

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

_____)
M.P., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Point Pleasant Beach, NJ, Employer)
_____)

Docket No. 08-1926
Issued: December 24, 2008

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2008 appellant filed a timely appeal from an April 4, 2008 decision of the Office of Workers' Compensation Programs that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he was totally disabled beginning on February 23, 2003 due to his accepted bilateral lower extremity conditions.

FACTUAL HISTORY

On January 28, 1977 appellant, then a 35-year-old letter carrier, sustained an employment-related torn left medial meniscus when he fell at work. He underwent surgical repair on May 20, 1977 and on November 14, 1978 sustained a second employment injury that was accepted for sprain of the right wrist and contusion of the left knee.¹ Appellant had

¹ The 1977 injury was initially adjudicated under OWCP No. xxxxxx478 and the 1978 injury under xxxxxx790. The latter file number became the master for these two left lower extremity claims.

additional surgical procedures on his left lower extremity and on September 16, 1998 he fell from a curb injuring both lower extremities. On April 16, 1999 he had surgical repair of the left ankle. Appellant returned to modified duty after the September 1998 injury and on July 15, 1999 sustained a right shoulder injury when he fell from his postal vehicle. He stopped work and was placed on the periodic rolls, due to his shoulder injury. On September 1, 1999 Dr. Il H. Kim, a Board-certified orthopedic surgeon, performed arthroscopic repair of meniscal tears of the right knee and on November 9, 1999 Dr. Robert Borgatti, Board-certified in orthopedic surgery, performed right rotator cuff tear repair.² On July 6, 2000 appellant fractured a thoracic vertebra while cleaning his gutters at home.

Dr. Kim performed arthroscopic debridement of the left knee on July 18, 2002.³ On August 1, 2002 appellant filed a Form CA-2a, claim for recurrence of disability, stating that, when he returned to work on August 6, 2001, the postmaster refused to let him work. By decision dated October 23, 2002, the Office denied the claim. On February 23, 2003 the Office terminated appellant's compensation benefits under the right shoulder injury claim on the grounds that he had no residuals of his right shoulder injury. In a March 5, 2003 report, Dr. Kim noted that he first evaluated appellant's left knee on October 16, 2001 and described his treatment, including the July 18, 2002 surgery. He related that he had last seen appellant on August 20, 2002.

On December 10, 2003 appellant filed a Form CA-7, claim for disability, and a Form CA-2a, recurrence claim. He submitted a September 25, 2003 treatment in which Dr. Kim noted appellant's complaint of problems with both knees and that he was using a cane. Dr. Kim provided examination findings and advised that x-rays demonstrated bilateral degenerative joint disease changes, worse on the left. In an April 21, 2004 report, Dr. Michael H. Gordon, a Board-certified orthopedic surgeon advised that he began treating appellant in April 1979 for a left knee injury incurred the previous fall. He described his treatment regimen through August 1989 and noted a history of bilateral knee injuries at work and that appellant had fractured his spine. Dr. Gordon reviewed x-ray and magnetic resonance imaging (MRI) scan studies and noted appellant's complaint of pain in both knees. He provided examination findings and advised that appellant had developed work-related premature arthritis and was getting progressively worse, such that he needed bilateral total knee replacement surgery. In a May 16, 2005 treatment note, Dr. Kim noted appellant's complaint of constant pain in both knees, advising that x-rays of both knees demonstrated bilateral chondrocalcinosis and arthritis changes. He provided examination

² The Board notes that appellant has a companion case before the Board for the right shoulder injury, Docket No. 08-532, OWCP No. xxxxxx166, that will be adjudicated separately. On February 7, 2008 the Office combined that file with the current claim, with xxxxxx790 becoming the master file.

³ Under OWCP No. xxxxxx166, the right shoulder injury claim, in January 2001, the Office referred appellant to Dr. Irving D. Strouse, a Board-certified orthopedist, for a second opinion evaluation. In a February 26, 2001 report, Dr. Strouse reported a history that appellant also injured his right knee on July 15, 1999 but his findings and conclusions were only with regard to appellant's shoulder injury and a nonwork-related back injury. The Office again referred appellant to Dr. Strouse in April 2002. In a May 6, 2002 report, Dr. Strouse noted a history that appellant injured his left knee at work in 1978 with subsequent surgeries and current knee difficulties. He noted that Dr. Kim was treating appellant's left knee. On examination of the left knee, Dr. Strouse noted slight swelling and medial joint line tenderness.

findings and opined that he did not think appellant's symptoms had changed to the degree that total knee replacement surgery was required.

