



## **FACTUAL HISTORY**

On January 14, 2011 appellant, then a 31-year-old city carrier, sustained injuries to his right shoulder, elbow and knee when he slipped and fell on icy stairs in the performance of duty. OWCP accepted his claim for sprain of the lateral collateral ligament of the right knee, sprain of the right shoulder, arm and acromioclavicular (AC) joint and sprain of the right elbow and forearm on March 7, 2011. It paid compensation by direct deposit commencing on April 8, 2011.

Appellant underwent a magnetic resonance imaging (MRI) scan of his right knee on March 21, 2011 which demonstrated a small horizontal tear of the posterior horn of the lateral meniscus. On June 22, 2011 OWCP accepted a sprain of the medial collateral ligament of the right knee and tear of the lateral meniscus of the right knee. It entered appellant on the periodic rolls on July 15, 2011. Dr. Richard Weinstein, a Board-certified orthopedic surgeon, performed a right knee partial lateral and medial meniscectomy on January 5, 2012. OWCP also accepted that appellant sustained a tear of his medial meniscus of his right knee.

Appellant sought treatment from Dr. David Brecka, a Board-certified orthopedic surgeon, on January 13, 2012 and Dr. Brian Patterson, a Board-certified orthopedic surgeon, on March 26, 2012. The physicians found that appellant had work restrictions and had not reached maximum medical improvement following his surgery. Dr. Patterson found a limited range of motion in appellant's right knee from 45 to 90 degrees of flexion and 0 degrees of extension as well as normal muscle testing and positive McMurray test both medial and lateral. He diagnosed knee pain and recommended a right shoulder arthrogram for a possible rotator cuff tear.

On May 15, 2012 OWCP referred appellant, a statement of accepted facts and a list of questions to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion examination. Appellant underwent a right shoulder arthrogram on May 21, 2012 which did not demonstrate evidence of rotator cuff tear.

In a report dated June 5, 2012, Dr. Black noted appellant's history of injury and his continued right knee, right shoulder and right elbow pain. He found that appellant had no swelling or effusion in his right knee. Appellant demonstrated 120 degrees of extension in his right knee as well as normal muscle strength and gait. Dr. Black stated that all tests of the right knee including McMurray's, Anterior Drawer, Posterior Drawer, Lachman's, Patellar Apprehension and Valgus stress tests were negative. He reviewed appellant's March 21, 2011 MRI scan and stated that the tear in the lateral meniscus was repaired in the January 5, 2012 surgery. Dr. Black examined appellant's upper extremities and found full range of motion and normal strength in appellant's right shoulder and elbow. He diagnosed right knee sprain, right shoulder sprain, right AC injury, right elbow and forearm sprain and tear of the right lateral or medial meniscus. Dr. Black stated that appellant had no objective findings on physical examination to support ongoing problems with his right knee, elbow or shoulder. He concluded that appellant's subjective complaints outweighed his objective findings as he had full range of motion. Dr. Black noted that appellant's right knee had healed with no ongoing evidence of clinical synovitis and that his right shoulder examination was benign. He diagnosed mild lateral epicondylitis of the right elbow. Dr. Black found that appellant had no work restrictions due to

his January 14, 2011 employment injury and that he had reached maximum medical improvement.

Appellant underwent an MRI scan of the right knee on June 27, 2012 which demonstrated anterior cruciate ligament sprain, patellar contusion, surface tear of the posterior horn of the lateral meniscus and potential patellar maltracking disorder. Dr. James M. Ray, a Board-certified orthopedic surgeon, examined appellant on October 11, 2012. He found that appellant reported a gradual onset of knee pain and moderate pain in the right shoulder. Dr. Ray submitted a form report on October 30, 2012 noting appellant's history of injury. He found that appellant was totally disabled and recommended additional diagnostic testing.

In a letter dated December 4, 2012, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Black's report. It allowed 30 days for him to respond.

Appellant underwent a right knee MRI scan on December 19, 2012 which demonstrated a tear of the posterior horn of the lateral meniscus extending to the inferior articular surface. On the same date Dr. Ray obtained an MRI scan of his right shoulder, which demonstrated degenerative changes of the AC joint with inferior AC joint spur exerting mass effect upon the supraspinatus. He completed a form report on December 27, 2012 and listed that appellant was totally disabled. Dr. Ray diagnosed right knee and right shoulder conditions.

By decision dated February 6, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date.

Appellant requested a review of the written record by an OWCP hearing representative on February 11, 2013.

In a report dated February 26, 2013, Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, noted appellant's history of injury. He listed appellant's symptoms of pain in his knee, right shoulder, lower back and right elbow. Dr. Bishai stated that appellant was totally disabled.

On April 23, 2013 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,437.45 from February 6 through April 6, 2013 following the termination of benefits. It found that he was at fault in the creation of the overpayment as he accepted a payment, which he knew or reasonably should have known was incorrect. Appellant received a compensation check on February 9, 2013 in the amount of \$358.18, two additional checks on March 9, 2013 for a total of \$2,523.01 and a final check on April 6, 2013 in the amount of \$2,556.26 for a total overpayment of \$5,437.45.

