

FACTUAL HISTORY

The case was previously before the Board.² On March 12, 2003 appellant, then a 54-year-old custodian, filed a traumatic injury claim alleging that he sustained back and knee injuries on March 4, 2003 when he was “cleaning out under the stage.” OWCP accepted a lumbar strain, posterior cruciate ligament sprain left knee and left medial meniscus tear. Appellant stopped working on August 28, 2003. He underwent left knee arthroscopic surgery on December 10, 2003. The Board noted an August 3, 2007 wage-earning capacity determination based on the selected position of security guard/merchant patroller. The Board indicated that appellant was being treated for his lumbar condition by Dr. Gary Dawson, a physiatrist, and the selected position was within his work restrictions. The additional history as reported by the Board in the July 24, 2009 decision is incorporated herein by reference.

OWCP referred appellant for a second opinion evaluations by Dr. Alexander Doman, an orthopedic surgeon, and Bruce Atkinson Ph.D, a clinical psychologist. In a report dated October 23, 2008, Dr. Doman provided a history and results on examination. He diagnosed degenerative lumbar disc disease with symptom magnification. Dr. Doman opined that the degenerative condition was not related to the employment injury, as the mechanism of injury would have resulted in a minor contusion or strain. He also stated that the meniscus tear was corrected with the surgery. Dr. Doman concluded that appellant’s back symptoms represented the natural history of the underlying disorder. In a report dated October 29, 2008, Dr. Atkinson stated that the evidence pointed to significant treatment interference from unconscious secondary gain factors.

In a report dated August 13, 2008, Dr. J. Kenneth Burkus, an orthopedic surgeon stated that appellant complained of back pain and bilateral sciatica pain. He noted that appellant had sustained an injury on March 4, 2003 and stated that an October 1, 2007 magnetic resonance imaging (MRI) scan showed stenosis at L4-5 and L5-S1 and severe spondylosis at L5-S1. In a report dated November 25, 2008, Dr. Burkus stated that appellant continued to have back and leg pain. He stated that appellant did have lumbar spondylosis and stenosis prior to the employment injury, but he was asymptomatic and his condition was aggravated. Dr. Burkus stated that the diagnoses and symptoms were directly related to the work injury.

OWCP determined that a conflict in the medical evidence existed and appellant was referred to Dr. Norman Donati, a Board-certified orthopedic surgeon, to resolve the conflict.³ In a report dated March 3, 2009, Dr. Donati provided a history and results on examination.⁴ He

² Docket No. 08-2505 (issued July 24, 2009).

³ FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations state that, if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

⁴ Dr. Donati referred to an employment injury to the right knee, but apparently intended to refer to the left knee.

noted normal range of motion for the hips and knees, with no discomfort or tenderness in any areas of the lower extremities. Dr. Donati stated that, based on the evidence, it appeared that appellant's low back problems were not causally related to the employment injury. He indicated that appellant had a preexisting back condition and had sustained a temporary aggravation of a chronic problem. According to Dr. Donati, a 2007 MRI scan had shown significant changes and worsening of the lumbar disc problem and appellant's condition could be significantly improved by surgical intervention. He stated:

“I do not believe that there is strong enough evidence to indicate that the actual injury that [appellant] sustained is the main cause of his present ongoing pain and problems.... I do not feel that there is any further rehabilitation or nonsurgical treatment that will make any difference as far as improving his condition. I believe that if [appellant] had not had the above stated injury he would still be having the same problems that he is having now. [Appellant] does appear to have a personality that would lead one to believe that he does have some malingering properties but I think that the overwhelming MRI [scan] and physical exam[ination] evidence does point to him having considerable chronic degenerative disc problems and very mild L5 nerve root problems. These continued problems are not a residual of his injury but are related to his chronic ongoing degenerative disc and joint disease.”

In a letter dated April 2, 2009, OWCP noted that it had accepted a left knee cruciate ligament sprain and medial meniscus tear and requested that Dr. Donati provide an opinion on continuing residuals. By report dated April 16, 2009, Dr. Donati stated, “My review of [appellant's] records never indicated that his left knee was actually a work[-]related injury. It appears that he had degenerative changes of his left knee and they were mistaken for a work injury. [Appellant] had surgery that really was nothing special and did not treat anything that he did not already have prior to his claimed work injury.” Dr. Donati stated, “From this work standpoint I do not feel that [appellant] has any residual problems” and that his problems were related to his preexisting degenerative arthritis. He concluded, “[Appellant's] original knee MRI [scan] indicated no acute abnormalities only chronic problems and he had arthroscopic surgery, which was of little benefit according to him, indicating that he never did have a work[-]related injury.”

