

FACTUAL HISTORY

On December 26, 2002 appellant, then a 44-year-old custodian, filed a traumatic injury claim alleging that he injured his lower back and right knee at work on January 19, 2002. He stopped work on December 26, 2002 and did not return. The claim was initially accepted for lumbar strain/sprain and expanded to include right knee strain, lumbar disc herniations at L3-4 and L4-5 and chondromalacia patella of the right knee. Appellant received continuation of pay and compensation and was placed on the periodic compensation rolls. He retired from the employing establishment effective September 10, 2003.²

On February 22, 2007 Dr. Bruce T. Cohn, an attending Board-certified orthopedic surgeon, performed arthroscopic partial right knee medial meniscectomy. In a January 2, 2008 report, Dr. Sheldon Kaffen, a Board-certified orthopedist, who performed a second-opinion evaluation for OWCP, indicated that there were no objective findings to indicate that appellant continued to suffer from the accepted lumbar and right knee strains or right knee chondromalacia but that he continued to have residuals of the accepted disc herniations at L3-4 and L4-5. He opined that appellant could perform sedentary work for eight hours a day. Appellant was referred to vocational rehabilitation in March 2008.

In a September 25, 2008 report, Dr. Nicholas U. Ahn, an attending Board-certified orthopedic surgeon, advised that appellant's last magnetic resonance imaging (MRI) scan demonstrated only mild degenerative changes at L3-4 and L4-5 without significant neural compression or stenosis. He indicated that appellant's symptoms were mechanical rather than neurogenic in nature and, due to this and his MRI scan findings, he was reluctant to recommend surgery. Dr. Ahn referred appellant for epidural injections.

In March 2009, OWCP referred appellant to Dr. Karl V. Metz, Board-certified in orthopedic surgery, for a second-opinion evaluation. In a July 31, 2009 report, he noted inconsistencies on examination of appellant's lumbar spine and advised that he had reached maximum medical improvement regarding the accepted lumbar strain and herniated discs and with regard to the right knee strain. Dr. Metz opined that appellant continued to have residuals with regard to chondromalacia patella and that maximum medical improvement was reached on approximately September 22, 2007. He concluded that appellant was capable of sedentary employment and recommended a functional capacity evaluation.³

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Cohn and Dr. Metz regarding appellant's continuing work-related disability and referred him to Dr. Mark S. Berkowitz, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In an October 5, 2010 report, Dr. Berkowitz advised that the lumbar strain

² In a January 7, 2004 decision, OWCP determined that appellant was not entitled to wage-loss compensation as of the date of his retirement. By decision dated August 13, 2004, an OWCP hearing representative vacated the January 7, 2004 decision on the grounds that OWCP's reason for denying compensation was invalid. Appellant was returned to the periodic compensation rolls.

³ Because appellant did not attend an initially scheduled appointment with Dr. Metz, his wage-loss compensation was suspended effective June 12, 2009. Following the July 31, 2009 examination, appellant's benefits were reinstated.

had reached maximum medical improvement but that appellant still had significant symptoms due to the herniated discs at L3-4 and L4-5 and continued to need treatment. He also indicated that the right knee sprain had reached maximum medical improvement but that the right knee chondromalacia had not, noting that on July 15, 2010 appellant had a total knee replacement (TKR) on the right. Dr. Metz opined that appellant could not perform the duties of the date-of-injury position, could not participate in vocational rehabilitation because he was still rehabilitating from the TKR and was totally disabled from all work.

A February 11, 2011 MRI scan study of the lumbar spine demonstrated degenerative disc and facet disease with disc protrusions at L1-2 and L5-S1.

In December 2012, OWCP referred appellant to Dr. Manhal A. Ghanma, a Board-certified orthopedist, for a second-opinion evaluation. In a December 20, 2012 report, Dr. Ghanma noted his review of the statement of accepted facts and medical record and appellant's report of the December 19, 2002 employment injury and complaint of back pain. Examination of the lumbosacral spine revealed no spinal listing or abnormal curvature and no lumbar spasm. He indicated that appellant presented using a cane and was unable to perform toe and heel standing and walking. Dr. Ghanma advised that there was no current evidence to support that appellant still had a lumbar sprain/strain, which had resolved and did not have objective findings needed to support lumbar disc herniation at L3-4 or L4-5, which were the same as they would have been independent of the work injury. He further indicated that there was no current evidence to support a right knee sprain or examination finding of chondromalacia since appellant had undergone a right TKR. Dr. Ghanma opined that the work-related conditions were no longer present or active and diagnosed status post right TKR for severe end-stage osteoarthritis and degenerative disc disease of the lumbar spine. He concluded that, based solely on the work-related conditions, appellant was able to return to the date-of-injury job but that he did require restrictions due to the TKR.

