

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 13-1443
Issued: May 22, 2014**

Appearances:
Aaron B. Aumiller, 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 June 4, 2013 appellant, through her attorney, filed a timely appeal from a December 6, 2012 merit decision 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 appellant has established continuing disability caused by residuals of her accepted left knee medial meniscus tear condition following the termination of compensation benefits on January 23, 2012; and (2) whether she met her burden of proof to establish that she is entitled to retroactive compensation for wage loss as of September 8, 2012 and continuing due to her accepted osteoarthritis condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 43-year-old letter carrier, injured her left knee in the performance of duty on February 8, 2010. OWCP accepted left knee medial meniscus tear and authorized left knee arthroscopy on August 9, 2010. Appellant stopped work on the date of injury and did not return. She had sustained a previous work-related injury on January 26, 2004, which OWCP had accepted for left ankle, left knee and thoracic spine sprains.

On August 9, 2010 Dr. Michael Cunningham, a specialist in sports medicine, performed the left knee arthroscopy with partial medial and lateral meniscectomy and chondroplasty. He provided numerous progress reports and treatment notes indicating that appellant was continuing to have left knee symptoms and that she remained off work. Appellant also underwent physical therapy for her left knee on numerous occasions.

In a June 7, 2011 report, Dr. Cunningham asserted that appellant continued to experience symptoms of left and right knee pain and that she remained out of work. He advised that on examination she had limited range of motion on extremes, with tenderness over the medial joint line and distal iliotibial band areas.

In order to determine appellant's current condition, OWCP referred her to Dr. Kenneth Heist, an osteopath. In a June 28, 2011 report, Dr. Heist reviewed the statement of accepted facts and the medical history and stated findings on examination. He advised that appellant utilized a knee brace for stability because she felt her kneecap sliding in and out and had complaints of occasional locking of her left knee. Dr. Heist related that she believed that her knee had improved due to her surgery. He diagnosed mild osteoarthritis of the left knee and opined that appellant's injuries were causally related to the work incident of February 8, 2010. Dr. Heist opined that she had reached maximum medical improvement with no need for additional orthopedic treatment or diagnostic testing. He stated that appellant's condition had resolved with surgical intervention and that she was capable of returning to work with no restrictions.

In a June 28, 2011 work capacity evaluation form, Dr. Heist indicated that appellant was capable of performing her usual job without restrictions and had reached maximum medical improvement.

On July 27, 2011 OWCP issued a notice of proposed termination of compensation. It found that the weight of the medical evidence, as represented by Dr. Heist's referral opinion, established that appellant's accepted left knee medial meniscus tear condition had ceased and that she had no work-related residuals stemming from this condition.

In a Form CA-20 dated August 8, 2011, Dr. Cunningham diagnosed status post left knee arthroscopy/chondroplasty and ruled out a right knee medial meniscus tear. He checked a box indicating that he had not advised appellant that she could return to work.

By decision dated September 8, 2011, OWCP terminated appellant's wage-loss compensation, finding that Dr. Heist's referral opinion represented the weight of the medical evidence.

On September 21, 2011 appellant, through her representative, requested an oral hearing, which was held on January 10, 2012. Counsel argued that Dr. Heist's report should not be afforded the weight of the medical evidence as it was based on an inaccurate history. Appellant testified that she was taking multiple medications and counsel noted that Dr. Heist indicated that she was taking no medications. She also testified that she needed to use a brace and a cane. Appellant claimed that she could not walk without the cane and she used the brace and cane every day. Counsel stated that Dr. Heist diagnosed mild osteoarthritis in the left knee which he indicated was causally related to the February 8, 2010 work incident; he, however, released appellant to return to all work activities.

By decision dated March 30, 2012, an OWCP hearing representative affirmed the September 8, 2011 termination decision, finding that Dr. Heist's referral report was sufficient to establish that the accepted condition of torn left medial meniscus had resolved without residuals. She found, however, that his report was sufficient to require further development by the district Office as to whether the diagnosed condition of mild left knee osteoarthritis was causally related to the accepted February 2010 employment incident and whether appellant required continued treatment and/or medications for that condition. The hearing representative noted that OWCP had continued to authorize continuing medical treatment despite its decision terminating compensation based on the February 8, 2010 employment injury. She directed the district Office on remand to refer the statement of accepted facts back to Dr. Heist and to provide a supplemental report as to whether there was a causal relationship between the diagnosed mild left knee osteoarthritis and the February 8, 2010 work injury.

In a May 23, 2012 report, Dr. Heist stated that, after appellant injured her left knee on February 8, 2010, she underwent x-rays which documented osteoarthritis. He advised that, as this was a progressive condition, her osteoarthritis preexisted the February 2010 work injury. Dr. Heist opined that the preexisting condition of osteoarthritis was accelerated by the accepted condition of torn left medial meniscus. He stated that the osteoarthritis was an employment-related injury and that the February 2010 work injury hastened the development of an underlying condition.

On July 31, 2012 OWCP accepted the condition of acceleration of mild osteoarthritis of the left knee.

By letter dated September 10, 2012, counsel requested reconsideration. He contended that appellant was entitled to retroactive wage-loss compensation due to the newly accepted condition of aggravation of left osteoarthritis.

