

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

E.M., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Brockton, MA,
Employer**

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**Docket No. 11-457
Issued: January 9, 2012**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 14, 2010 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated June 22, 2010 concerning the denial of his recurrence claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 sustained a recurrence of partial disability beginning November 1, 2005 causally related to his accepted May 18, 2004 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 18, 2004 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that he injured his left forearm and leg on that day. The truck he was loading rolled away from the dock and he fell. OWCP accepted the claim for abrasion and contusion of the left knee and leg, elbow, forearm and wrist and contusion of the left elbow and forearm. On the back of the form it indicated that appellant stopped work that day at 5:05 a.m. and returned to work the same day at 11:30 p.m.²

In a November 1, 2005 report, Dr. Mark Steiner, a treating Board-certified orthopedic surgeon, reported that appellant was injured on May 18, 2004 when he fell off the rear of a tractor trailer and landed on his knees. He reported that a recent magnetic resonance imaging scan revealed significant left knee medial and patellofemoral degenerative arthritis. Dr. Steiner concluded the May 18, 2004 employment injury aggravated appellant's underlying knee arthritis as appellant reported no knee problems prior to the employment injury.

In a March 14, 2006 note, Dr. Steiner indicated that appellant was only capable of working a four-hour day. He opined that his chronic right and left knee degenerative arthritis had been exacerbated by a May 18, 2004 work injury.

In a May 11, 2006 duty status report, Dr. Steiner noted an injury date of May 18, 2004 and indicated that appellant was only capable of working four hours per day with restrictions. Diagnoses included exacerbation of degenerative joint disease with physical findings of crepitus and right knee effusion.

On July 14, 2006 appellant filed a claim for a recurrence of partial disability beginning November 1, 2005 when his physician reduced his work hours to four hours per day.

In a letter dated October 12, 2006, OWCP informed appellant as to the definition of a recurrence of disability and the evidence required to support a claim for a recurrence of disability.

On May 23, 2007 OWCP received a November 1, 2005 progress note from Dr. Steiner in which he indicated that appellant was restricted to working four hours per day. Dr. Steiner diagnosed bilateral tricompartmental degenerative arthritis and noted that appellant continued to be symptomatic with the left knee being worse than the right knee.

In a May 11, 2007 duty status report, Dr. Steiner indicated that appellant was capable of working 20 hours per week with restrictions. On June 13, 2007 appellant accepted a light-duty job working 20 hours per week.

In November 28, 2007 attending physician's report (Form CA-20), Dr. Steiner diagnosed post-traumatic degenerative arthritis which he checked "yes" to the question of whether it had been caused or aggravated by an employment activity.

² A May 18, 2004 attending physician's report stated that appellant could resume regular work on May 19, 2004.

In an April 17, 2008 report, Dr. Stanley Horn, a second opinion Board-certified orthopedic surgeon, diagnosed left knee degenerative arthritis with a possible degenerative medial meniscus tear, right knee degenerative arthritis, suspected gout and mild left elbow medial epicondylitis. He concluded that the May 18, 2004 employment injury could have caused an aggravation of appellant's bilateral knee degenerative arthritic conditions, but that the gout and left elbow medial epicondylitis were unrelated to the employment injury. As to the aggravation of appellant's knee conditions, Dr. Horn opined that it was temporary and should have resolved within 6 to 10 weeks. Next, he concluded that appellant's current condition was unrelated to the May 18, 2004 employment injury and was due to the chronic degenerative processes and progression of his condition. Dr. Horn opined that appellant was capable of working with restrictions.

By decision dated July 3, 2008, OWCP denied appellant's recurrence claim.

On July 3, 2008 appellant requested an oral hearing before an OWCP hearing representative, which was held on October 29, 2008.

In an August 26, 2008 report, Dr. Steiner diagnosed bilateral post-traumatic degenerative arthritis which he opined was caused and aggravated by the May 18, 2004 employment injury as appellant had no symptoms prior to the May 18, 2004 work injury.

By decision dated January 29, 2009, an OWCP hearing representative found a conflict in the medical opinion evidence between Drs. Steiner and Horn, set aside OWCP's July 3, 2008 decision and remanded the case for referral to an impartial medical examiner.

On March 30, 2009 OWCP referred appellant to Dr. George P. Whitelaw, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding whether appellant's claimed recurrence of partial disability was causally related to his accepted May 18, 2004 employment injury.

In an April 13, 2009 report, Dr. Whitelaw reviewed the medical evidence, noted the employment injury history and statement of accepted facts and conducted a physical examination. Based on his review of the evidence and physical examination, he diagnosed bilateral knee osteoarthritis which he noted was an ongoing problem and unrelated to the May 18, 2004 employment injury when appellant fell four feet to the ground. Dr. Whitelaw related that appellant was taking Prednisone for his kidney condition at the time of the May 18, 2004 employment injury. A physical examination revealed full range of motion, a negative McMurray's sign, stable ligaments and some boggy bilateral knee edema. Dr. Whitelaw opined that the May 2004 employment injury caused no significant exacerbation as appellant only had a flare up in September 2004 when he stopped taking Prednisone.

