United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 13-96**
	)	**Issued: March 22, 2013**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Brooklyn, NY, Employer	)	

Appearances:
Paul Kalker, 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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On October 18, 2012 appellant, through his attorney, filed a timely appeal from the August 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 11, 2012 on the grounds that he had no residuals of his September 27, 2000 work injury after that date.

FACTUAL HISTORY

OWCP accepted that on September 27, 2000 appellant, then a 36-year-old food service supervisor, sustained a medial meniscus injury of his right knee when a full food cart hit his right

[1] 5 U.S.C. §§ 8101-8193.

knee, causing it to pop. Appellant stopped work on September 27, 2000 and did not return. He received compensation on the periodic rolls for total disability since that time.

On October 6, 2000 appellant began treatment with Dr. Carl Barbera, a Board-certified orthopedic surgeon, who noted that a November 27, 2000 magnetic resonance imaging (MRI) scan testing of appellant's right knee showed a bucket handle tear of the posterior horn of the medial meniscus with no cruciate or collateral ligament tear seen. The testing also showed small joint effusion. On February 22, 2001 Dr. Barbera performed right knee arthroscopy with partial medial meniscectomy and chondroplasty. The surgery was authorized by OWCP.

On July 30, 2001 appellant began to be treated by Dr. Joel R. Bonamo, a Board-certified orthopedic surgeon. During his initial examination of appellant's right knee on July 30, 2001, Dr. Bonamo did not find evidence of effusion, loss of motion or joint line tenderness and the knee was determined to be stable. He found an equivocal McMurray sign and indicated that the possibility existed that appellant might still have a meniscal pathology.

On May 8, 2002 Dr. Howard I. Baum, an attending Board-certified orthopedic surgeon, reviewed the report of appellant's February 22, 2001 surgery and noted that he had significant degenerative changes at the time of his surgery. He examined appellant and diagnosed right knee chondromalacia. Dr. Baum determined that appellant remained disabled.

On April 9, 2004 Dr. Bartholomew F. Savino, an attending Board-certified internist, stated that appellant had been complaining of stress-related anxiety and depression as a result of his condition and injury-related outcome.

On April 19, 2004 Dr. Baum performed a right knee arthroscopy with partial synovectomy, extensive removal of scar tissue and partial synovectomy. The surgery was authorized by OWCP. On April 28, 2004 Dr. Baum removed appellant's sutures and referred him for physical therapy. In an August 20, 2004 report, he stated that appellant's right knee condition was improving. On December 13, 2005 Dr. Baum indicated that appellant's complaints concerned his left shoulder and left knee, conditions which were not claimed as work related. He did not note any complaints or treatment regarding the right knee. Dr. Baum continued to provide an opinion that appellant was totally disabled.

In a September 19, 2007 note, Dr. Baum diagnosed right knee derangement noting that physical examination of the right knee showed evidence of both medial and lateral femoral condyle and joint line tenderness. He continued to provide additional notes which made brief references to examination of appellant's right knee. Dr. Baum also completed numerous form reports in which he indicated that appellant was totally disabled since September 27, 2000.[2]

In order to determine whether appellant still had residuals and disability due to his September 27, 2000 work injury, OWCP referred appellant to Dr. Jerome D. Rosman, a Board-certified orthopedic surgeon, for examination and an opinion on this matter. Dr. Rosman was provided with the records in appellant's file and a statement of accepted facts.

[2] Dr. Baum made note of appellant's right knee chondromalacia, a condition which is not accepted as work related.

In a November 17, 2011 report, Dr. Rosman detailed appellant's factual and medical history and reported the findings of his November 17, 2011 examination. He concluded that appellant no longer had a medical condition or disability as a result of his September 27, 2000 work injury. Dr. Rosman noted that appellant was able to walk on his heels and toes without difficulty and was able to get on and off the examining table unassisted. He also noted a limp to the left, but indicated that the examination revealed that the range of motion of appellant's hips was normal. Examination of the right knee revealed range of motion to 130 degrees and no effusion, instability or ligamentous laxity was observed. Dr. Rosman stated that the Lachman sign, McMurray test, drawer sign, and abductor and adductor stress tests were normal. He noted that there was mild retropatellar crepitus, but no pain with right patellar compression. There was no loss of strength or loss of sensation in the legs bilaterally. Dr. Rosman stated:

> "The claimant has fully recovered from the effects of the accepted injury based on the objective findings of examination. The claimant does demonstrate mild residual atrophy of the right thigh and right calf. His subjective complaints and his inability to return to work after the second surgery are not supported by objective findings on examination…. Based on the history of injury and the objective findings of examination, the claimant can perform his date[-]of[-]injury job as a food service supervisor. Based on the objective findings of examination, the claimant does not demonstrate work-related restrictions. The prognosis is good. No further care is indicated based on the objective findings. [Appellant] has reached maximum medical improvement. Maximum medical improvement was attained in June 2004, approximately eight weeks after the second surgery."[3]

In a January 25, 2012 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because the opinion of Dr. Rosman showed that appellant ceased to have residuals of his September 27, 2000 work injury. It indicated that the referral to Dr. Rosman was necessary because the reports of Dr. Baum, finding work-related residuals and disability, were not rationalized. OWCP advised appellant that he had 30 days from the date of the letter to provide evidence and argument challenging the proposed termination. Appellant did not submit any evidence or argument within the allotted time.

In a March 6, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective March 11, 2012 based on Dr. Rosman's opinion that he ceased to have residuals of his September 27, 2000 work injury.

Appellant submitted an April 11, 2012 report in which Dr. Baum provided a history of the medical treatment for his right knee, including physical examinations, diagnostic testing and surgeries.[4] He stated that appellant suffered from anxiety in 2004 and was treated by Dr. Savino for this condition. Dr. Baum indicated that appellant had difficulty standing for long periods of time and was taking medication due to the pain in his right knee and the anxiety he suffered. He indicated that appellant's right knee condition ultimately caused him to develop pain in his

[3] In a November 18, 2011 work restrictions form, Dr. Rosman indicated that appellant did not any work limitations.

[4] The report does not appear to contain any findings of a recent physical examination of appellant by Dr. Baum.

shoulder and left knee. Dr. Baum opined that due to the fact that appellant had quadriceps atrophy for more than one year after his operation indicated that his failure to improve was permanent and that he was at marked disability. He disagreed with Dr. Rosman's evaluation of appellant's condition and stated that the examination by Dr. Rosman showed that appellant had continued mild atrophy to the right calf and thigh. Dr. Baum posited that the right calf symptoms evolved from appellant's work-related right leg injury. The fact that appellant still had calf atrophy indicated that he still had residual neurological issues which had worsened. Dr. Baum asserted that the gait abnormality could affect the contralateral extremity and lower back and felt that Dr. Rosman did not adequately address appellant's right calf atrophy, a condition which developed from the right knee condition over time. Dr. Baum also posited that a physician who is not a psychiatrist could treat anxiety and indicated that appellant still had an "anxiety-related disorder related to the traumatic events that happened in 2000." He diagnosed status post right knee arthroscopy with quadriceps atrophy and lumbar spine derangement. Dr. Baum indicated that appellant was too young to have a right knee replacement and stated that he remained totally disabled.

In brief notes dated February 8, 29 and July 11, 2012, Dr. Baum indicated that appellant continued to report aches and pain in his right knee.[5] He noted that appellant continued to have quadriceps atrophy, chronic patella-femoral plain synovitis and chondromalcia in the right knee. Appellant also had difficulty with activities of daily living and an antalgic gait pattern. Dr. Baum noted that appellant used medications for pain and a Palumbo knee support and stated that he would follow up on an as needed basis. He posited that appellant was not a candidate for any physical activity.

In an August 20, 2012 decision, OWCP affirmed its March 6, 2012 termination decision. It considered the new medical evidence of Dr. Baum but found that it did not show that appellant had residuals of his September 27, 2000 work injury after March 11, 2012.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[6] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[7] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

ANALYSIS

OWCP accepted that on September 27, 2000 appellant sustained a medial meniscus injury of his right knee when a full food cart hit his right knee. Appellant stopped work on

[5] It is unclear whether Dr. Baum actually examined appellant around the times these notes were produced.

[6] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[7] *Id.*

[8] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

September 27, 2000 and did not return. He received compensation on the periodic rolls for total disability since that time. On February 22, 2001 Dr. Barbera, an attending Board-certified orthopedic surgeon, performed right knee arthroscopy with partial medial meniscectomy and chondroplasty. On April 19, 2004 Dr. Baum, an attending Board-certified orthopedic surgeon, performed a right knee arthroscopy with partial synovectomy, extensive removal of scar tissue and partial synovectomy. The surgeries were authorized by OWCP.

