

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

V.G., Appellant

and

**U.S. POSTAL SERVICE, HOMECREST
STATION, Brooklyn, NY, Employer**

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**Docket No. 13-1462
Issued: November 26, 2013**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 11, 2013 appellant, through his attorney, filed a timely appeal from a December 18, 2012 merit decision of the Office of Workers' Compensation Programs denying his claim for disability compensation. 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 was totally disabled commencing January 1, 2011 due to his January 26, 2004 employment injury.

On appeal, counsel contends that the medical reports of an OWCP referral physician and attending physician support appellant's continuing employment-related total disability. He further contends that the medical evidence of record establishes that appellant's claim should be accepted for degenerative arthritis of the left knee.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 26, 2004 appellant, then a 49-year-old letter carrier, sustained a patellar tendon tear of the left knee when he slipped on stairs covered with snow. It authorized surgery for an open reduction internal fixation of the left patellar which was performed on the date of injury. Appellant did not return to work following surgery.

On January 17, 2012 appellant filed an election form opting to receive compensation benefits under FECA effective January 1, 2011 in lieu of retirement benefits from the Office of Personnel Management (OPM).²

By letter dated April 25, 2012, OWCP acknowledged receipt of appellant's election form and advised him that it could not process his request for FECA compensation benefits. It explained that the last medical evidence of record was from 2005, which was insufficient to support his claimed continuing employment-related disability. OWCP informed appellant that he would be scheduled for a second opinion medical examination.

By letter dated May 16, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Leon Sultan, a Board-certified orthopedic surgeon.

In a May 12, 2012 report, Dr. Daniel W. Wilen, an attending Board-certified orthopedic surgeon, reviewed a history of the January 26, 2004 employment injury and appellant's medical treatment, social and family background. On physical examination of the left knee, he found a healed quadriceps tendon repair and continued restricted range of motion. The quadriceps and hamstrings had reduced muscle strength. There was crepitus on range of motion throughout the left knee joint, parapatellar swelling and effusion. An x-ray of the left knee showed significant development of degenerative arthritis. Dr. Wilen advised that the left knee had continued weakness. He opined that significant degenerative arthritis had developed in the left knee as a result of the January 26, 2004 employment injury. Dr. Wilen concluded that appellant remained totally disabled from his postal job.

In a May 21, 2012 report, received by OWCP on May 18, 2012, Dr. Sultan obtained a history of the January 26, 2004 employment injury and appellant's medical treatment. He reported that appellant ambulated without his cane and demonstrated mild nonantalgic favoring of the left lower extremity. On physical examination of the left knee, Dr. Sultan found a well-healed longitudinal six-inch scar over the anterior patella region. There was mild swelling which measured an 18-inch circumference compared to a 17-inch circumference on the right side. Both distal thighs measured 18½ inches in circumference. There was some swelling of the left calf which measured 16½ inches in circumference compared to 15½ inches in circumference on the right side. The left calf was subtle and a Homan's test was negative. Range of motion testing of the right and left knee revealed normal extension and diminished flexion. Collateral and cruciate ligaments were stressed intact bilaterally. Sensory testing of the left lower extremity was intact. There was a small well-healed pigmented abrasion mark over the posterior ankle region. Dr. Sultan advised that appellant was status post rupture of the left patella tendon followed by a

² In an undated letter, appellant stated that on May 11, 2005 he retired on disability from the employing establishment.

patella tendon repair which left him with residual surgical scarring, swelling and partial ankylosis of the left knee. He presently suffered from an ongoing partial left knee disability secondary to the patella tendon tear. Dr. Sultan advised that appellant's left knee condition was not totally resolved. He had residual left knee swelling and left knee motion restriction with flexion. Appellant's condition was permanent. Dr. Sultan advised that appellant was prevented from resuming full unrestricted work activity as a letter carrier; but he could return to full-time light-duty activity with restrictions as a postal clerk performing window work activities. He concluded that appellant did not require any additional physical therapy, testing or surgery to treat his left knee condition.

In a June 6, 2012 report, Dr. Raymond Bartoli, a chiropractor, stated that he had treated appellant for severe arthritis in his lower back. Appellant also had severe left hip and knee pain as shown in an x-ray performed by Dr. Wilen on May 17, 2012. Dr. Bartoli advised that appellant was totally disabled and unable to perform his work duties.

In a July 17, 2012 decision, OWCP denied appellant's claim for wage-loss compensation commencing January 1, 2011. It found that Dr. Sultan's opinion represented the weight of the medical evidence and established that appellant was not totally disabled due to his accepted injury. OWCP further found that Dr. Wilen's report failed to address the cause of appellant's current left knee conditions, including degenerative arthritis, and that the only diagnostic test report dated February 2, 2004 found no evidence of an additional left knee condition.

