

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

D.T., Appellant)	
)	
and)	Docket No. 14-1239
)	Issued: December 9, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Wheaton, MD, Employer)	
)	

Appearances:
Richard Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 5, 2014 appellant, through her representative, filed a timely appeal from a November 26, 2013 merit decision and January 29 and March 26, 2014 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether OWCP properly terminated compensation for wage-loss and medical benefits effective May 5, 2013; and (2) whether OWCP properly denied merit review of the claim.

FACTUAL HISTORY

On August 25, 2011 appellant, then a 47-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right leg and knee injury in the performance of duty

¹ 5 U.S.C. § 8101 *et seq.*

on August 18, 2011. She reported stepping in a groove between the sidewalk and grass, while on her route. OWCP accepted the claim for a right knee medial meniscus tear, bilateral knee sprains and a right leg sprain. By report dated January 10, 2012, Dr. Matthew Menet, a Board-certified orthopedic surgeon, indicated that appellant underwent a right knee partial meniscectomy surgery. Appellant began receiving compensation for total disability.

In a report dated December 7, 2012, Dr. Menet provided results on examination and noted that appellant had been receiving treatment for her lumbar spine. By report dated December 20, 2012, Dr. Rommann Ahmad, an osteopath, provided results on examination and diagnosed chronic pain syndrome and lumbar radiculopathy.

OWCP prepared a statement of accepted facts (SOAF) and referred appellant to Dr. Robert Smith, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Smith was asked to determine the diagnoses, whether a diagnosed condition was causally related to the work injury or employment factors, and was specifically asked whether lumbar strain or radiculopathy was casually related to employment factors. He was also asked to describe periods of total disability due to a work condition, when did total disability cease, and to describe any physical limitations resulting from a work-related disability.

In a report dated January 31, 2013, Dr. Smith provided a history and results on examination. He stated that appellant had sustained “a simple meniscal tear that was dealt with arthroscopically on the right side and a sprain of the left knee that was treated conservatively and objectively has resolved, at this point.” Dr. Smith opined that, as to the accepted conditions, appellant had reached maximum medical improvement with no residual findings from an objective standpoint. With respect to a diagnosis of lumbar strain and lumbar radiculopathy, Dr. Smith opined that these conditions were “not causally connected to this accident, based on the initial record. In any event, there are no clinical findings, at this time, of ongoing radiculopathy in the lower extremities.” He further opined that appellant could return to regular duty and did not require any additional medical treatment.

By letter dated March 7, 2013, OWCP advised appellant that it proposed to terminate compensation for wage-loss and medical benefits based on the weight of the medical evidence. Appellant was advised to submit additional evidence within 30 days.

In a report dated April 2, 2013, Dr. Menet provided results on examination and diagnosed right medial meniscal tear status post partial meniscectomy, chondroplasty with lumbar disc syndrome and possible inflammatory arthropathy. He indicated that appellant would continue her current work status. Dr. Menet stated that after reviewing Dr. Smith’s report, “I cannot agree with [Dr. Smith’s] assessment due to [appellant’s] symptoms failing to respond appropriately to the knee surgery as well as [electromyogram] findings, I find objective proof her right lower extremity symptoms are suspicious for lumbar pathology and not primarily from meniscal tear.” He stated that since appellant continued to have symptoms, continuing treatment of the spine as well as rheumatologic work up was reasonable “secondary to her elevated [erythrocyte sedimentation rate].”

By decision dated April 22, 2013, OWCP terminated compensation for wage-loss and medical benefits finding that the weight of the medical evidence was represented by Dr. Smith.

Appellant requested a hearing before an OWCP hearing representative, which was held on September 12, 2013. In an undated report submitted on May 13, 2013, Dr. Ahmad provided a history and results on examination. He stated that appellant had stepped in a hole and her leg twisted. Dr. Ahmad first evaluated her on July 31, 2012, with complaints of bilateral knee pain, lumbar pain with right leg radiation, and weakness. He stated that appellant's lumbar pain "has come into question as it was not an initial complaint after her work injury," but lumbar pain was common "when patients have ligamentous or meniscal complaints in the knees, and posterior leg muscles and lumbar muscle becomes strained and damaged to compensate for weakened knee joints." Dr. Ahmad opined that her lumbar pain and radiculopathy was an indirect result of her injury on August 18, 2011. In a report dated June 25, 2013, he stated that he disagreed with "[independent medical examiner] findings. I do believe work injury has directly caused knee and back problems."

