United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 10-2289**
	)	**Issued: July 5, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 1, 2010 appellant filed a timely appeal from a March 19, 2010 merit decision of the Office of Workers' Compensation Programs which denied his claim for recurrence and a May 12, 2010 nonmerit decision which denied his request for review of the written record. Pursuant to the Federal Employees' Compensation Act[1] 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 appellant sustained a recurrence of partial disability commencing March 6, 2009 as a result of his accepted bilateral knee condition; and (2) whether the Office properly denied his request for an oral hearing as untimely.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 27, 1999 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging he suffered from a bilateral knee condition due to his employment. On November 30, 2000 the Office accepted his claim for exacerbation bilateral chondromalacia patella. In December 2000, appellant returned to full-time limited duty at his employing establishment.

On August 5, 2009 appellant filed a recurrence claim alleging that he sustained a recurrence of disability commencing on March 6, 2009 due to his accepted bilateral chondromalacia condition. In a supplemental statement, he explained that he continued to have knee pain, which increased over time, even after he began his light-duty assignment. Appellant provided a timeline of doctor visits, medical restrictions given and limited-duty assignments. He stated that his knee pain increased and never went completely away despite physical therapy, medications and cutting back on normal life activities such as cooking and cleaning. By 2008, appellant stopped doing almost anything at home, but, in March 2009, he decided that he could no longer justify his low quality of life. He asked his physician if his pain could be reduced through means other than medication, so his doctor restricted his workday to six hours.

In support of his recurrence claim, appellant submitted various forms and reports by Dr. Luis Valls, a Board-certified internist. In June 26, 2009 medical report, Dr. Valls reduced appellant's work hours to a six-hour workday, instead of an eight-hour workday. He explained that appellant requested a reduction in his work hours because of increasing knee pain. In a July 9, 2009 duty status report, Dr. Valls stated that appellant was working eight hours a day until recently and requested the Office to consider this information. He described appellant's injury as pain under his knee caps, tendons and joints of knees.

In a letter dated August 10, 2009, the Office requested additional evidence from appellant regarding his wage-loss compensation claim. It specifically asked that appellant provide a narrative medical report from his treating physician with objective findings explaining how his condition worsened and why he was no longer able to perform the light-duty assignments he used to be able to perform. The Office advised him that Form CA-17s and Form CA-20s would not suffice to meet his burden of proof.

Appellant thereafter submitted various additional forms and reports by Dr. Valls, including duty status reports with restrictions dated December 1999 to July 2009, modified duty assignments from June 2005 to August 2009 and medical notes from November 1999 to March 2006. He also provided various medical reports from Dr. Valls to support his claim. In a July 9, 2009 medical form, Dr. Valls reported that appellant suffered from bilateral chondromalacia and constant knee pain since June 1997. He also checked a box marked "yes" that appellant needed to work on a reduced schedule because it was medically necessary and stated that appellant should work six hours a day, five days a week. Dr. Valls stated that appellant's condition was chronic, but stable. He included a duty status report, which noted that appellant had been working eight hours a day until recently and requested the Office to reconsider the information. In an August 11, 2009 handwritten addendum, Dr. Valls listed appellant's dates of examination and estimated a reduced work schedule to six hours a day, five days a week on June 26, 2009.

In a September 23, 2009 medical report, Dr. Valls confirmed appellant's condition of chondromalacia patellae. He explained that this condition could not be demonstrated by x-rays or magnetic resonance imaging (MRI) scans, but only through an arthroscope or other surgical procedure. Dr. Valls stated that he could not provide any objective findings to establish the progression of appellant's condition other than recognizing the classic symptoms of bilateral knee pain, worsened with quadriceps functioning and that the arthritic process of his condition was classic in its clinical presentation. He explained that evidence of the progression of appellant's condition included increased use of aspirin and other anti-inflammatory medication, increased restrictions at work and home and the need of narcotic analgesics. Dr. Valls felt that appellant could no longer tolerate an eight-hour workday and should be given a reduced work schedule. He requested appellant be allowed to work a six-hour workday. In an undated medical report, Dr. Valls stated that appellant worked six-hour days and continued to suffer from chronic bilateral knee pain secondary to chondromalacia patellae.

