

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

L.T., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Lewisburg, PA, Employer**

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**Docket No. 10-2228
Issued: August 1, 2011**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 1, 2010 appellant, through counsel, filed a timely appeal of the August 3, 2010 merit decision of the Office of Workers' Compensation Programs terminating compensation and modifying a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ and 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 the Office met its burden of proof to terminate appellant's compensation benefits and modify its determination of her wage-earning capacity effective September 30, 2009; and (2) whether appellant established continuing disability after September 30, 2009.

On appeal, appellant's attorney contends that the Office's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The Office accepted that on April 27, 2000 appellant, then a 41-year-old correctional officer, sustained a strain and traumatic arthritis of the left knee as a result of making repetitive trips up stairs at work. Appellant stopped work on the date of injury and the Office paid wage-loss compensation for temporary total disability.

On September 28, 2000 the Office referred appellant to a vocational rehabilitation counselor. The counselor identified the position of receptionist, finding that it was within the sedentary strength category and appellant's work restrictions. Appellant qualified for the position based on her education and work experience and it was reasonably available in her commuting area.²

In a December 12, 2002 decision, the Office reduced appellant's compensation effective that date under 5 U.S.C. § 8115 to reflect her capacity to earn wages in the constructed position of receptionist. By decision dated December 4, 2003, the Office's Branch of Hearings and Review found that appellant abandoned her January 10, 2003 request for an oral hearing as she failed to appear at the scheduled hearing.

On June 12, 2009 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Michael A. MacKay, a Board-certified orthopedic surgeon, for a second opinion medical examination on the nature and extent of her employment-related residuals and disability. In a July 7, 2009 report, Dr. MacKay reviewed a history of the April 27, 2000 employment injuries and the statement of accepted facts. He noted that appellant underwent nonemployment-related left knee anterior cruciate ligament reconstruction in 1978 with arthroscopy and debridement in 1999. Appellant also sustained an apparent knee work injury 1998 that was treated with arthroscopic surgery. She also had osteoarthritis of the left knee for which she received treatment on November 19, 1999. On physical examination, Dr. MacKay reported essentially normal findings with swelling, tenderness, and mild valgus instability and flexion contracture of the left knee. X-rays of the left knee showed severe degenerative arthritis. Dr. MacKay diagnosed osteoarthritis of the left knee. He advised that the diagnosed condition predated the accepted April 27, 2000 employment injury and was treated towards the end of 1999. Dr. MacKay stated that there may have been some exacerbation or aggravation of the underlying arthritis in 2000, but her condition was not caused by the accepted employment injury. He advised that any aggravation of the diagnosed condition was purely subjective in nature. It was impossible for Dr. MacKay to determine how much aggravation occurred due to the April 27, 2000 employment injury based on the medical records alone. He opined that the employment-related left knee strain had resolved and appellant's residual symptoms were purely an arthritic pain. Dr. MacKay noted that she did not sustain traumatic arthritis due to the accepted employment injury. He advised that appellant continued to be totally disabled due to her arthritic left knee condition. Appellant was unable to perform her work duties as a correctional officer due to her severely impaired mobility. Dr. MacKay stated that appellant's prolonged disability was essentially due to a lack of effective treatment. He recommended total knee replacement surgery which could significantly improve her mobility,

² The record reveals that appellant was unable to obtain a receptionist position.

pain and opportunity to return to work. Alternatively, appellant could perform sedentary work with restrictions, eight hours per day.

On August 20, 2009 the Office issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits. It modified the December 12, 2002 decision to reflect that appellant had zero percent loss of wage-earning capacity based on Dr. MacKay's medical opinion.

Appellant submitted an August 18, 2009 treatment note from Dr. Timothy J. Mosher, a Board-certified radiologist, who related that appellant had pain in both knees and right foot and crepitus in the left knee. Dr. Mosher listed findings on physical examination and diagnosed bilateral knee degenerative joint disease. On August 18, 2009 he obtained an x-ray of both knees which demonstrated moderate tricompartmental osteoarthritis of the right knee and severe osteoarthritis of the left knee.

In a September 30, 2009 decision, the Office terminated appellant's wage-loss compensation and medical benefits and modified its wage-earning capacity determination to reflect that she had no wage loss effective that date. It found that the evidence she submitted was insufficient to overcome the weight accorded to Dr. MacKay's opinion.