By decision dated July 20, 2005, the Office denied the claim on the grounds that the medical evidence was insufficient to establish that appellant was disabled from work beginning February 24, 2003 due to his accepted lower extremity injuries. On July 25, 2005 appellant, through his attorney, requested a hearing and submitted a January 26, 2004 foot x-ray that demonstrated hallux valgus deformity, likely due to old fracture. In an October 12, 2005 report, Dr. Kim noted that he had not seen appellant since May 16, 2005. Regarding disability, he stated:

“The question is whether [appellant] has been disabled since September 25, 2003 which was his last visit prior to his 2005 visit. He did have a problem with both knees with swelling and difficulty in walking with limping plus a joint effusion. I was informed by [appellant] that he retired from work around February 2003 and assumed this was due to disability from his knee problem. I felt I could not offer any clear treatment plan to make him functional to work as a letter carrier for the U.S. Postal Service yet his symptoms were not bad enough to recommend a total knee arthroplasty which was his request. Even if a total knee replacement was offered and performed, I doubt [appellant] could return to his job on a full-time basis with no limitation.”

At the hearing held on December 20, 2005, appellant described his past work-related injuries to his left lower extremity and surgical procedures for the left knee, with the latest on July 18, 2002. He also described the September 16, 1998 injury when he fell while delivering mail necessitating left ankle and right knee surgery. Appellant testified that bilateral knee problems had worsened, requiring a cane, and that he could not have returned to work in February 2003 when compensation for his right shoulder injury was terminated. His counsel argued that the medical evidence established that appellant was disabled due to his lower extremity employment-related injuries and submitted a June 25, 2005 report in which Dr. Gordon noted that appellant returned for examination on April 5, 2005 with complaints of persistent bilateral knee pain causing difficulty with activities of daily living. Dr. Gordon noted that appellant was taking no medication for his knees and had received epidural injections for his nonwork-related back injury. He provided examination findings and diagnosed progressive degenerative arthritis of the knees and again recommended bilateral total knee replacements. Dr. Gordon advised that appellant was disabled for all work due to his bilateral knee condition and probably could never return to work at the employing establishment due to his employment injuries.

In a March 8, 2006 decision, an Office hearing representative affirmed the July 20, 2005 decision. On June 27, 2006 appellant's attorney requested reconsideration and submitted additional medical evidence including a December 22, 2003 MRI scan of the left knee that demonstrated joint effusion, a lateral meniscus tear and degenerative arthritic changes. A December 22, 2003 MRI scan of the right knee demonstrated joint effusion and a tear of the posterior horn of the medial meniscus. By report dated September 29, 2005, Dr. Alvin Ong, a Board-certified orthopedic surgeon, reported a history of bilateral work-related knee injuries and complaints of intolerable bilateral knee pain that limited activities of daily living and walking,

noting that appellant used a cane. He provided examination findings and noted that x-rays demonstrated moderate-to-severe degenerative joint disease of both knees, left worse than right. Dr. Ong diagnosed post-traumatic bilateral degenerative joint disease and recommended total knee replacement for both knees. In a May 25, 2006 report, Dr. John M. Tozzi, a Board-certified orthopedist, noted the history of employment injuries, appellant's medical history and complaints of limitations in knee motion and severe debilitating pain in both knees. He recommended bilateral total knee replacement surgery.

By decision dated November 17, 2006, the Office denied modification of the prior decisions. On January 3, 2007 appellant submitted reports dated March 17 and May 25, 2006 in which Dr. Tozzi advised that appellant was totally disabled and had significant end-stage disease in the right and left knee with severe limitations in range of motion, difficulties with ambulation, and night, rest and day pain which affected his activities of daily living. Dr. Tozzi stated that appellant was being scheduled for total knee replacement surgery. Appellant then filed an appeal with the Board and, by order dated November 30, 2007, the Board remanded the case to the Office.⁴ The Board found that, contrary to language found in prior decisions, the evidence established that the Office had accepted appellant's claim for a meniscus tear of the right knee and internal derangement of the left knee. The Board ordered that OWCP Nos. xxxxxx368, xxxxxx790 and xxxxxx166 be combined so as to provide full and fair adjudication of appellant's claim.⁵ The law and the facts of the previous Board order are incorporated herein by reference.

