

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

X.J., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISIONS, Atlanta, GA, Employer**

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**Docket No. 15-1776
Issued: December 10, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 24, 2015 appellant filed a timely appeal from May 18 and June 5, 2015 merit decisions of the Office of Workers' Compensation Programs (OWCP) and an August 14, 2015 nonmerit decision.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of the case.

¹ The Board notes that appellant submitted additional evidence after OWCP rendered its April 20, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 606(b)(2).

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation benefits effective May 19, 2015; and (2) whether OWCP properly denied his request to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 25, 2013 appellant, then a 44-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on June 21, 2013 he ruptured his right quadriceps tendon after he slipped and fell on stairs. He stopped work on June 21, 2013.

OWCP accepted appellant's claim for a rupture of the right quadriceps tendon. On July 16, 2013 Dr. Mathew W. Pombo, a Board-certified orthopedic surgeon, performed a repair of the right quadriceps tendon rupture. OWCP paid compensation benefits for total disability beginning August 25, 2013.³

On June 28, 2014 OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion examination as to appellant's work capacity.

On August 26, 2014 Dr. Doman reviewed the history of injury and the statement of accepted facts. He noted that appellant was "extremely strong preoperatively and states that he was squatting 500 pounds. He still feels relatively weak on the right leg compared to prior to his injury." On examination Dr. Doman found full flexion and extension of the right knee with no instability, and normal muscle and quadriceps strength. He determined that appellant had no objective findings of his accepted work injury. Dr. Doman related, "[He] does have excellent overall strength of the quadriceps muscle. He may not have reached his maximum preinjury strength, but his overall strength is excellent." Dr. Doman opined that appellant could return to his regular employment. In a work restriction evaluation dated August 26, 2014, he found that he had no work limitations.

In a report dated November 19, 2014, Dr. Pombo noted that appellant was one year and four months postsurgical repair of a right quadriceps tendon tear. He noted that appellant was undergoing physical therapy and also "running and jumping for exercise, but states it [is] irritating his back and knee." On examination Dr. Pombo found full right knee motion without swelling, a negative ligamentous examination, a negative McMurray's test, full strength, and mild patella tenderness. He noted that appellant complained of tenderness in the left knee. Dr. Pombo diagnosed bilateral knee pain and a right quadriceps tendon rupture. He noted that appellant had a separate claim for problems with his left lower back, hip, and left knee. Dr. Pombo reviewed the results of an October 6, 2014 functional capacity evaluation (FCE)

³ On October 28, 2014 appellant filed a separate occupational disease claim alleging that he sustained a consequential injury of the left leg. In a report dated August 18, 2014, Dr. Zouheir A. Shama, a surgeon, reviewed appellant's history of injury and noted that he was currently experiencing pain in his left leg and hip. He diagnosed a quadriceps tendon tear after surgical repair, a left leg sprain, sacroiliac sprain, and hip sprain. Dr. Shama found that appellant's left leg condition occurred as a consequence of overcompensating for his right leg injury.

finding that appellant could perform heavy work. In a work slip dated November 19, 2014, he determined that appellant could return to work without restrictions.

On January 30, 2015 OWCP proposed to terminate appellant's wage-loss compensation benefits as both Dr. Pombo and Dr. Doman found that he had no further limitations as a result of his accepted employment injury.

In an April 2, 2015 fitness-for-duty examination, Dr. Vincent E. Boswell, an orthopedic surgeon, found that appellant could perform all job functions without any restrictions or need for accommodation.

By decision dated May 18, 2015, OWCP terminated appellant's wage-loss compensation benefits based on the report of appellant's treating physician, Dr. Pombo which established no further employment-related disability. It noted that the second opinion physician also found him able to resume full duty.

On May 28, 2015 appellant requested reconsideration. He submitted a request to change attending physicians and resubmitted medical reports already of record. By decision dated June 5, 2015, OWCP denied modification of its May 18, 2015 decision. It noted that appellant's request to change physicians was a separate issue from the termination of his compensation.

On August 4, 2015 appellant requested reconsideration. In a statement dated August 3, 2015, he related that Dr. Pombo failed to properly evaluate him for his back pain and numbness of both legs. Dr. Bender performed a magnetic resonance imaging (MRI) scan study and determined the reason for his continued quadriceps weakness and pain in the lower back and bilateral knees.

A July 30, 2014 FCE, received by OWCP on June 16, 2015, indicated that appellant could perform all the duties of his position with the exception of restraining inmates. An October 6, 2014 FCE determined that he could resume his full employment without restrictions and could perform heavy work.

In a report dated June 12, 2015, Dr. Jay B. Bender, a Board-certified physiatrist, discussed appellant's June 21, 2013 work injury and surgery on his quadriceps tendon. He noted that he had persistent pain in his right knee, left hip, and lower back. Dr. Bender diagnosed a right quadriceps rupture and repair, low back strain, and right hip strain. He opined that appellant ruptured his quadriceps tendon when he fell at work on June 21, 2013.

On July 10, 2015 Dr. Bender indicated that he was evaluating appellant for a June 21, 2013 employment injury. On examination, he found reduced right knee flexion and extension with crepitus and tenderness to palpation and a loss of spinal motion. Dr. Bender asserted, "Due to my objective findings, and [appellant's] job duties, I have determined that [he] is totally incapacitated and unable to work at this time. He is unable to work with inmates due to his physical incapacity, especially if sudden motion or physical activity is required."

On July 17, 2015 Dr. Bender advised that an MRI scan revealed a herniated disc at L4-5 with a fragment at the L4 level more on the right.

