United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 13-1200**
	)	**Issued: November 1, 2013**
U.S.POSTAL SERVICE, POST OFFICE, Lauderhill, FL,Employer	)	

Appearances:
Lenin V. Perez, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2013 appellant, through his attorney, filed a timely appeal from a February 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), affirming an August 29, 2012 termination of appellant's compensation benefits. 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 claim.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective August 29, 2012 on the grounds that residuals of an accepted left knee injury lumbarhad ceased without residuals; and (2) whether appellant established that he remained disabled for work on and after August 29, 2012 due to the accepted left knee injury.

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, counsel asserts a conflict of medical opinion between appellant's attending physician and Dr. Peter J. Millheiser, a second opinion physician Board-certified in orthopedic surgery. He also asserts that Dr. Millheiser cannot serve as the second opinion physician as he had "already seen [appellant] on a different case."

FACTUAL HISTORY

OWCP accepted that on July 6, 2011 appellant, then a 46-year-old letter carrier, sustained a left medial meniscus tear and sprain of the left medial collateral ligament when his left foot became entangled in a lawn sprinkler.

An August 8, 2011 magnetic resonance imaging(MRI) scan of appellant's left knee showed mucoid degeneration of the meniscus cartilages without a frank tear, mild chondromalacia of the patella, bone edema in the medial femoral condyle consistent with a blunt trauma injury and mild arthritic changes.

On October 4, 2011 Dr. Michael Feanny, an attending Board-certified orthopedic surgeon, performed a left knee arthroscopy with a lateral retinacular release and chondroplasty of the patella, approved by OWCP. He noted postoperative diagnoses of chondromalacia and lateral subluxation of the patella, without meniscal tears. Appellant received wage-loss compensation for total disability from October 31, 2011 to February 1, 2012.

Dr. Feanny released appellant to sedentary duty as of November 3, 2011. Appellant returned to limited-duty work on February 1, 2012. On February 8, 2012he filed a recurrence of disability claim (Form CA-2a) claiming that while delivering mail on February 4, 2012, he experienced increased left knee pain and stopped work. Appellant sought treatment in a hospital emergency room. Dr. Rakesh Khanna, a physician specializing in emergency medicine, diagnosed left knee pain. Appellant consulted Dr. Feanny on February 6, 2012, who opined that he could work six hours a day light duty.

Beginning on February 7, 2012, appellant was followed by Dr. Carols Roig, an attending orthopedic surgeon. In reports through March 27, 2012, Dr. Roig noted left knee pain and swelling. He diagnosed left knee derangement, mild chondromalacia and mild degeneration of the meniscal cartilage without frank tears.[2]

Dr. Sammy F. Bishai, an attending orthopedic surgeon, treated appellant beginning on March 14, 2012. He reviewed appellant's history of injury and treatment. On examination, Dr. Bishai found tenderness to palpation throughout the left knee, with slight swelling. He diagnosed internal derangement of the left knee, chondromalacia of the patella and rule out torn medial meniscus. Dr. Bishai held appellant off work. He obtained a March 14, 2012 left knee MRI scan showing a horizontal tear of the posterior horn of the medial meniscus, prepatellar bursitisand a bone contusion of the tibial plateau and generalized effusion. On March 27, 2012 Dr. Bishai opined that appellant was disabled for work due to the left knee posterior horn meniscal tear and internal derangement.He found that both of these conditions were directly

[2]A February 23, 2012 computerized tomography (CT) scan of appellant's left knee showed patellofemoral fluid collection suggesting a hemorrhage or debris.

related to the accepted left knee injuries.Dr. Bishai continued to hold appellant off work in reports through July 3, 2012.

On May 21, 2012 OWCP obtained a second opinion from Dr. Millheiser, a Board-certified orthopedic surgeon, who provided a history of injury and treatment and reviewed a statement of accepted facts. On examination, he noted vague tenderness to palpation throughout the left knee and suprapetellar swelling. Dr. Millheiser opined that appellant never had a meniscal tear as Dr. Freanny did not find one during the October 4, 2011 procedure. Also, Dr. Freanny trimmed frayed areas of the medial meniscus but did not perform a partial meniscectomy. Dr. Millheiser released appellant to full-time unrestricted duty. In a June 27, 2012 addendum,he stated that the accepted left knee sprain had resolved completely, that there was no meniscal tear and that appellant had attained maximum medical improvement. Dr. Millheiser reiterated that appellant could return to his date-of-injury position as a letter carrier with no restrictions.

