

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

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**W.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Providence, RI, Employer**

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**Docket No. 12-479  
Issued: November 27, 2012**

*Appearances:*  
*Damon Williams, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 27, 2011<sup>1</sup> appellant, through his attorney, filed a timely appeal of the June 30, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computerized beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on June 30, 2011, the 180-day computation begins July 1, 2011. One hundred eighty days from June 30, 2011 was December 27, 2011. Since using January 3, 2012, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 27, 2011, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective August 31, 2008 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injury.

On appeal, counsel contends that there is a conflict in the medical opinion evidence which requires a referee opinion. He further contends that appellant was not provided due process as OWCP reversed the Board's prior decision in this case and erroneously issued a *de novo* decision without a pretermination notice.

## FACTUAL HISTORY

This case has previously been on appeal before the Board. In a January 26, 2011 decision, the Board set aside OWCP decisions dated September 10 and November 19, 2009 which denied appellant's requests for reconsideration and remanded the case to OWCP for consideration of the merits of his claim.<sup>3</sup> The Board found that an August 12, 2009 medical report of Dr. Glenn Nuttall, an attending Board-certified internist, which stated that appellant had left knee symptoms directly related to his accepted employment-related right knee injury constituted relevant and pertinent new evidence not previously considered with regards to the issue of whether OWCP properly terminated his compensation for wage loss and medical benefits on the grounds that he did not have any continuing employment-related residuals or disability. Accordingly, the Board remanded the case to OWCP to address the merits of his request for reconsideration of the August 29, 2008 termination of his compensation. The facts from the Board's prior decision are hereby incorporated by reference. The relevant facts follow.

OWCP accepted that on August 15, 2007, appellant, then a 50-year-old mechanic, sustained temporary aggravation of loose bodies in his right knee while putting down a large monitor at work. He stopped work on the date of injury. Appellant returned to full-time regular-duty work on August 22, 2007.

In terminating appellant's compensation on August 29, 2008, OWCP relied on the June 16, 2008 report of Dr. Stanley Hom, a Board-certified orthopedic surgeon and OWCP referral physician, who obtained a history of the August 15, 2007 employment injury and appellant's medical treatment, family and social background. Dr. Hom reviewed the medical record and statement of accepted facts. He noted appellant's complaints of constant pain in the right knee which was exacerbated by walking. Dr. Hom also complained about intermittent falls which he attributed to loose bodies. Appellant had intermittent pain in the left knee and used Canadian crutches. On examination of the right knee, Dr. Hom reported a four and one-half inch transverse surgical scar centered over the mid portion of the patella. The knee joint was boggy without any obvious clinical effusion. Dr. Hom noted recurvatum of the proximal tibia and medial and lateral joint line tenderness to palpation. There was also crepitus about the medial compartment and patellofemoral joint, with manipulation and motion of the knee. Instability of the medial collateral ligament to stress was demonstrated. Anterior instability was also

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<sup>3</sup> Docket No. 10-838 (issued January 26, 2011).

demonstrated. The knee had 95 degrees of flexion with approximately a 10-degree flexion contracture. Neurovascular status of the right lower extremity was intact. On examination of the left knee, Dr. Hom reported no obvious knee joint effusion. There was diffuse medial joint line tenderness. The ligaments appeared stable to stress. There was no pain in the region of the *p.e.s.* There was mild crepitus, but minimal pain with compression of the patellofemoral joint. The knee had 110 degrees of flexion. There was no flexion contracture and the neurovascular status of the left lower extremity was intact. Dr. Hom advised that appellant had underlying post-traumatic degenerative joint disease of the right and left knee and a degenerative tear of the medial meniscus of the left knee. He opined that appellant no longer had any residuals of his August 15, 2007 employment injury. This injury represented a temporary exacerbation of his underlying post-traumatic right knee condition which ceased approximately 8 to 12 weeks following his injury. Dr. Hom advised that the accepted injury was not the cause of appellant's current right knee condition and need for treatment. He concluded that appellant was unable to perform his regular work duties due to his underlying bilateral knee conditions, but could work eight hours a day with restrictions.

In his August 12, 2009 report, Dr. Nuttall provided a history of the August 15, 2007 employment injury and appellant's medical treatment. He noted the findings of a January 22, 2008 magnetic resonance imaging (MRI) scan of the right knee and findings on physical examination. Dr. Nuttall stated that appellant was in severe pain and had difficulty standing for a period greater than 10 minutes. He reported severe crepitus in the bilateral knees. Mild effusions were present, but there was no overlying erythema. Range of motion was extremely limited with flexion and extension. Appellant had difficulty standing. He walked with a crutch with frequent periods needed to rest due to pain. Appellant could not walk more than 50 feet. Dr. Nuttall noted the findings of a February 6, 2008 MRI scan of the left knee and opined that appellant's symptoms were directly due to the added stress and change in gait caused by the August 15, 2007 employment-related right knee injury. He concluded that due to the degree of damage to and pain in his bilateral knees, appellant was totally and permanently disabled for work. Dr. Nuttall further concluded that his chronic bilateral knee pain was a residual of his August 15, 2007 employment injury.

Following the issuance of the Board's January 26, 2011 decision, OWCP, in a letter dated March 1, 2011, requested that Dr. Hom review an updated statement of accepted facts and Dr. Nuttall's August 12, 2009 report. Dr. Hom was asked to provide a rationalized medical opinion as to whether appellant had any residuals of his accepted right knee injury and sustained a left knee condition as a consequence of the accepted condition.