Appellant filed additional wage-loss compensation claims for the period August 1 to September 25, 2009 alleging that he was medically restricted to working only six hours.

By decision dated September 29, 2009, the Office denied appellant's claims for a recurrence of disability and wage-loss compensation on the grounds that he failed to demonstrate a change in his limited-duty assignment or in the nature and extent of his condition to establish that he sustained a recurrence of disability.

On October 8, 2009 appellant requested a review of the written record and resubmitted Dr. Valls' September 23, 2009 medical report. He also filed additional wage-loss compensation claims for the period September 26 to November 20, 2009 alleging that he was medically restricted to working six hours a day.

In a decision dated November 25, 2009, an Office hearing representative set aside the Office's September 29, 2009 decision and remanded the case for further development. The Office determined that, although Dr. Valls' reports were not completely rationalized, they were consistent in supporting appellant's claim for a recurrence and reduction of work hours. The Office hearing representative requested that it prepare a statement of accepted facts and refer the claimant for a second opinion examination regarding whether claimant's disability from work due to appellant's accepted bilateral knee condition was causally related to his limited-duty assignment at work.

On December 4, 2009 appellant filed another wage-loss compensation claim for the period November 21 to December 4, 2009.

In a May 13, 2009 medical report, Dr. Michael B. Wyman, a Board-certified orthopedic surgeon, noted appellant's complaints of pain and stiffness in both his knees. The pain was described as largely anterior around the four corners of his patella, radiating distally but without a radicular quality. Upon examination, Dr. Wyman observed appellant had full extension in his knee without difficulty but experienced some pain with compression. His distal CMS was intact and straight leg raise test was negative. Dr. Wyman radiographs also showed minimal arthritic changes and no joint space narrowing. He diagnosed appellant with patella malalignment, which exacerbated his chondromalacia, as an overuse phenomenon relative to his work. Dr. Wyman

also stated that appellant was getting along okay with diminished activity, but had inquired about how he could lessen his symptoms.

On January 20, 2010 the Office referred appellant, together with a statement of accepted facts, the medical record and a work capacity evaluation form, to Dr. Ronald Lohman, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a February 12, 2010 report, Dr. Lohman reviewed the statement of accepted facts, history of injury and appellant's medical records. Upon examination he noted that appellant's chief complaint regarded pain in both knees. Appellant rated his pain between a four to five on a daily basis and explained that the pain increased when remaining immobile, sitting in the bent-knee position, carrying weight and ascending or descending stairs. Dr. Lohman observed mild crepitus bilaterally in the patellofemoral articulation and minor discomfort to compression at the patellofemoral joint bilaterally. The Lachman's and McMurray's tests were also normal. Dr. Lohman reviewed appellant's May 23, 2009 radiographs and noted some minimal narrowing of the patellofemoral articulation on the right side and bilateral medial compartment narrowing, which was symptomatic with some minor spurring, over the distal aspect of the medial femoral condyle in the notch on the bent-knee films. He diagnosed appellant with chronic bilateral anterior knee pain, patellofemoral crepitus bilaterally, which was suggestive of chondromalacia patellae and underlying alignment issues.

Dr. Lohman further opined that he saw no orthopedic rationale for appellant to not be able to perform his modified-duty requirements eight hours a day. He explained that based on his examination, he could not see where appellant's condition has changed significantly to where he was no longer capable of performing his light-duty assignments prior to March 6, 2009. Dr. Lohman pointed out that appellant only complained of increased pain, but that pain was a subjective symptom that could not be addressed objectively. He also included a work capacity evaluation form which restricted appellant to sitting for up to four hours, walking for one to four hours intermittently and standing for four hours intermittently.