OWCP requested clarification from Dr. Whitelaw on May 15, 2009. In a July 8, 2009 supplemental report, Dr. Whitelaw opined that appellant's degenerative arthritis was unrelated to the May 18, 2004 employment injury. He concluded that the May 18, 2004 employment injury caused a temporary aggravation and that his current problems were related to degenerative arthritis.

On September 23, 2009 Dr. Whitelaw responded to OWCP's August 11, 2009 request for further clarification. He related that the May 14, 2004 employment injury aggravated appellant's left knee degenerative arthritis, but the exacerbation/aggravation ceased within six weeks. Dr. Whitelaw also opined that there was no material worsening of appellant's left knee arthritis on May 18, 2004 and that the reduction in appellant's work hours was unrelated to the accepted employment injury.

By decision dated October 22, 2009, OWCP denied appellant's claim for a recurrence of partial disability.

On November 12, 2009 appellant requested an oral hearing before an OWCP hearing representative, which was held on February 26, 2010.

By decision dated June 22, 2010, an OWCP hearing representative affirmed the October 22, 2009 decision.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.⁴

Section 8123(a) of FECA 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.⁵ Where 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.⁶

For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.⁷

³ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). See also *Phillip L. Barnes*, 55 ECAB 426 (2004).

⁴ *Supra* note 3, Chapter 2.1500.3 (May 1997), *Donald T. Pippin*, 54 ECAB 631 (2003).

⁵ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁶ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

⁷ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000); *G.A.*, Docket No. 09-2153 (issued June 10, 2010).

ANALYSIS

Appellant's claim was accepted for a contusion of the left knee and lower leg, abrasion of the left leg, elbow, forearm and wrist and contusion of the left elbow and forearm as a result of the May 18, 2004 employment injury. He reduced his work hours on November 1, 2005 to four hours per day. The issue to be resolved is whether appellant has established that his recurrence of partial disability beginning November 1, 2005 was causally related to his May 18, 2004 accepted employment injury.

As OWCP determined there was a conflict in the medical opinion evidence between Drs. Steiner regarding whether appellant's recurrence of partial disability was causally related to his accepted May 18, 2004 employment injury. On remand, OWCP referred appellant to Dr. Whitelaw to resolve this conflict.

The Board finds that the opinion of Dr. Whitelaw, the impartial medical specialist and a Board-certified orthopedic surgeon, based his opinion on a proper factual and medical background. OWCP provided him with appellant's medical record, a statement of accepted facts and questions to be addressed in resolving the conflict of medical opinion between Drs. Steiner and Horn. Dr. Whitelaw reviewed appellant's history, noted his current complaints, set forth findings on examination of appellant and addressed the questions presented in his initial and supplemental reports.

In his initial April 13, 2009 report, Dr. Whitelaw provided examination findings and diagnosed bilateral knee osteoarthritis he opined was an ongoing problem and unrelated to the May 18, 2004 employment injury. He opined that the reduction in appellant's work hours in November 2005 was due to his degenerative arthritis and not his accepted employment injuries. OWCP subsequently requested that Dr. Whitelaw provide a supplemental report to clarify and explain the basis for his opinions. In a July 8, 2009 response, Dr. Whitelaw opined that appellant's degenerative arthritis was unrelated to the May 18, 2004 employment injury, that the May 18, 2004 employment injury caused a temporary aggravation and that his current problems are related to degenerative arthritis. On September 23, 2009 he provided a second supplement report in response to OWCP's September 1, 2009 request for further clarification. Dr. Whitelaw opined that while the May 18, 2004 employment injury aggravated appellant's left knee degenerative arthritis, that any aggravation ceased within six weeks of the May 18, 2004 employment injury. He also concluded that appellant's reduction in work capacity on November 1, 2005 to four hours per day was due to his left knee degenerative arthritis and unrelated to the accepted May 18, 2004 employment injury.

Dr. Whitelaw offered a medical opinion that is sound, rational and logical. Because the opinion of the impartial medical specialist is based on a proper history and is sufficiently rationalized, the Board finds that it must be accorded special weight in resolving the conflict. The Board finds that the weight of the medical opinion evidence supports that appellant's recurrence of partial disability beginning November 1, 2005 was unrelated to his May 18, 2004 accepted employment injury. Thus, appellant failed to meet his burden of proof to establish that his recurrence of partial disability was due to his accepted May 18, 2004 employment injury.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of partial disability beginning November 1, 2005 causally related to his accepted May 18, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2010 is affirmed.

Issued: January 9, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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