In a June 16, 2011 report, Dr. Hom reviewed appellant's medical record. He stated that the right knee had an extensive history of severe trauma requiring emergent surgical treatment related to a 1983 motor vehicle accident. Appellant had documented postinjury deformity and extensive degenerative changes with associated meniscal and ligamentous findings as demonstrated by an MRI scan. Dr. Hom advised that these conditions represented chronic post-traumatic changes and were not related to the August 15, 2007 injury. He further advised that these conditions represented indications for any proposed knee reconstructive surgery. Dr. Hom related that appellant's left knee condition also presented with a history of significant trauma and medical treatment related to the 1983 accident. Additionally, he had documented preexisting chronic tricompartmental degenerative joint disease as noted on the February 6, 2008

MRI scan. Dr. Hom advised that a recommended knee replacement represented severe preexisting chronic degenerative changes unrelated to the August 15, 2007 injury. He concluded that appellant's left knee condition did not represent a consequential injury with regards to his accepted right knee condition.

In a June 30, 2011 decision, OWCP noted that it had carried out evidentiary development as instructed by the Board and found that it had determined that the evidence did not support reinstatement of appellant's claim for wage loss or medical benefits under FECA for his claimed disability. It found that the weight of the medical evidence rested with Dr. Hom's reports and supported its prior decision terminating appellant's wage-loss compensation and medical benefits.

### **LEGAL PRECEDENT**

Once OWCP 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 his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.<sup>6</sup>

### **ANALYSIS**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits as of August 31, 2008. OWCP accepted that appellant sustained temporary aggravation of loose bodies in the right knee while in the performance of duty. It subsequently referred him to Dr. Hom for a second opinion evaluation.

Dr. Hom's June 16, 2008 report reviewed a history of appellant's bilateral knee conditions and medical treatment. He found that although the August 15, 2007 employment injury exacerbated appellant's underlying post-traumatic degenerative joint disease of the bilateral knees, he did not have any residuals of the accepted injury. Dr. Hom advised that the temporary aggravation ceased approximately 8 to 12 weeks following the accepted injury. He found that appellant had a degenerative tear of the medial meniscus of the left knee, but did not attribute this condition to the accepted right knee condition. Dr. Hom opined that while appellant could not perform his regular work duties as a mechanic, he could work eight hours a day with restrictions. His physical findings regarding the right knee revealed a knee joint that was boggy without any obvious clinical effusion, recurvatum of the proximal tibia and medial

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<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>5</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

and lateral joint line tenderness to palpation, crepitus about the medial compartment and patellofemoral joint with manipulation and motion of the knee, instability of the medial collateral ligament to stress, anterior instability and limited range of motion. On examination of the left knee, Dr. Hom found essentially normal findings with the exception of diffuse medial joint line tenderness, mild crepitus, but minimal pain with compression of the patellofemoral joint and limited range of motion.

After reviewing the August 12, 2009 report of Dr. Nuttall, an attending physician, which found that appellant had residuals and permanent total disability due to the August 15, 2007 employment injury, Dr. Hom opined in a June 16, 2011 supplemental report that appellant's extensive preexisting degenerative changes of the bilateral knees and deformity of the right knee were status post the 1983 car accident and not causally related to the accepted August 15, 2007 employment injury. He stated that these preexisting conditions as documented by MRI scan results represented chronic post-traumatic changes.

While Dr. Nuttall opined that the damage to and pain in appellant's bilateral knees and his permanent total disability were due to the August 15, 2007 employment injury, he failed to provide sufficient medical rationale explaining how residuals of the accepted temporary aggravation of loose bodies in the right knee continued and were disabling.<sup>7</sup> Further, the Board has consistently held that pain is a symptom, not a compensable medical diagnosis.<sup>8</sup>

The Board finds that Dr. Hom's reports represent the weight of the medical evidence and that OWCP properly relied on his reports in terminating appellant's wage-loss compensation and medical benefits for the accepted condition on June 30, 2011. Dr. Hom's opinion is based on a proper factual and medical history as he reviewed the statements of accepted facts and appellant's prior medical treatment. He also related his comprehensive examination findings in support of his opinion that appellant no longer had any residuals or disability causally related to the accepted temporary aggravation of loose bodies in the right knee.

On appeal, appellant's attorney contended that there was a conflict in the medical evidence which requires a referee opinion. Contrary to appellant's contention there is no unresolved conflict in the medical opinion evidence. As stated, Dr. Nuttall did not provide sufficient medical rationale explaining how appellant's residuals and disability were employment-related while Dr. Hom provided a thorough report including sufficient rationale to support his opinion that appellant no longer had any residuals or disability causally related to the accepted August 15, 2007 employment injury. Thus, his report is insufficient to create a conflict.

Counsel further contended that OWCP erred in failing to issue a pretermination notice before terminating appellant's compensation in its June 30, 2011 decision. The record, however, indicates that OWCP issued a pretermination notice by letter dated April 26, 2011. Further, the Board, in its January 26, 2011 decision, had jurisdiction only over OWCP's September 10 and November 19, 2009 nonmerit decisions denying appellant's requests for reconsideration of the August 29, 2008 merit termination decision. Because of its limited jurisdiction, the Board did

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<sup>7</sup> *Dean E. Pierce*, 40 ECAB 1249 (1989).

<sup>8</sup> *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

not address the merit termination decision and its findings remained intact. Thus, there was no need for OWCP to issue another pretermination notice prior to its June 30, 2011 decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective August 31, 2008 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related temporary aggravation of loose bodies of the right knee.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 30, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 27, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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