condition was caused by an employment activity and noted that he was totally disabled from February 23 through April 8, 2004. Dr. Saunders' report does not address total disability during the claimed period. In addition, her report does not provide any medical rationale explaining how or why appellant's condition was caused by the accepted employment incident and, therefore, the report is insufficient to establish his claim. This type of report, without more by way of medical rationale explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.⁸

In a report dated August 18, 2003, Dr. Vitols found that, based on the facts presented to him and the clinical objective findings of his examination, appellant sustained a torn medial

⁸ See *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

meniscus of the right knee as a direct and proximal result of the February 12, 2003 employment injury and that he needed diagnostic testing and arthroscopy surgery. Dr. Vitols' report is insufficient to establish appellant's burden of proof because he does not address whether appellant was disabled during the period May 19 through June 11, 2003 due to the February 12, 2003 employment injury. Similarly, Dr. Saunders' August 20, 2003 treatment note in which she stated that she appreciated Dr. Vitols' opinion and that appellant required arthroscopy surgery fails to address whether appellant was disabled during the claimed period due to the accepted employment injury. Further, the January 8, 2004 emergency room treatment notes which indicated that appellant's right knee was evaluated on that date, Dr. Suntay's January 13, 2004 report finding no evidence of deep or superficial venous thrombosis, the February 11, 2004 blood test results and Dr. Ahmad's February 17, 2004 disability slip which indicated that appellant was unable to work from January 30 through February 10, 2004 not address whether appellant was disabled during the period May 19 through June 11, 2003 due to the February 12, 2003 employment injury.

The Board finds that appellant has not submitted sufficient rationalized medical evidence establishing that he was totally disabled from May 19 through June 11, 2003 as a result of a change in the nature and extent of his employment-related condition. Further, appellant has not alleged and there is no evidence of record establishing a change in the nature and extent of his limited-duty work during the alleged time period. He has not established a recurrence of disability from May 19 through June 11, 2003 causally related to his February 12, 2003 employment injury.

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained an employment-related left knee strain on September 8, 2000. He claimed compensation for total disability during the period June 30 through August 8, 2003 causally related to this accepted employment injury.

Dr. Sheridan's October 8, 2003 report addressed appellant's employment-related left knee strain. He opined that appellant had residuals of this condition and subsequent surgery which included crepitus and positive grind and Frieberg tests. He further opined that the left knee strain had resolved but the aggravation of chondromalacia was still present and active. He concluded that appellant was not currently disabled from performing the duties of a window clerk and that he could return to this position with certain restrictions. In a December 16, 2003 addendum report, Dr. Sheridan clarified his opinion regarding the nature and extent of appellant's employment-related left knee condition by stating that the aggravation of chondromalacia was permanent. Although Dr. Sheridan opined that appellant sustained a permanent aggravation of his employment-related left knee condition, he did not change his opinion that appellant was not disabled for work. In addition, he did not address whether appellant was totally disabled for work during the period June 30 through August 8, 2003 due to his September 8, 2000 employment injury. Thus, the Board finds that his reports are not sufficient to establish appellant's burden of proof.

Dr. Saunders' treatment notes which cover the period July 23 through October 1, 2003 fail to address whether appellant was totally disabled during the claimed period due to the September 8, 2000 accepted employment injury.

The Board finds that appellant has failed to submit sufficient rationalized medical evidence establishing that he was totally disabled during the period June 30 through August 8, 2003 as a result of a change in the nature and extent of his employment-related condition due to his September 8, 2000 employment injury. Moreover, he has not alleged nor does the record establish that there was a change in his limited-duty work during the claimed period. Thus, appellant has failed to satisfy his burden of proof in this case.

CONCLUSION

The Board finds that appellant has failed to establish that he is entitled to wage-loss compensation for recurrence of total disability during the period May 19 through June 11, 2003 causally related to his February 12, 2003 employment injury. The Board further finds that appellant has failed to establish that he is entitled to wage-loss compensation for total disability during the period June 30 through August 8, 2003 causally related to his September 8, 2000 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 2, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member