In a decision dated March 19, 2010, the Office denied appellant's claim for recurrence of disability. It found that Dr. Lohman's second opinion examination was the weight of medical evidence. Based on the second opinion report, the Office determined that appellant did not show that his condition materially changed such that he was no longer able to perform his light-duty position prior to March 6, 2009.

On April 21, 2010 appellant filed a request for a review of the written record. He resubmitted Dr. Valls' September 23, 2009 medical report, July 9, 2009 duty status report and the February 12, 2010 second opinion examination and included an April 21, 2010 personal statement.

By decision dated May 12, 2010, the Office denied appellant's request for review of the written record because it was untimely filed and it determined that his issue could equally be addressed through requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[2] 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 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 established physical limitations.[3]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of disability and to show that he cannot perform such limited-duty work. As part of this burden, 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 through the submission of probative, medical evidence.[4] To establish a change in the nature and extent of the injury-related condition the employee must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[5]

Section 8123 (a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[6] When there are opposing reports of virtually equal weight and rationale, the case must be refereed to an impartial medical specialist, pursuant to section 8123 (a) of the Act, to resolve the conflict in the medical evidence.[7]

ANALYSIS -- ISSUE 1

On August 5, 2009 appellant filed a claim alleging that he sustained a recurrence of disability commencing on March 6, 2009 because he was medically restricted to a six-hour workday due to a worsening of his bilateral chondromalacia patella. The Board finds that the case is not in posture for decision.

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[2] 20 C.F.R. § 10.5(x).

[3] *Id.*

[4] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[5] *Maurissa Mack*, 50 ECAB 498, 503 (1999); *James H. Botts*, 50 ECAB 265 (1999).

[6] 5 U.S.C. § 8123(a).

[7] *M.S.*, 58 ECAB 328 (2007).

Appellant provided medical reports from Dr. Valls, his treating physician, to support his claim. In a June 26, 2009 medical report, Dr. Valls noted that appellant requested a reduction of work hours due to increasing knee pain and provided a duty status report reducing appellant's workday to six hours. In a July 9, 2009 medical form and August 11, 2009 addendum, he reported that appellant suffered from constant knee pain since June 1997 and recommended he work six-hour workdays. In his September 23, 2009 medical report, Dr. Valls stated that he could not provide objective findings to establish the progression of appellant's condition other than recognizing the symptoms of bilateral knee pain. He explained that the arthritic process of appellant's condition was classic in its clinical presentation and had progressed such that he felt appellant could no longer tolerate an eight-hour workday.

Dr. Lohman's February 12, 2010 second-opinion report reviewed the statement of accepted facts, history of injury and appellant's medical records. He examined appellant and performed tests. Dr. Lohman reported examination findings of mild crepitus bilaterally in the patellofemoral articulation, minor discomfort to compression at the patellofemoral joint bilaterally; normal Lachman's and McMurray's tests, and minimal narrowing of the patellofemoral articulation on the right and bilateral medial compartment narrowing with minor spurring over the distal aspect of the medial femoral condoyle based upon May 23, 2009 x-rays. Based on his observations, Dr. Lohman found that appellant's condition had not significantly changed to where he was not capable of performing his same light-duty assignments as of March 6, 2009 and that there was no orthopedic rationale for why he was unable to keep his light-duty position for eight hours a day.

The Board finds that the reports of Dr. Valls and Dr. Lohman are in conflict as to whether appellant could continue to perform light-duty work for eight hours a day. In order to resolve the conflict in medical opinion, the case will be remanded to the Office. The Office shall prepare a statement of accepted facts and refer appellant and the case record to an impartial medical specialist for examination and evaluation. After such further development as necessary, it shall issue a *de novo* decision.[8]

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained a recurrence of disability from March 6 until December 4, 2009.

[8] Given the disposition of the first issue, the issue of denial of review of the written record is moot.

ORDER

IT IS HEREBY ORDERED THAT the May 12 and March 19, 2010 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further development consistent with this decision.

Issued: July 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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