In a March 6, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective March 11, 2012 based on the fact that the November 2011 opinion of Dr. Rosman, a Board-certified orthopedic surgeon serving as an OWCP referral physician, showed that he ceased to have residuals of his September 27, 2000 work injury.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Rosman, the second opinion physician. The November 17, 2011 report of Dr. Rosman establishes that appellant had no disability due to his September 27, 2000 employment injury after March 11, 2012.[9]

In his November 17, 2011 report, Dr. Rosman detailed appellant's factual and medical history and reported the findings of his November 17, 2011 examination. He noted that appellant was able to walk on his heels and toes without difficulty and was able to get on and off the examining table unassisted. Dr. Rosman also noted a limp to the left, but indicated that the examination revealed that the range of motion of appellant's hips was normal. Examination of the right knee revealed no effusion, instability or ligamentous laxity. Dr. Rosman stated that the Lachman sign, McMurray test, drawer sign and abductor and adductor stress tests were normal. He noted that there was mild retropatellar crepitus, but no pain with right patellar compression. There was no loss of strength or loss of sensation in the legs bilaterally. Dr. Rosman stated that appellant had fully recovered from the effects of the accepted injury based on the objective findings of examination. He noted that appellant did demonstrate mild residual atrophy of the right thigh and right calf, but did not provide any indication that this condition was related to his September 27, 2000 medial meniscus injury or his two surgeries. Dr. Rosman noted that appellant's subjective complaints and his inability to return to work after the second surgery were not supported by objective findings on examination. He posited that appellant could work as a food service supervisor without restrictions and that no further care was indicated based on the objective findings. Appellant reached maximum medical improvement in June 2004, approximately eight weeks after his second right knee surgery.

The Board has carefully reviewed the opinion of Dr. Rosman and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Rosman provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[10] He provided medical rationale for his opinion by explaining that appellant had limited objective findings of his right knee and that

[9] On appeal, counsel suggested that it was improper to refer appellant to Dr. Rosman. The Board notes that the referral was proper because the reports of Dr. Baum finding work-related residuals and disability were not rationalized.

[10] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

none of the observed findings were related to the September 27, 2000 work injury, a medial meniscus tear which was repaired through surgery.[11]

After OWCP's March 6, 2012 decision terminating appellant's compensation effective March 11, 2012, appellant submitted additional medical evidence which he felt showed that he was entitled to compensation after March 11, 2012 due to residuals of his September 27, 2000 employment injury. Given that the Board has found that OWCP properly relied on the opinion of Dr. Rosman in terminating appellant's compensation, effective March 11, 2012, the burden shifts to appellant to establish that he is entitled to compensation after that date.[12] The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his September 27, 2000 employment injury after March 11, 2012.

In an April 11, 2012 report, Dr. Baum stated that appellant had continued mild atrophy to his right calf and thigh and posited that the right calf symptoms evolved from his work-related right leg injury. He noted that the fact that appellant still had calf atrophy indicated that he still had residual neurological issues which had worsened and asserted that appellant's gait abnormality could affect his left leg and lower back. The Board finds that this report does not meet appellant's burden of proof to show that he had residuals of his September 27, 2000 employment injury after March 11, 2012. Dr. Baum did not provide a rationalized opinion explaining how appellant's mild right calf and thigh atrophy was related to his September 27, 2000 employment injury. He suggested that appellant had left leg and back injuries as a consequence of his September 27, 2000 employment injury but he did not adequately explain the medical process through which such a consequential injury could have occurred. The Board notes that it remains unclear whether Dr. Baum conducted a physical examination of appellant around the time he produced his April 11, 2012 report and Dr. Baum did not cite specific examination findings to support his conclusions.[13]

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.

[11] As noted above, the brief reports of Dr. Baum from the period prior to the referral to Dr. Rosman are of limited probative value on the main issue of this case due to their vague nature and lack of a rationalized medical opinion showing that appellant had residuals of his September 27, 2000 work injury. Some medical reports of record suggest that appellant had an emotional condition related to his September 27, 2000 work injury, but OWCP has not accepted such a condition and the record does not contain a rationalized medical opinion regarding appellant's emotional condition.

[12] *See I.J.*, 59 ECAB 408 (2008).

[13] Dr. Baum's February 8, 29 and July 11, 2012 notes mention appellant's mild right-sided atrophy, but they do not contain any medical rationale on the matter of causal relationship. He indicated that appellant continued to have chronic patella-femoral plain synovitis and chondromalcia in the right knee, but these conditions are not accepted as work related.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 11, 2012 on the grounds that he had no residuals of his September 27, 2000 work injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board