By decision dated November 26, 2013, the hearing representative affirmed the April 22, 2013 decision. The hearing representative found that the weight of the evidence was represented by Dr. Smith.

In a letter dated December 30, 2013, appellant, through her representative, requested reconsideration. She argued that a question posed to Dr. Smith was a leading question, as he was asked when the disability ceased, which suggested that the disability had ceased. According to appellant, Dr. Smith should not represent the weight of the medical evidence.

By decision dated January 29, 2014, OWCP denied the reconsideration request without merit review of the claim. In a letter dated March 13, 2014, appellant's representative inquired as to the status of the December 30, 2013 reconsideration request. By decision dated March 26, 2014, OWCP again denied the reconsideration request without merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.² The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. 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.³

ANALYSIS -- ISSUE 1

The accepted conditions in this case are limited to the knees and right leg. OWCP accepted a right medial meniscus tear and sprains of the right leg and both knees. The attending physicians, Dr. Menet and Dr. Ahmad, did not provide probative medical opinions that appellant continued to have an employment-related knee condition or right leg sprain. Dr. Menet stated in his April 2, 2013 report that appellant's right leg symptoms were "suspicious for lumbar pathology and not primarily from meniscal tear." In the report submitted on May 13, 2013,

² *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

³ *Furman G. Peake*, 41 ECAB 361 (1990).

Dr. Ahmad also referred to a lumbar condition and opined that it was a consequence of the knee injury. The lumbar condition is not an accepted condition, but, as to the accepted conditions, the attending physicians do not provide a probative medical report indicating a continuing disability or condition.

The second opinion physician, Dr. Smith, opined that the accepted knee and leg conditions had resolved. He noted the surgery and treatment and found no objective evidence of a continuing condition. The Board finds that the weight of the medical evidence is sufficient to meet OWCP's burden of proof to terminate compensation for the accepted conditions.⁴

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP."⁶ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁷

ANALYSIS -- ISSUE 2

In the December 30, 2013 application for reconsideration, appellant did not show that OWCP erroneously applied a specific point of law. She argued that OWCP had provided leading questions to Dr. Smith. This represented a new legal argument, but the Board finds that it lacked a reasonable color of validity. OWCP provided a number of open-ended questions for Dr. Smith, asking for diagnoses, physical limitations and an opinion on causal relationship with employment. After asking whether there was an employment-related lumbar condition, OWCP asked for an opinion as to a period of total disability for a work-related condition. In this context the follow-up question as to "when the total disability ceased" is not a leading question, but a request for the physician to clearly state, if there was a specific period of disability, when the disability would have ended. The Board finds no evidence that the questions posed to Dr. Smith were leading questions that suggested or implied a specific answer.⁸ Where the legal argument

⁴ On appeal, appellant briefly argued that the SOAF was silent as to appellant's claim for a consequential injury resulting from an altered gait. The purpose of an SOAF is to provide a proper frame of reference for the physician to evaluate the medical issues presented. *See D.S.*, Docket No. 10-1597 (issued March 22, 2011). The January 14, 2013 SOAF properly described the employment injury, the accepted conditions and the medical history. There is no evidence that the SOAF failed to provide an adequate factual background for an opinion on the issues presented.

⁵ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *See B.S.*, Docket No. 14-576 (issued May 22, 2014).

presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁹

Appellant did not submit new and relevant evidence with the application for reconsideration. The Board finds that she did not show that OWCP erroneously applied or interpreted a specific point of law, advance a valid legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered by OWCP. Since appellant did not meet a requirement of 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review of the claim.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate compensation effective May 5, 2013. The Board further finds that OWCP properly denied the application for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 26, 2013 is affirmed. The decisions dated March 26 and January 29, 2014 are affirmed.

Issued: December 9, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁹ See *Norman W. Hanson, supra* note 9.