By letter dated September 28, 2012, appellant, through his attorney, requested reconsideration. Counsel contended that the reports of Dr. Sultan and Dr. Wilen established that appellant had continuing disability causally related to his accepted January 26, 2004 employment injury. He further contended that Dr. Wilen's report also established that appellant sustained degenerative arthritis as a consequence of his accepted injury.

In a decision dated December 18, 2012, OWCP reviewed the merits of appellant's claim and denied modification of the July 17, 2012 decision. It found that there was insufficient rationalized medical evidence of record to establish that appellant's degenerative arthritis of the left knee was causally related to his accepted work injury. OWCP further found that Dr. Wilen did not provide adequate rationale explaining why appellant's total disability resulted from his accepted employment injury.

LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of his or her claim, including that the medical condition for which compensation is claimed is causally related to the

employment injury.³ For wage-loss benefits the claimant must submit medical evidence showing that the condition claimed is disabling.⁴ The evidence submitted must be reliable, probative and substantial.⁵ Benefits are available only while the effects of a work-related condition continue.⁶ Compensation for wage loss due to disability is available for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁷ The employee is responsible for providing sufficient medical evidence to support payment of any compensation sought.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted that appellant sustained a patellar tendon tear of the left knee on January 26, 2004 while working as a letter carrier. He elected to receive FECA benefits effective January 1, 2011 in lieu of OPM retirement benefits. OWCP denied appellant's claim for wage-loss compensation on the grounds that the evidence was insufficient to establish that the claimed disability was due to his accepted left knee injury.

Dr. Wilen, an attending physician, examined appellant and found continued weakness and significant degenerative arthritis of the left knee and resultant disability caused by the January 26, 2004 employment injury. The Board notes that OWCP never accepted that appellant sustained left knee degenerative arthritis as a result of the January 26, 2004 work injury and there is insufficient medical evidence to support such a conclusion.⁹ Dr. Wilen did not provide sufficient medical rationale explaining how appellant's left knee conditions were a consequence of the accepted injury. The Board has held that opinions unsupported by rationale are of

³ 20 C.F.R. § 10.115(e) (2011); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

⁴ 20 C.F.R. § 10.115 (f).

⁵ *Id.* at § 10.115.

⁶ *Id.* at § 10.500(a).

⁷ *Id.*

⁸ *Id.* at § 10.501(a).

⁹ See *Alice J. Tysinger*, 51 ECAB 638 (2000) (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).

diminished probative value.¹⁰ Thus, the Board finds that Dr. Wilen's report is insufficient to establish appellant's claim.

Although Dr. Bartoli, a chiropractor, found that appellant was totally disabled and unable to perform his work duties, he is not considered a physician under FECA as he did not diagnose a spinal subluxation as demonstrated by x-ray to exist. Thus, his report is of no probative medical value.¹¹

OWCP sought a second opinion from Dr. Sultan as to whether appellant was totally disabled due to the accepted injury. Dr. Sultan examined appellant and noted residuals of the January 26, 2004 employment injury that prevented him from performing his regular letter carrier duties. He could perform sedentary light-duty work with certain restrictions. However, Dr. Sultan did not explain how appellant's continuing residuals and disability for work were causally related to the accepted work injury.¹² The Board finds, therefore, that his report requires clarification on this issue. Once OWCP undertook further development of the medical evidence by obtaining a second opinion, it had the responsibility to do so in a proper manner.¹³ Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁴ While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁵ The Board finds that the case will be remanded to OWCP to obtain a supplemental report from Dr. Sultan clarifying appellant's period of disability resulting from the January 26, 2004 employment injury. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for compensation.

On appeal, appellant's attorney contended that the medical reports of Drs. Sultan and Wilen support appellant's continuing employment-related total disability. As found, the case will be remanded to OWCP for further development of the medical evidence and issuance of a *de novo* decision on appellant's claim for compensation.

Counsel further contended on appeal that the medical evidence of record established that appellant's claim should be expanded to accept degenerative arthritis of the left knee. As found, Dr. Wilen did not provide a rationalized medical opinion explaining how the diagnosed left knee condition was caused by the accepted January 26, 2004 employment injury and resulted in total disability. Thus, his report is insufficient to establish appellant's claim.

¹⁰ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹¹ A chiropractor is not considered a physician under FECA unless their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary. 5 U.S.C. § 8102(2); see *Sean O'Connell*, 56 ECAB 195 (2004); *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹² See *supra* note 10.

¹³ *Peter C. Belkind*, 56 ECAB 580 (2005); *Melvin James*, 55 ECAB 406 (2004).

¹⁴ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁵ *Richard E. Simpson*, 55 ECAB 490 (2004).

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant has established that he was totally disabled commencing January 1, 2011 due to his January 26, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision.

Issued: November 26, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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