

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

E.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Trenton, NJ, Employer**

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**Docket No. 12-774
Issued: October 3, 2012**

Appearances:

*Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 23, 2012 appellant, through his representative, filed a timely appeal from the December 5, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied 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 sustained a recurrence of disability on March 25, 2009 as a result of his December 31, 2007 accepted right knee injury.

FACTUAL HISTORY

On December 31, 2007 appellant, a 42-year-old letter carrier, sustained a traumatic injury in the performance of duty when he stood from a bending position and felt a cracking in his right

¹ 5 U.S.C. § 8101 *et seq.*

knee. OWCP accepted his claim for right knee and leg sprain and for derangement of the posterior horn of the right medial meniscus. Following a partial medial meniscectomy, appellant returned to modified duty.

Appellant sustained a second traumatic injury in the performance of duty on December 11, 2008, when he fell down some porch steps while delivering mail. He struck his back against the steps and landed on his left arm. Appellant complained of low back pain and stiffness. He also complained of left forearm pain. OWCP accepted that claim for lumbar strain and contusion of the left forearm.² Appellant continued to work his modified assignment.

The record indicates that appellant claimed a recurrence of disability on or about March 24, 2009 as a result of his December 11, 2008 low back employment injury. On July 6, 2009 OWCP denied that claim. On February 3, 2010 an OWCP hearing representative affirmed.

On May 11, 2009 appellant filed a claim for compensation alleging that he sustained a recurrence of disability on March 25, 2009 as a result of his December 31, 2007 right knee employment injury.

Two weeks before he stopped work, appellant saw Dr. William Gomez, a consulting Board-certified orthopedic surgeon, who examined appellant and reviewed a bone scan, which he found consistent with degenerative arthritis of the right knee. Dr. Gomez concluded that appellant's pain was probably due to underlying arthritis. Appellant advised that he was told at the time of surgery that he had some arthritis. Dr. Gomez considered this not unreasonable and recommended that appellant continue limited duty.

Dr. David O. Weiss, the attending osteopath, saw appellant on March 24, 2009, one day before the claimed recurrence of disability. He related appellant's history of a right knee injury in 2007 and a low back injury in 2008. Appellant described continued right knee pain and stiffness with significant difficulty at work. He had difficulty with prolonged walking and climbing stairs. Appellant noted episodes of swelling after work. He also noted ongoing low back pain with pain radiating into the right lower extremity. Dr. Weiss diagnosed, among other things, right chondromalacia patella, post-traumatic osteoarthritis of the right knee and rule out lumbar disc pathology. Given appellant's marked increase in low back and right lower extremity pain following work duties, he took appellant off work.

Dr. Zohar Stark, a Board-certified orthopedic surgeon and OWCP consultant, saw appellant on March 26, 2009, one day after the claimed recurrence of disability. He related appellant's complaints, described his findings on physical examination and reviewed the medical record. It appeared to Dr. Stark that appellant sustained a right knee sprain superimposed on degenerative disease of the knee. Appellant still had signs compatible with degenerative joint disease and it was Dr. Stark's opinion that the December 31, 2007 employment injury precipitated that condition. Dr. Stark concluded, however, that appellant could work with restrictions.

² OWCP File No. xxxxxx155.

Dr. Weiss reviewed Dr. Stark's opinion that appellant could work with restrictions with regard to the right knee. In combination with the low back, however, he was of the opinion that appellant should remain out of work.

In a March 1, 2010 decision, OWCP denied appellant's recurrence claim. It noted that Dr. Weiss did not explain how the right knee injury had worsened to the point that appellant was no longer able to perform his modified job duties. He did not discuss the physical requirements of the limited-duty assignment or explain how objective right knee findings prevented appellant from performing his duties.

On March 11, 2010 Dr. Weiss found that appellant remained disabled for work due to the combined work-related injuries to his right knee and lumbar spine. He continued to find that appellant remained totally disabled due to the extent of pathology to the knee as well as to the lumbar spine.

In a September 17, 2010 decision, an OWCP hearing representative affirmed the denial of appellant's recurrence claim. He found that the evidence did not support a March 25, 2009 recurrence of disability due to an objective change in the nature and extent of appellant's accepted right knee sprain and right medial meniscus tear with surgery.

Dr. Weiss reiterated that appellant attempted to continue work, but due to his ongoing and increasing symptomatology in both the knee and low back he was experiencing significant difficulties and therefore was taken off work. He found appellant disabled from March 24, 2009 due to his injuries on December 31, 2007 and December 11, 2008.

On March 30, 2011 OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. It reviewed the merits of his claim on December 5, 2001 and again denied modification of its prior decision.

