

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

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**B.R., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, TINKER  
AIR FORCE BASE, OK, Employer**

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**Docket No. 13-1808  
Issued: February 4, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 29, 2013 appellant filed an appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated January 29 and June 19, 2013. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 met his burden of proof to establish that he had any employment-related disability due to the accepted right knee injury.

On appeal, appellant generally asserts that he is entitled to disability compensation.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> By decision dated January 6, 2000, the Board found that OWCP improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA.<sup>3</sup> Following the Board's remand, in a February 4, 2000 decision, OWCP found that he was entitled to wage-loss compensation for total disability beginning December 19, 1996. In a June 1, 2001 decision, it found that appellant had not established clear evidence of error regarding February 4, 2000 decision<sup>4</sup> and on January 17, 2006, the Board dismissed his appeal on the grounds that the record did not contain a final decision over which it had jurisdiction.<sup>5</sup> By decision dated August 7, 2007, the Board found that, in decisions dated April 6 and May 26, 2006, OWCP met its burden of proof to terminate his wage-loss compensation effective April 4, 2006 and that he did not meet his burden of proof to establish that he had any disability after April 4, 2006 causally related to his accepted conditions. The Board, however, found that, in its August 2, 2006 decision, OWCP improperly denied appellant's request for a merit review.<sup>6</sup> In a June 10, 2008 decision, the Board affirmed a September 19, 2007 OWCP merit decision, finding that he had not established disability on or after April 6, 2006 due to his accepted injury.<sup>7</sup> In a September 1, 2009 decision, the Board found that appellant did not establish disability after April 4, 2006 due to his May 19, 1988 employment injury and affirmed a November 5, 2008 merit decision of OWCP.<sup>8</sup> In a March 2, 2011 decision, the Board affirmed a December 18, 2009 OWCP decision that found that he had no continuing employment-related disability after April 4, 2006.<sup>9</sup> The law and facts of the previous Board decisions are incorporated herein by reference.

Subsequent to the Board's March 2, 2011 decision, on May 28, 2011 appellant submitted a recurrence claim in which he noted that he had a recurrence of disability and stopped work on March 7, 1989 and that his disability compensation was terminated in April 2006. He stated that

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<sup>2</sup> On August 12, 1986 appellant, an aircraft mechanic, injured his right knee and missed a brief period of work. On April 4, 1988 he sustained an employment-related internal derangement of the right knee. Appellant stopped work on September 27, 1988, returned briefly in 1989 and was placed on the periodic rolls. In 1991, he was granted a schedule award for 45 percent permanent impairment of the right leg. Appellant worked periodically in the private sector and in 1994 was referred for vocational rehabilitation and retrained as an auto mechanic technician. He underwent corrective surgery in 1988, 1989 and 1998. Appellant was involved in nonwork-related motor vehicle accidents in March 1990 and July 1995, in which he sustained right knee injuries. The job duties of the aircraft mechanic position are considered arduous with extensive walking, climbing, bending, stooping and crawling and lifting up to 74 pounds.

<sup>3</sup> Docket No. 98-336 (issued January 6, 2000).

<sup>4</sup> Appellant was seeking compensation from June 23, 1996, when a wage-earning capacity decision was put in place and the resumption of total disability compensation on December 19, 1996.

<sup>5</sup> Docket No. 05-1385 (issued January 17, 2006).

<sup>6</sup> Docket No. 06-2100 (issued August 7, 2007).

<sup>7</sup> Docket No. 08-252 (issued June 10, 2008).

<sup>8</sup> Docket No. 09-330 (issued September 1, 2009).

<sup>9</sup> Docket No. 10-1728 (issued March 2, 2011).

he had continuing problems with his right knee and was claiming time loss from work. The employing establishment indicated that appellant had retired in 1991.

In a September 18, 2011 decision, OWCP denied the recurrence claim. Appellant thereafter requested reconsideration on several occasions and in merit decisions dated January 29 and June 19, 2013, OWCP denied modification of the September 18, 2011 decision.<sup>10</sup>

The medical evidence submitted subsequent to the December 18, 2009 OWCP merit decision, affirmed by the Board on March 2, 2011, includes reports dated June 22, 2010 to May 26, 2011 in which Dr. Nurulhusein Nurbhai, a Board-certified osteopath specializing in orthopedic surgery, noted a history of a 1988 knee injury and appellant's complaint of right knee pain. Dr. Nurbhai provided physical examination findings and diagnosed right knee osteoarthritis and right knee pain. A June 24, 2010 magnetic resonance imaging (MRI) scan of the right knee revealed an oblique tear in the body of the medial meniscus. Right knee x-rays on June 24 and July 6, 2010 demonstrated degenerative and postsurgical changes and joint space narrowing.

On May 5, 2011 Dr. Nurbhai advised that appellant had chronic symptoms on the right side of the knee from a prior injury and recent onset of mechanical symptoms on the medial side of the knee that could be associated with a medial meniscus tear. He recommended arthroscopic surgery and advised that appellant could work with physical restrictions.