On February 7, 2008 the three claims were combined. By decision dated April 4, 2008, the Office noted that it had reviewed the evidence in all three claim files and found that the medical evidence did not establish that appellant's claimed disability was due to his accepted knee conditions.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁶ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁷

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

⁴ Docket No. 07-1397 (issued November 30, 2007).

⁵ *Supra* notes 2 and 3.

⁶ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

⁷ *Id.*

establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.⁸

ANALYSIS

The Board finds this case is not in posture for decision. The accepted conditions in this case include a left knee internal derangement with secondary arthritis, a left ankle fracture and a meniscus tear of the right knee. The latter injury was sustained on July 15, 1999 when appellant fell from his postal vehicle. On that date, he also sustained a right shoulder rotator cuff tear and received wage-loss compensation for his shoulder injury through February 23, 2003 when the Office terminated his compensation on the grounds that the shoulder condition had resolved with no residuals.⁹ Appellant then filed claims alleging that he was totally disabled due to his employment-related bilateral knee conditions. He also sustained a nonwork-related thoracic vertebral fracture when he fell while cleaning gutters at home.

The medical evidence relevant to whether appellant was totally disabled for any period on or after February 23, 2003 due to his accepted bilateral lower extremity conditions includes a number of reports from Dr. Kim, who performed arthroscopic surgery on appellant's right knee on September 1, 1999 and on his left knee on July 18, 2002. In an October 12, 2005 report, Dr. Kim advised that appellant had degenerative joint disease in both knees. He related that physical findings in May 2005 included swelling and joint effusion and noted that appellant had difficulty walking. Dr. Kim stated that he presumed appellant had retired on disability in February 2003 due to his knee problems and felt that he could not offer a treatment plan to make appellant functional to work as a letter carrier. Dr. Gordon diagnosed work-related bilateral progressive knee arthritis and on June 25, 2005 advised that appellant was permanently disabled for all work due to his bilateral knee conditions. On May 25, 2006 Dr. Tozzi advised that appellant was totally disabled due to end-stage disease of both knees with severe limitations of range of motion, difficulties with ambulation and severe pain that affected his activities of daily living.

The Board finds that, while these reports lack detailed medical rationale sufficient to discharge appellant's burden of proof to establish by the weight of reliable, substantial and probative evidence that he was totally disabled for any period on or after February 23, 2003 due to his accepted bilateral lower extremity conditions, this does not mean that they may be completely disregarded by the Office. It merely means that their probative value is diminished.¹⁰ The Board also notes that the record provides scant information regarding the actual job appellant was performing when he stopped work on July 15, 1999. While it appears that he was working at a modified position, a complete description of his modified duties on that date is not

⁸ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁹ *Supra* note 2.

¹⁰ *Shirley A. Temple*, 48 ECAB 404 (1997).

found in the record. Furthermore, Drs. Gordon, Ong and Tozzi recommended bilateral total knee replacement surgery.¹¹

It is well established that proceedings under the Federal Employees' Compensation Act¹² are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹³ The case shall therefore be remanded to the Office. On remand, the Office shall refer appellant, an updated statement of accepted facts that includes a description of all accepted injuries, a description of the modified duty appellant was performing on July 15, 1999 and the medical evidence of record to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether appellant had any disability for work on or after February 23, 2003 causally related to his accepted bilateral lower extremity conditions and whether the recommended total knee replacement surgery should be authorized. After this and such further development deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established that he was totally disabled beginning on February 23, 2003 due to his accepted bilateral lower extremity conditions.

¹¹ Drs. Kim, Gordon, Ong and Tozzi are Board-certified orthopedic surgeons.

¹² 5 U.S.C. §§ 8101-8193.

¹³ See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 4, 2008 be set aside and the case remanded to the Office.

Issued: December 24, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board