Appellant requested a prerecoumpment hearing on May 10, 2013. He requested waiver of recovery of the overpayment on the grounds that the overpayment was not his fault and would be a financial hardship to repay. Appellant completed an overpayment recovery questionnaire and advised that he had no monthly income and that he provided support for his two minor children. He listed monthly expenses of rent \$1,331.30; food \$500.00; clothing \$50.00; utilities \$675.00; and miscellaneous expenses of \$300.00. Appellant also had a monthly car payment of \$488.00 and monthly credit card debt of \$280.00 for total monthly expenses of \$3,724.30. He indicated that his only asset was a checking account balance of \$6.23. At the oral hearing on May 13,

2013, appellant testified that he returned to work on March 16, 2013 and reinjured his right knee, shoulder, elbow and lower back.

By decision dated June 20, 2013, OWCP's hearing representative affirmed the termination decision finding that there was little objective medical evidence from appellant's treating physicians to support ongoing injury-related disability and that Dr. Black's report was sufficiently well reasoned to meet OWCP's burden of proof to terminate wage-loss and medical benefits.

Appellant's representative appeared at the precoupment hearing on September 3, 2013. He stated that appellant had no income as he had stopped work and filed an additional claim for injury with OWCP, case file number xxxxxx552, which was accepted for injury on March 16, 2013. Appellant's representative stated that appellant received compensation under this claim.

Appellant received a third-party recovery of \$125,000.00 resulting in refund to OWCP of \$43,859.80, attorney's fees of \$41,662.50 and court costs of \$1,104.49. He recovered \$16,446.60 and \$21,926.61 for attorney's fees or \$38,373.21.

By decision dated November 21, 2013, OWCP's hearing representative found that appellant had received an overpayment of compensation in the amount of \$5,437.45. Appellant was at fault in the creation of the overpayment as he accepted three compensation checks after the February 6, 2013 termination. The hearing representative determined that because he was at fault in the creation of the overpayment he was not entitled to waiver of recovery. She found that appellant received compensation in the amount of \$2,890.98 every 28 days under case file number xxxxxx552. The listed expenses of \$3,132.30 per month including unexplained credit card debt of \$388.00. The hearing representative reduced appellant's expenses by this amount on the grounds that this expense was represented by other listed expenses. She found that his ongoing compensation benefits should be reduced by \$200.00 per check or \$216.17 per month (every 28 days) to recover the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> 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.<sup>3</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>5</sup> To terminate

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<sup>2</sup> 5 U.S.C. § 8102.

<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>4</sup> *Id.*

<sup>5</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

OWCP entered appellant on the periodic rolls on July 15, 2011 due to his accepted employment injuries of sprain of the lateral collateral ligament of the right knee, sprain of the right shoulder, arm and AC joint and sprain of the right elbow and forearm with a sprain of the medial collateral ligament of the right knee and tears of the medial and lateral meniscus of the right knee. Appellant underwent corrective surgery on January 5, 2012. Following his surgery, he sought treatment from Drs. Brcka and Patterson in January and March 2012 respectively. Both physicians found that appellant continued to have residuals and disability due to his employment injuries and surgery. Dr. Patterson reported loss of range of motion in the right knee as well as positive McMurray tests both medially and laterally.

OWCP referred appellant for a second opinion evaluation with Dr. Black. In his June 5, 2012 report, Dr. Black reported appellant's history of injury and noted complaint of right knee, right shoulder and right elbow pain. He found full range of motion and normal strength in appellant's right shoulder, elbow and knee. Dr. Black stated that all special tests including McMurray were negative. He determined that appellant's subjective complaints outweighed his objective findings. Dr. Black concluded that appellant had no work restrictions due to his January 14, 2011 employment injury and that he had reached maximum medical improvement with no residuals.

Following Dr. Black's report, appellant submitted additional diagnostic test results including an MRI scan of the right knee on June 27, 2012. The MRI scan demonstrated anterior cruciate ligament sprain, patellar contusion, surface tear of the posterior horn of the lateral meniscus and potential patellar maltracking disorder. Dr. Ray found that appellant was totally disabled and recommended additional diagnostic testing.

The Board finds that Dr. Black's report is not sufficiently well reasoned to represent the weight of the medical opinion evidence. Dr. Black opined that appellant's employment-related conditions had resolved and noted that the objective findings did not support his subjective symptoms, however, he did not review contemporaneous diagnostic tests in reaching his conclusions. He found that appellant's tests on examination were negative in contrast to Drs. Brcka and Patterson. Dr. Black based his conclusion that appellant's knee condition had resolved based on range of motion of only 120 degrees. The Board finds Dr. Black's report is not sufficient to meet OWCP's burden of proof to establish that appellant had no disability or ongoing medical residuals related to his accepted employment injury. The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective February 6, 2013. OWCP failed to meet its burden of proof to terminate appellant's compensation benefits. Therefore, fact of overpayment is not established in this case. The remaining issues are rendered moot.

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<sup>6</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits effective February 6, 2013 and that therefore there is no overpayment resulting from such a termination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 21, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 21, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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