In September 2011, appellant came under the care of Dr. Andrew K. Lee, a Board-certified orthopedic surgeon. In reports dated November 10, 2011 to April 23, 2012, Dr. Lee provided physical examination findings and diagnosed post-traumatic degenerative joint disease. He indicated that appellant was not yet a good candidate for a total knee arthroplasty but that the mechanical symptoms could benefit from arthroscopic treatment. Dr. Lee advised that appellant could not work pending additional treatment and requested authorization for right knee arthroscopic surgery.

On April 26, 2012 OWCP advised that right knee arthroscopy was authorized. On May 23, 2012 Dr. Lee performed arthroscopic partial medial meniscectomy, synovectomy and chondroplasty of the right knee. In a report dated June 18, 2012, Dr. Ronald Blum, an OWCP medical adviser, noted his review of the record with regard to whether a total knee arthroplasty should be authorized. He advised that OWCP should obtain a recent clinical note from the treating surgeon containing his clinical findings, descriptions of conservative treatment, interpretations of recent imaging studies, recommendations for surgical treatment and the rationale for that recommendation.

On July 26 and October 19, 2012 Dr. Lee provided follow-up care and continued to advise that appellant could not work. He recommended a functional capacity evaluation that was done by Dr. Rogelio G. Rodriguez, a chiropractor, on November 12, 2012, who indicated that appellant could perform work at a light physical demand level. On January 7, 2013 Dr. Lee

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<sup>10</sup> In an August 7, 2012 decision, an OWCP hearing representative noted that appellant had requested a hearing from a May 18, 2012 decision but that the record did not contain such decision.

advised that appellant could return to modified duty. In reports dated February 4 and March 4, 2013, he indicated that appellant was improving and could work with physical restrictions.

### **LEGAL PRECEDENT**

Under FECA, the term “disability” is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>11</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.<sup>12</sup> The test of “disability” under FECA is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.<sup>13</sup> Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>14</sup>

Section 10.5(x) of OWCP regulations provide in part that 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>15</sup>

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>16</sup> Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>17</sup>

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<sup>11</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>12</sup> *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

<sup>13</sup> *Corlisia Sims*, 46 ECAB 963 (1995).

<sup>14</sup> *Tammy L. Medley*, 55 ECAB 182 (2003).

<sup>15</sup> 20 C.F.R. § 10.5(x) (2011).

<sup>16</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>17</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

## ANALYSIS

The Board finds that appellant failed to establish that he had work-related disability after April 4, 2006, the date his wage-loss compensation was terminated by OWCP. The termination was affirmed by the Board on in its August 7, 2007 decision.<sup>18</sup>

The medical evidence relevant to the period following April 4, 2006 that has not previously been reviewed by the Board includes reports from Dr. Nurbhai who advised on May 5, 2011 that appellant had chronic symptoms on the right side of the knee from a prior injury and recent onset of mechanical symptoms on the medial side of the knee that could be associated with a medial meniscus tear.<sup>19</sup> Dr. Nurbhai also indicated that appellant could work with restrictions. He, however, did not discuss a cause of the recent onset of appellant's right knee problems or provide any explanation that a diagnosed condition was caused by the employment injuries.

Dr. Lee began treating appellant in September 2011 and performed right knee surgery. He diagnosed post-traumatic degenerative joint disease and was consistent in his opinion that appellant could not work pending surgery. After the May 23, 2012 surgery, Dr. Lee continued to advise that appellant could not work. However, he too did not discuss a cause of appellant's diagnosed knee condition or appellant's surgical findings. Moreover, neither Dr. Nurbhai nor Dr. Lee indicated knowledge that appellant was involved in motor vehicle accidents in 1990 and 1995, in which his right knee was injured and he has not worked at the employing establishment since 1989.<sup>20</sup> The reports of Dr. Nurbhai and Dr. Lee are therefore insufficient to establish that appellant was totally disabled due to his employment-related right knee condition for any period after his wage-loss compensation was terminated on April 4, 2006.<sup>21</sup>

As noted above, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence<sup>22</sup> and in this case appellant submitted insufficient evidence to establish that he was disabled due to the accepted conditions of right knee strain, internal right knee derangement and right knee chondromalacia patellae caused by employment injuries.

Lastly, the Board notes that the fact that OWCP previously authorized the May 23, 2012 right knee surgery does not establish that the condition for which appellant received treatment was employment related.<sup>23</sup>

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<sup>18</sup> *Supra* note 6.

<sup>19</sup> A June 24, 2010 MRI scan study of the right knee had revealed an oblique tear in the body of the medial meniscus.

<sup>20</sup> *Supra* note 2.

<sup>21</sup> *Tammy L. Medley, supra* note 14.

<sup>22</sup> *Id.*

<sup>23</sup> *See Dale E. Jones*, 48 ECAB 648 (1997); *James F. Aue*, 25 ECAB 151 (1974).

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.<sup>24</sup>

**CONCLUSION**

The Board finds that appellant did not establish that he continued to be disabled after April 4, 2006 due to his employment-related right knee injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 19 and January 29, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2014  
Washington, DC

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

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

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

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<sup>24</sup> The Board notes that appellant submitted evidence with his appeal to the Board. The Board, however, cannot consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501(2)(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).