By decision dated August 14, 2015, OWCP denied appellant's request for reconsideration after finding that he had failed to submit evidence or raise an argument sufficient to warrant reopening his case for further review of the merits of his termination decision under 5 U.S.C. § 8128(a).

On appeal appellant argues that he advised Dr. Pombo and Dr. Doman that he was unable to return to work due to low back pain, hip numbness, and bilateral weakness of the knees and legs. Dr. Bender diagnosed a herniated disc as a result of his June 21, 2013 injury. Appellant further contends that the therapist who performed the July and October 2014 FCE found that he could not work as a correctional officer and noted that he had pain and tightness in his knees, back, and hip. He further argues that the medical evidence supports his claim for consequential conditions but that OWCP denied his consequential injury claim.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ OWCP must furnish rationalized medical evidence based on a proper factual and medical background to support its termination of compensation.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a rupture of the right quadriceps tendon on June 21, 2013. On July 16, 2013 appellant underwent a repair of the right quadriceps tendon rupture. OWCP paid him compensation for total disability beginning August 25, 2013. Based on the opinions of Dr. Doman, an OWCP referral physician, and Dr. Pombo, his attending physician, OWCP terminated his wage-loss compensation effective May 19, 2015.

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits as the opinions of Dr. Doman and Dr. Pombo establish that he had no further disability due to his accepted employment injury. The August 26, 2015 report of Dr. Doman reflected an evaluation to determine whether appellant had any further disability due to his accepted right quadriceps tendon rupture. On examination, Dr. Doman found no loss of motion or instability of the right knee and normal quadriceps strength. He opined that appellant had exceptionally good strength and could resume his regular employment without limitations. Dr. Doman based his opinion on a complete factual and medical background and provided detailed findings on examination. Moreover, he reached medical conclusions regarding appellant's condition which comported with his findings.⁶ Dr. Doman explained that he had no further objective findings of the accepted condition of a right tear of the quadriceps tendon.

⁴ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001); 20 C.F.R. § 10.503.

⁵ *See Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁶ *M.R.*, Docket No. 14-1405 (issued December 22, 2015); *Pamela K. Guesford*, 53 ECAB 727 (2002).

Dr. Pombo's November 19, 2014 report diagnosed bilateral knee pain and a right quadriceps tendon rupture. On examination he found full range of motion and strength of the right knee with no swelling and mild patella tenderness. Dr. Pombo noted that an October 6, 2014 FCE indicated that appellant could perform heavy work. He determined that appellant could return to work without restrictions. As appellant's attending physician, Dr. Pombo had a thorough knowledge of appellant's condition, his opinion is probative on the issue of whether appellant had any further disability due to his accepted employment injury.⁷ The Board therefore finds that OWCP properly relied upon Dr. Pombo's opinion, as bolstered by the opinion of Dr. Doman, in terminating his wage-loss benefits.

Subsequent to the termination, appellant submitted a request to change attending physicians. As found by OWCP, this is a separate issue from the termination of his compensation benefits.

On appeal appellant relates that he complained of back pain and lower extremity weakness and numbness to Dr. Pombo and Dr. Doman. Dr. Bender found that a herniated disc caused his back and lower extremity problems. OWCP, however, did not accept appellant's claim for any condition other than a rupture of the right quadriceps tendon. The issue is whether he sustained any further disability due to his accepted condition of a right ruptured quadriceps tendon as of May 19, 2015.⁸

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁰ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the

⁷ See *M.D.*, Docket No. 14-1981 (issued June 24, 2015).

⁸ *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004) (where appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

⁹ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides 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."

¹⁰ 20 C.F.R. § 10.606(b)(3).

date of that decision.¹¹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹²

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.¹³ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁴ If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁵

ANALYSIS -- ISSUE 2

On August 4, 2015 appellant requested reconsideration of OWCP's termination of his compensation benefits. He argued that Dr. Pombo failed to properly evaluate his back and lower extremity symptoms and his complaints of increased pain with physical therapy. Appellant advised that Dr. Bender recommended additional surgery. He submitted medical evidence from Dr. Bender and FCE's dated July 30 and October 6, 2014 in support of his reconsideration request. By decision dated August 14, 2015, OWCP denied appellant's request for reconsideration as the evidence submitted and arguments raised were insufficient to warrant reopening his case for further merit review.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁶ In a report dated June 12, 2015, Dr. Bender diagnosed a ruptured tendon due to appellant's June 21, 2013 work injury. On July 10, 2015 he evaluated appellant in connection with his June 21, 2013 employment injury. Dr. Bender provided examination findings of right knee reduced motion, tenderness to palpation, and crepitus. He advised that appellant was not able to perform his usual employment as he was unable to perform motion that required sudden movements. Dr. Bender's July 10, 2015 report is relevant to the issue of appellant's ability to perform the duties of his employment. As his report constituted pertinent new and relevant medical evidence, the Board finds that OWCP improperly denied his request for review of the merits of the claim. The case will be remanded for OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue a *de novo* decision on the claim.

¹¹ *Id.* at § 10.607(a).

¹² *Id.* at § 10.608(b).

¹³ *Donald T. Pippin*, 53 ECAB 631 (2003).

¹⁴ *Id.*

¹⁵ *See Annette Louise*, 53 ECAB 783 (2003).

¹⁶ *See supra* note 13.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits effective May 19, 2015 as he had no further disability causally related to his June 21, 2013 employment injury. The Board further finds that OWCP improperly denied his request to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings in accordance with this decision of the Board. The June 5 and May 18, 2015 decisions are affirmed.

Issued: December 10, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board