In a February 19, 2013 letter, OWCP proposed to terminate appellant's compensation and medical benefits on the grounds that the medical evidence, as characterized by Dr. Ghanma's report, established that appellant no longer had residuals or disability due to the accepted conditions. Appellant did not respond. By decision March 25, 2013, OWCP finalized the termination of wage-loss compensation and medical benefits, effective that day.

Appellant, through his attorney, timely requested a hearing. On March 28, 2013 appellant's elected civil service retirement benefits, effective March 26, 2013. In an April 3, 2013 report, Dr. Ulf Knothe, an orthopedic surgeon with the Cleveland Clinic,⁴ advised that appellant was two years post a right TKR. He indicated that appellant was doing very well with regard to the right knee but was now complaining of left knee osteoarthritis and that he would see appellant as needed. A June 17, 2013 MRI scan study of the lumbar spine demonstrated moderate lumbar spondylosis and an extrusion at L2-3 that affected the left L3 nerve root.

At the hearing, held on July 17, 2013, appellant testified that he received a 30 percent benefit from Veterans Affairs (VA) for his right knee and that the July 2010 TKR was paid by his private insurance. Appellant's attorney questioned whether the accepted chondromalacia was

⁴ Dr. Knothe is certified in Switzerland.

one of the reasons appellant had the TKR, noting that the medical evidence indicated that he continued to have restrictions as a result of the TKR procedure. The attorney also asserted that objective evidence on MRI scan studies indicated that the disc herniations continued.

Following the hearing, appellant submitted evidence including a medical scheduler's work lists, drug screenings and an appointment schedule. In correspondence dated August 12, 2013, the VA advised that appellant received a 30 percent disability rating for chondrosis and medial meniscal tear of the right knee.

Additional medical evidence included an operative report dated September 22, 2009 in which Dr. James S. Williams, a Board-certified orthopedic surgeon, performed arthroscopic removal of a loose osteochondral fragment and debridement of the right knee. In an August 19, 2009 report, Dr. Pasha Saaed, Board-certified in anesthesiology and pain management, noted that appellant was being seen at the Cleveland Clinic pain management center for evaluation of worsening low back, right buttock and right leg pain that began in 2002. He provided physical examination findings and diagnosed lumbosacral neuritis. Dr. Saaed recommended out-patient pain management and medication. He submitted additional reports dated November 6, 2009 to April 6, 2010 in which he described appellant's condition and pain management progress. Dr. Saaed performed epidural steroid injections with good relief.⁵

By decision dated September 23, 2013, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Ghanma who advised that appellant no longer had residuals of the December 2002 employment injury and affirmed the March 25, 2013 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS

OWCP accepted that appellant sustained employment-related lumbar and right knee strains, right knee chondromalacia patella and herniated discs at L3-4 and L4-5. Appellant, who did not return to work after December 26, 2002, was placed on the periodic compensation rolls.

⁵ Appellant also submitted a treatment note dated July 9, 2010 from the pain management center, completed by Michaelena Glavic, a registered nurse, and Barbara L. Pritchard, a physician's assistant, that described his pain management.

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ *Id.*

In December 2012, OWCP referred appellant to Dr. Ghanma, a Board-certified orthopedist, for a second-opinion evaluation. In a December 20, 2012 report, Dr. Ghanma provided physical examination findings. He indicated that there was no current evidence of a lumbar or right knee strain, that appellant did not have sufficient objective findings to support lumbar disc herniations at L3-4 or L4-5, which were the same as they would have been independent of the work injury and that, as appellant had a right TKR, chondromalacia patella was no longer present. Dr. Ghanma concluded that the work-related conditions were no longer active and that, while appellant had physical restrictions related to the TKR, he had no restrictions with regard to the accepted conditions. OWCP terminated appellant's compensation and medical benefits based on Dr. Ghanma's opinion.

While Dr. Ghanma opined that disc herniations at L3-4 and L4-5 were the same as they would have been without the work injury, the disc herniations at L3-4 and L4-5 have been accepted as employment related and acceptance of these conditions has not been rescinded. The report does not conform to the statement of accepted facts and does not support with adequate rationale the determination that residuals have ceased.⁸ Dr. Ghanma's opinion is insufficient to establish that appellant's disability had ceased. OWCP, therefore, did not meet its burden of proof to terminate appellant's compensation and medical benefits for the December 19, 2002 employment injury.⁹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits on March 25, 2013.

⁸ See *John L. Hofmann*, Docket No. 04-1802 (issued November 22, 2004).

⁹ The Board also notes that, if OWCP pursues further medical development, there is sufficient medical evidence of record, including Dr. Berkowitz' impartial evaluation on October 5, 2010 to require inquiry regarding whether the need for appellant's TKR procedure was a result of the accepted chondromalacia patella.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 28, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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