By letter dated April 20, 2009, OWCP advised appellant that it proposed to modify the wage-earning capacity determination and terminate compensation for wage-loss and medical benefits. It provided him 30 days to submit relevant evidence. On May 11, 2009 appellant submitted a brief April 28, 2009 report from Dr. Burkus, stating that appellant's examination was unchanged.

In a decision dated June 4, 2009, OWCP modified the existing wage-earning capacity determination and terminated compensation for wage-loss and medical benefits effective June 6, 2009.

Appellant requested a hearing before an OWCP hearing representative, which was held on September 8, 2009. By decision dated November 25, 2009, the hearing representative affirmed the June 4, 2009 OWCP decision.

On November 25, 2010 appellant requested reconsideration of his claim. He submitted a note from Dr. Thomas Bernard, an orthopedic surgeon, dated September 14, 2009. Dr. Bernard diagnosed lumbar spondylosis and reported that appellant stated he was symptomatic since the injury.

By decision dated February 7, 2011, OWCP reviewed the case on its merits and denied modification.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

With respect to termination of benefits, OWCP has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁷ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁸

ANALYSIS

In the present case, OWCP had accepted a lumbar injury as well as a torn left medial meniscus and posterior cruciate ligament sprain. In affirming the August 3, 2007 wage-earning capacity determination, the Board noted that the existing medical restrictions were provided by Dr. Dawson, who was treating appellant's lumbar condition. To establish a modification of the wage-earning capacity was warranted, OWCP must show there was a material change in the injury-related condition.

In this regard there was a conflict in the evidence between the second opinion physician Dr. Doman, who found that appellant's degenerative disc disease was not employment related and Dr. Burkus, who opined that appellant had a continuing employment-related aggravation of lumbar stenosis and spondylosis. The referee physician, Dr. Donati, provided a detailed medical report with respect to the lumbar issue presented. He opined that appellant had sustained a temporary aggravation of the underlying degenerative disc disease, but the continuing condition

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

⁸ *Furman G. Peake*, 41 ECAB 361 (1990).

was not related to the employment injury. Dr. Donati indicated that appellant would have the same current symptoms regardless of the employment injury.

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁹ Dr. Donati supported his opinion with a detailed examination and review of medical records and his opinion as to the lumbar condition is entitled to special weight.

The Board finds that OWCP met its burden of proof to modify the wage-earning capacity determination. The report of Dr. Donati found that there was no continuing employment-related disability or lumbar condition. This represents a material change in the nature and extent of the injury-related condition. In addition, based on Dr. Donati's opinion OWCP also has met its burden of proof to terminate compensation for wage-loss and medical benefits regarding a lumbar condition. Having met its burden of proof to terminate compensation, the burden for reinstating compensation benefits shifts to appellant.¹⁰ Appellant submitted a report from Dr. Bernard, who did not provide an opinion that appellant continued to have an employment-related disability or lumbar condition. The Board finds that appellant did not establish a continuing employment-related lumbar condition after June 6, 2009.

The Board notes, however, there remains an issue with respect to termination of medical benefits for a left knee condition. In this regard there was no conflict in the medical evidence. Dr. Burkus did not discuss a left knee condition or provide any opinion on the issue. Therefore, as to the left knee, Dr. Donati is a second opinion physician.¹¹

OWCP did ask Dr. Donati for an opinion as to a continuing employment-related left knee condition. Dr. Donati's opinion on this issue is of diminished probative value. He appeared to base his conclusions on the fact that appellant never had an employment-related left knee injury. But the record clearly establishes that OWCP had accepted a left knee meniscus tear and a posterior cruciate ligament sprain. A physician must base his opinion on the accepted factual background and consider the accepted conditions as employment related.¹² OWCP should have advised Dr. Donati of the accepted conditions and the need to base his opinion on the accepted facts and requested clarification. The April 16, 2009 report is of diminished probative value and is not sufficient to meet OWCP's burden of proof to terminate medical benefits for the accepted left knee injury.

⁹ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

¹⁰ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

¹¹ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹² *See Paul King*, 54 ECAB 356 (2003).

CONCLUSION

The Board finds that OWCP met its burden of proof to modify the August 3, 2007 wage-earning capacity determination and terminate compensation for wage loss. The Board further finds that OWCP did not meet its burden to terminate medical benefits for the accepted left knee conditions.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2011 is affirmed with respect to modification of wage-earning capacity and termination of compensation regarding the lumbar condition. The decision is reversed with respect to termination of medical benefits for a left knee condition.

Issued: April 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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