By decision dated December 6, 2012, OWCP denied modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² Following a

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

proper termination of compensation benefits, the burden of proof shifts back to claimant to establish continuing employment-related disability.³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she had continuing disability causally related to the accepted injury. In his June 28, 2011 report, Dr. Heist found that appellant's August 9, 2010 left knee arthroscopy/menisectomy had improved the condition of her work-related left knee medial meniscal tear. He asserted that the injuries she sustained due to the February 8, 2010 employment injury had resolved with surgical intervention and that she was capable of returning to work with no restrictions. In the June 28, 2011 form report, Dr. Heist advised that appellant was capable of performing her usual job without restrictions and had reached maximum medical improvement. OWCP relied on his opinion in its September 8, 2011 termination decision, finding that appellant had no continuing disability or impairment causally related to her accepted left knee medial meniscus tear condition. By decision dated March 30, 2012, an OWCP hearing representative affirmed the September 8, 2011 termination decision, finding that Dr. Heist's referral report was sufficient to establish that the accepted condition of torn left medial meniscus had resolved without residuals. In his May 23, 2012 supplemental report, Dr. Heist stated that appellant also had a left knee osteoarthritis condition which preexisted the February 2010 work injury; this condition was accelerated by the accepted condition of torn left medial meniscus and was causally related to the February 2010 work injury. He did not state, however, that she continued to have residuals from this condition; nor did he revise or amend his previously stated opinion that the injuries she sustained due to the February 8, 2010 employment injury had resolved with surgery, that she was capable of returning to work with no restrictions and that she had reached maximum medical improvement.

The Board finds that Dr. Heist's referral opinion establishes that appellant no longer has any residuals from her accepted torn left medial meniscus condition and the accepted February 8, 2010 work injury. Dr. Heist's opinion is sufficiently probative, rationalized and based upon a proper factual background. Appellant has submitted no other medical evidence sufficient to establish disability due to the accepted conditions. The Board therefore finds that his opinion constituted the weight of medical opinion and supports OWCP's March 30 and December 6, 2012 decisions denying any entitlement to continuing compensation based on her accepted torn left medial meniscus condition and accepted February 8, 2010 employment injury.

LEGAL PRECEDENT -- ISSUE 2

It is the employee's burden of proof to establish disability during the period of time for which wage-loss compensation is claimed. The term "disability" is defined by implementing regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."⁴ The Board has long held that

³ *John F. Glynn*, 53 ECAB 562 (2002).

⁴ 20 C.F.R. § 10.5(f).

whether a particular injury causes an employee disability for employment is a medical question which must be resolved by competent medical evidence.⁵

ANALYSIS -- ISSUE 2

On appeal, counsel notes that Dr. Heist found in his report that, in addition to a torn left medial meniscus, appellant had a left knee osteoarthritis condition causally related to the February 8, 2010 work injury. He contends that the report cannot represent the weight of the medical evidence because Dr. Heist did not opine whether appellant had any work restrictions and continuing disability attributable to her osteoarthritis condition, which was subsequently accepted by OWCP. Counsel argues that any contribution from work factors renders the accepted condition and resulting disability compensable. He asserts that the case should be remanded for further development of the medical evidence to determine whether appellant had any disability resulting from the left knee osteoarthritis condition.

The Board does not accept counsel's contentions. In his June 28, 2011 report, Dr. Heist noted appellant's secondary diagnosis of mild osteoarthritis; however, he also stated that her condition had significantly improved as a result of her August 2010 arthroscopic surgery and found that she had reached maximum medical improvement with no need for additional orthopedic treatment or diagnostic testing. He completed a duty status report on June 28, 2011 in which he related that she could return to her full-duty employment with no restrictions. In his supplemental May 23, 2012 report, Dr. Heist opined that appellant's preexisting left knee osteoarthritis condition was accelerated by the accepted condition of torn left medial meniscus and indicated that it was causally related to the February 2010 work injury. He did not indicate, however, that she had sustained any periods of disability or had any current residuals stemming from the left knee osteoarthritis condition.

As noted above, to establish entitlement to compensation, an employee must establish through competent medical evidence that disability from work resulted from the employment injury.⁶ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.⁷ Appellant has the burden to demonstrate her disability for work based on rationalized medical opinion evidence. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.⁸ There is no such evidence in this case.

⁵ See *Donald E. Ewals*, 51 ECAB 428 (2000).

⁶ *Id.*

⁷ *Paul E. Thams*, 56 ECAB 503 (2005).

⁸ *Howard A. Williams*, 45 ECAB 853 (1994).

Appellant did not submit any medical report with any opinion or supporting medical rationale regarding her disability status as of September 8, 2011. In a Form CA-20 dated August 8, 2011, Dr. Cunningham diagnosed status post left knee arthroscopy/chondroplasty. He indicated by check mark that appellant had been advised not to return to work. Dr. Cunningham did not provide any discussion as to why the diagnosed condition would be disabling.⁹ Further the Board notes that he did not provide an opinion that appellant had any disability as of September 8, 2011 and continuing.¹⁰

In addition, the Board notes that appellant submitted several reports from a physical therapist. These reports, however, do not constitute medical evidence under section 8101(2). Because healthcare providers such as nurses, acupuncturists, physicians assistants and physical therapists are not considered “physicians” under FECA, their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability or causal relationship.¹¹ Appellant has thus failed to submit such evidence which would indicate that her left knee osteoarthritis condition caused any wage loss for any periods. Because she has not provided a rationalized opinion supporting her disability for work for the period in question, OWCP properly denied her claim for retroactive wage-loss compensation.

CONCLUSION

The Board finds that appellant has not met her burden to establish continuing disability due to her left knee medial meniscus tear. The Board also finds that she has not met her burden to establish that she was entitled to retroactive compensation for wage loss as of September 8, 2011 and continuing due to her accepted osteoarthritis of the left knee.

⁹ See *Phyllis Johnson-Jarvis*, Docket No. 04-1839 (issued January 27, 2005).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8101(2); see also *G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.¹²

Issued: May 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹² Richard J. Daschbach, Chief Judge, who participated in the preparation of the opinion, was no longer a member of the Board after May 16, 2014.