By notice dated July 17, 2012, OWCP advised appellant of its preliminary determination to terminate his wage-loss and medical benefits as the accepted left knee injuries had ceased without residuals, based on Dr. Millhesier's reports as the weight of the medical evidence.

In response, appellant submitted an August 1, 2012 report from Dr. Bishai expressing strong disagreement with Dr. Millheiser's opinion. Dr. Bishai opined that appellant's objective findings on examination were "quite impressive" and had not resolved.[3]

By decision dated August 29, 2012, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day on the grounds that the accepted left knee injuries had ceased without residuals, based on Dr. Millheiser's opinion as the weight of the medical evidence. It noted thatunlike Dr. Millheiser, Dr. Bishai was not a Board-certified orthopedic surgeon.

In a September 5, 2012 letter, appellant requested a telephonic hearing, held August 13, 2012. At the hearing, counsel asserted that there was a conflict of medical opinion between Dr. Bishai, for appellant, and Dr. Millheiser, for the Government.

Following the hearing, appellant submitted new medical reports from Dr. Bishai dated August 30, 2012 to January 15, 2013, asserting that Dr. Millheiser erred by failing to diagnosed the left medial meniscus tear and questioned his medical skill. Dr. Bishai opined that appellant would remain totally disabled for work unless he underwent a second left knee arthroscopy to repair the meniscal tear and address chronic instability.Appellant also provided reports from

[3]Appellant also provided a July 18, 2012 report from Dr. Ramon A. Berenguer, an attending family practitioner, diagnosing internal derangement of the left knee and chondromalacia of the patella.

Dr. Berenguerdated from August 29, 2012 to January 9, 2013, diagnosing internal derangement of the left knee and chondromalacia of the patella.[4]

By decision dated and finalized February 26, 2013, OWCP's hearing representative affirmed OWCP's August 29, 2012 decision terminating appellant's wage-loss and medical benefits. He found that Dr. Millheiser's opinion continued to carry the weight of the medical evidence, as he presented detailed medical rationale explaining that the left medial meniscus tear accepted by OWCP was not in fact present at the time of the October 4, 2011 operation. In contrast, Dr. Bishai, who was not a Board-certified orthopedic surgeon, opined that imaging studies performed after the October 4, 2011 surgery were sufficient to establish the presence of a presurgical meniscal tear. The hearing representative found that the medical evidence did not support "any ongoing condition causally related to the accepted employment trauma or injury sustained as a result thereof."

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[7] 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 -- ISSUE 1

OWCP accepted that appellant sustained a sprain of the left medial collateral ligament and a left medial meniscus tear, necessitating arthroscopic left retinacular release and patellar chondroplasty. Dr. Feanny, an attending Board-certified orthopedic surgeon, noted in his October 4, 2011 surgical report that there was no meniscal tear present. Appellant received wage-loss compensation from October 31 to February 1, 2012, when he returned to full duty. He experienced increased left knee pain on February 4, 2012 and again stopped work.

[4]The employing establishment submitted a February 8, 2013 investigative report, surveillance photographs and video footage obtained from April 20 to October 25, 2012, showing appellant lifting and carrying various objects, loading and unloading his car, cleaning his vehicle and pulling garbage bins. It undertook this investigation pursuant to his claim for a February 13, 2012 lumbar sprain. The back injury claim is not before the Board on the present appeal.

[5]*Bernadine P. Taylor*, 54 ECAB 342 (2003).

[6]*Id.*

[7]*Roger G. Payne*, 55 ECAB 535 (2004).

[8]*Pamela K. Guesford*, 53 ECAB 726 (2002).

Dr. Roig, an attending orthopedic surgeon, submitted reports from February 7 to March 27, 2012 diagnosing internal derangement of the left knee without a meniscal tear. Dr. Bishai, an attending orthopedic surgeon, opined in reports from March 14 to July 3, 2012 that appellant was totally disabled for work due to a tear of the posterior horn of the left medial meniscus, causally related to the accepted left knee injuries.

OWCP obtained a second opinion from Dr. Millheiser, a Board-certified orthopedic surgeon, who found that based on Dr. Feanney's opinion, a review of the complete medical record and statement of accepted facts, in addition to minimal clinical signs, appellant did not have a left medial meniscus tear. Dr. Millheiser found appellant able to return to full duty without restrictions. Based onhis opinion, OWCP issued a preliminary notice of termination on July 17, 2012. Appellant then submitted Dr. Bishai's August 1, 2012 report, opining that Dr. Millheiser was not qualified to diagnose a meniscal tear and that appellant remained totally disabled. OWCP terminated his wage-loss and medical benefits effective August 29, 2012.