By letter dated December 17, 2009, appellant, through counsel, requested reconsideration. In an October 31, 2009 report, Dr. Charles M. Davis, III, a Board-certified orthopedic surgeon, reviewed Dr. MacKay's report. He reviewed prior findings from March 22, 2000 which included a history that appellant had a twisting injury in 1999. Appellant underwent anterior cruciate ligament and arthroscopy procedures in June 1999. Dr. Davis stated that x-rays performed on March 22, 2000 were consistent with considerable degenerative joint disease of the medial compartment of the left knee. He stated that the arthritic condition was likely post-traumatic in origin. Dr. Davis noted that on May 3, 2000 appellant reported increased pain in the left knee due to her work duties, which included walking and carrying heavy objects up and down stairs many times per day. He stated that her work duties were the largest contributing factor to her pain. Dr. Davis recommended a sedentary job as it was likely that appellant would continue to have difficulties as long as her job required prolonged standing and walking. He agreed with Dr. MacKay's opinion that appellant was currently unable to perform her correctional officer work duties. Dr. Davis concluded that her disability was causally related to a 1999 work injury.

In an August 3, 2010 decision, the Office affirmed the September 30, 2009 decision. It found that the medical evidence appellant submitted was insufficient to establish that she had any continuing employment-related residuals or disability.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability

causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the work-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.⁴ The burden of proof is on the party attempting to show the award should be modified.⁵

ANALYSIS

The Office accepted that appellant sustained a strain and traumatic arthritis of the left knee while in the performance of duty on April 27, 2000. Appellant stopped working for the employing establishment on April 27, 2000. In a December 12, 2002 decision, the Office determined that appellant's wage-earning capacity was represented by the constructed position of receptionist. In decisions dated September 30, 2009 and August 3, 2010, it terminated appellant's wage-loss compensation and medical benefits and modified its wage-earning capacity determination to reflect that she had no wage loss effective September 30, 2009 based on the July 7, 2009 medical opinion of Dr. MacKay, an Office referral physician.

The Board finds that Dr. MacKay's opinion is of diminished probative value and insufficient to represent the weight of the medical evidence. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.⁶ The Office provided Dr. MacKay with a statement of accepted facts indicating that it had accepted that appellant sustained a strain and traumatic arthritis of the left knee. Dr. MacKay opined that appellant no longer had any residuals of her employment-related left knee strain and, while she could not perform her regular duties as a correctional officer, she could perform sedentary work with restrictions, eight hours per day. He further opined that she did not sustain traumatic arthritis due to the accepted April 27, 2000 employment injury. Dr. MacKay noted a diagnosis of left knee osteoarthritis. He advised that appellant's residual pain was arthritic. Dr. MacKay found that her continued total disability was due to the left knee osteoarthritis which he found not to be causally related to the April 27, 2000 employment injury. He advised that the diagnosed condition predated the accepted employment injury, noting that appellant received treatment in late 1999. Office procedures provide that accepted conditions must be included in a statement of accepted facts and further provide that, when a second opinion specialist renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁵ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁶ *Helen Casillas*, 46 ECAB 1044 (1995).

the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is diminished.⁷

Dr. MacKay did not fully address the accepted left knee arthritic condition and disputed that it was employment related. The Board notes that when the Office referred the medical record to Dr. MacKay, it specifically requested that he provide the date when the employment-related left knee traumatic arthritis condition ceased if he believed that appellant no longer had any residuals of the condition. The Board finds that his opinion is outside the framework of the statement of accepted facts and of reduced probative value. Dr. MacKay's report is insufficient to meet the Office's burden of proof.⁸ The Board finds, therefore, that the Office improperly relied on his opinion to establish that appellant had no remaining residuals or disability from the accepted employment injuries and that she had a material change in her work-related conditions for the better such that she no longer had wage loss due to the work injuries.⁹

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits and modify its determination of her wage-earning capacity effective September 30, 2009.

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

⁸ *Willa M. Frazier*, 55 ECAB 379 (2004).

⁹ In light of the disposition of the first issue, the second issue of continuing disability is moot.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 1, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board