Appellant appeals OWCP's December 5, 2011 decision. His representative argues that appellant has provided *prima facie* evidence to establish that he suffered a recurrence of disability beginning March 25, 2009 as a result of his work injuries of December 31, 2007 and December 11, 2008. The representative also argues that the opinion of Dr. William C. Hamilton, a Board-certified orthopedic surgeon, cannot carry the weight of the medical evidence as an impartial medical specialist.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f).

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.⁵ An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.⁶

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 of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such limited duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁷

ANALYSIS

The issue in this case is whether appellant sustained a recurrence of disability on March 25, 2009 as a result of his accepted December 31, 2007 right knee employment injury. More specifically, because he stopped working his limited-duty assignment, the issue is whether his work stoppage on March 25, 2009 was a result of a change in the nature and extent of his injury-related right knee and leg sprain or his injury-related right medial meniscus tear.

Dr. Weiss, the attending osteopath, supported that appellant sustained a recurrence of disability on or about March 25, 2009, but he did not attribute the disability to the December 31, 2007 right knee employment injury. Rather, he attributed the disability to the combined effects of both the December 31, 2007 and December 11, 2008 employment injuries. Although this is in some respects supportive of appellant’s recurrence claim, several deficiencies in Dr. Weiss’ opinion prevent the Board from remanding the case for further development of the evidence or case doubling.

At no point did Dr. Weiss explain how the December 31, 2007 employment right knee and leg sprain or right medial meniscus tear worsened spontaneously. Instead, he noted that appellant had difficulty with prolonged walking and climbing stairs and had episodes of swelling after work. That might suggest a new occupational injury or simply the disabling progression of an underlying pathology, but it does not suggest a recurrence of disability, as that phrase is defined.

⁵ *Id.* at § 10.5(x).

⁶ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

⁷ *Terry R. Hedman*, 38 ECAB 222 (1986).

Further, Dr. Weiss diagnosed right chondromalacia patella and post-traumatic osteoarthritis of the right knee. Dr. Gomez, a consulting orthopedic surgeon, reviewed a bone scan and found it consistent with degenerative arthritis of the right knee. He concluded that appellant's pain was probably due to underlying arthritis. Although Dr. Stark, an OWCP consulting orthopedic surgeon, believed that, the December 31, 2007 incident had precipitated appellant's degenerative joint disease, OWCP has not accepted any of these conditions as work related. To the extent that Dr. Weiss was attributing appellant's increased pain and disability for work to chondromalacia or osteoarthritis or degenerative joint disease, he did not support a recurrence of disability due to the accepted conditions of sprain and meniscal tear.

Dr. Weiss reviewed Dr. Stark's opinion and appeared to agree that appellant could work with restrictions with regard to the right knee. There is no conflict on that issue. Dr. Weiss went one step further, however, and implicated the more recent December 11, 2008 low back employment injury as the precipitating cause of disability beginning March 25, 2009, as best the Board can determine from his reports. It was the addition of low back issues to the apparently nondisabling right knee condition that prompted Dr. Weiss to take appellant off work.

Dr. Weiss did not offer sound medical reasoning. He did not establish a change in the nature and extent of the accepted injury-related conditions.⁸ For this reason, the Board finds that appellant has not met his burden of proof. The medical evidence does not establish that he sustained a recurrence of disability on March 25, 2009 as a result of his accepted right knee injury. The Board will affirm OWCP's December 5, 2011 decision.

Appellant's representative argues that appellant has made a *prima facie* case and indeed, Dr. Weiss indicated that appellant suffered a recurrence of disability beginning March 25, 2009 as a result of his work injuries on December 31, 2007 and December 11, 2008. But as the Board has explained, Dr. Weiss did not specifically address the sprain and meniscal tear OWCP accepted from the first injury and he did not show a change in the nature and extent of those injury-related conditions. It appears, instead, that Dr. Weiss was attributing appellant's right knee pain to a diagnosed chondromalacia or osteoarthritis that OWCP has not yet accepted and which neither he, Dr. Gomez nor Dr. Stark found intrinsically disabling.

The Board agrees with appellant's representative that Dr. Hamilton's opinion cannot carry the weight of the medical evidence as an impartial medical specialist. Dr. Hamilton did not serve as an impartial medical specialist in this case. It appears he served that function in the case relating to appellant's December 11, 2008 low back employment injury. As Dr. Hamilton did not offer an opinion on whether appellant suffered a recurrence of disability related to the December 31, 2007 right knee employment injury, his report is, at best, immaterial to the resolution of this case.

⁸ Appellant did not allege and the record does not support, a change in the nature and extent of the limited-duty job requirements.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained a recurrence of disability on March 25, 2009 as a result of his accepted December 31, 2007 right knee injury.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board