The Board finds that Dr. Millheiser's opinion was sufficient to establish that the accepted left knee injuries had ceased without residuals as of August 29, 2012. Dr. Millheiser's reports were based on the complete medical record and a statement of accepted facts. He also performed a thorough clinical examination. Dr. Millheiser then presented detailed rationale explaining how and why the medical evidence and clinical findings negated an ongoing meniscal tear related to the accepted left knee injuries.

The Board notes that Dr. Millheiser is a Board-certified orthopedic surgeon, whereas Dr. Bishai is not Board-certified. Also, Dr. Bishai failed to explain how the accepted July 6, 2011 left knee injuries would continue to disable appellant for work as late as July 3, 2012, in light of Dr. Feanney's operative report stating that there was no meniscal tear present. The Board finds that Dr. Millheiser's report is sufficiently rationalized to represent the weight of the medical evidence in this case.[9]

On appeal, counsel asserts a conflict of medical opinion between Dr. Bishai and Dr. Millheiser. As stated above, Dr. Millheiser is a Board-certified orthopedic surgeon whose well-rationalized report was based on the complete record and statement of accepted facts. His opinion outweighs that of Dr. Bishai, who is not Board-certified and did not provide adequate medical rationale. Counsel also asserts that Dr. Millheiser cannot serve as the second opinion physician as he had "already seen [appellant] on a different case." The Board notes that he did not submit proof of this contention. Additionally, although impartial medical examiners may not have a previous association with a claimant's case, this restriction does not apply to second opinion examiners.[10]

[9] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[10] The Board has held that OWCP must assure that the person designated as the referee medical examiner has no prior association or affiliation with any other physician who has examined the claimant or provided an opinion on the claim. To hold otherwise would undermine the impartiality sought under 5 U.S.C. § 8123(a). *Susan Fleming*,Docket No. 02-1887 (issued February 3, 2003); *Daniel A. Davis*, 39 ECAB 151 (1987).

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.[11] 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.[12] The fact that a condition's etiology is unknown or obscures neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of OWCP to disprove an employment relationship.[13]

ANALYSIS -- ISSUE 2

Following the August 29, 2012 decision terminating appellant's wage-loss and medical compensation benefits, he submitted medical reports from Dr. Bishai dated from August 30, 2012 to January 15, 2013. Dr. Bishai contended that Dr. Millheiser wrongly failed to diagnose a left medial meniscus tear. He opined that appellant needed repeat arthroscopy to address the tear and chronic instability. Dr. Berenguer, an attending family practitioner, diagnosed internal derangement of the left knee and chondromalacia of the patella in reports from August 29, 2012 to January 9, 2013. However, neither physician provided medical rationale explaining how the accepted July 6, 2011 left knee injuries would continue to disable appellant on and after August 29, 2012. In the absence of such rationale, the opinions of Dr. Bishai and Dr. Berenguer are insufficient to meet appellant's burden of proof.[14] Also, Dr. Bishai attributed appellant's disability, in part, to chondromalacia of the patella and chronic instability, while Dr. Berenguer diagnosed internal derangement of the left knee. OWCP did not accept these conditions as work related.[15]

The Board finds that OWCP properly found that appellant did not establish a continuing disability for work on and after August 29, 2012, based on Dr. Millheiser's opinion as impartial medical examiner. Dr. Millheiser provided a detailed report, based on a complete and factual medical history, explaining that there were no objective signs of the accepted injuries. Although Dr. Bishai supported continuing disability for work, he did not explain how and why the accepted left knee injuries would disable appellant on and after August 29, 2012. Therefore, OWCP correctly accorded Dr. Millheiser's opinion the weight of the medical evidence.[16]

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[11] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

[12] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[13] *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

[14] *Supra* note 12.

[15] *Id.*

[16] *Anna M. Delaney*, 53 ECAB 384 (2002).

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 and medical compensation benefits effective August 29, 2012 on the grounds that accepted left knee injuries had ceased without residuals. The Board further finds that appellant has not established that he remained disabled on and after August 29, 2012 due to sequelae of the accepted left knee injuries.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2013 is affirmed.

Issued: November 1, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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