

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

P.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Long Branch, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-0961
Issued: May 1, 2017**

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 4, 2016 appellant, through counsel, filed a timely appeal from a December 1, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits effective May 8, 2015 because she no longer had residuals of the accepted

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

bilateral meniscus tears and right knee synovitis; and (2) whether appellant established that she had any continuing employment-related disability or condition after May 8, 2015 due to the accepted conditions.

On appeal counsel asserts that the opinion of an OWCP referral physician is insufficient to meet OWCP's burden of proof, and that appellant's attending Board-certified orthopedic surgeon, Dr. Mark W. Gesell, was consistent in his opinion that the degenerative arthritis in her right knee was due to her employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ In an August 18, 2010 decision, the Board found the case was not in posture for decision as to whether appellant established that she was entitled to disability compensation for the period April 16, 2003 to May 1, 2006. The Board remanded the case to OWCP to compare appellant's actual earnings to those wages earned on the date of injury, to be followed by an appropriate decision.⁴ Following the Board's August 18, 2010 decision, on November 3, 2010, OWCP accepted that appellant sustained a recurrence of disability on August 13, 2010 when she underwent authorized right knee surgery. It began development of her pay rate.⁵ In a second Board decision dated February 5, 2013, the Board again remanded the case for OWCP to ascertain appellant's earnings for the period January 24, 2003 through December 31, 2006.⁶

³ OWCP accepted that appellant, a 44-year-old part-time flexible clerk, injured her knees on April 24, 2002. Appellant stopped work that day and did not return. The claim was initially accepted for meniscal tear and synovitis of the left knee. On November 2, 2002 Dr. Christopher D. Johnson, a Board-certified orthopedic surgeon, performed arthroscopic surgery for a torn left medial meniscus. Appellant retired on disability effective September 8, 2003 and began private employment in 2004. The claim was expanded to include a right knee meniscal tear. On August 13, 2010 Dr. Johnson performed authorized arthroscopic repair for a torn medial meniscus of the right knee. He provided follow-up care through December 9, 2010. On September 20, 2011 Dr. David B. Fox, a Board-certified physiatrist, began treating appellant on a monthly basis.

⁴ Docket No. 09-1783 (issued August 18, 2010).

⁵ OWCP obtained outside earnings information for the years 2003 through 2007 and calculated appellant's average weekly outside earnings for each calendar year from 2003 through 2007, applied the *Shadrick* formula, and issued a September 29, 2011 decision explaining the calculation of the pay rate for compensation purposes. On March 30, 2012 an OWCP hearing representative affirmed the September 28, 2011 decision. Appellant, through counsel, filed a timely appeal with the Board.

⁶ Docket No. 12-1437 (issued February 5, 2013). After the February 5, 2013 decision, OWCP, in a March 28, 2013 decision, noted that appellant's wage-loss compensation for the years 2003 through 2006 was recalculated and the *Shadrick* formula applied, yielding an \$8,770.47 underpayment. It indicated that this amount would be forwarded to OPM to be applied to a debt owed for a dual benefit. On August 8, 2013 OWCP asked appellant to provide evidence to support her disability claims from February 1, 2011 to July 26, 2013. In a November 14, 2013 decision, OWCP denied appellant's claims for compensation for that period, finding that the medical evidence was insufficient. On June 19, 2014 counsel requested reconsideration. OWCP requested information regarding appellant's employment in the private sector. In a June 27, 2014 decision, it vacated the November 14, 2013 decision finding that this decision was issued prematurely as questions remained regarding appellant's level of disability and wages earned during the claimed period (February 1, 2011 to July 26, 2013). OWCP indicated that further development would be undertaken.

Dr. Gesell an associate of Dr. Johnson had begun treating appellant in February 2012.⁷ A January 2, 2014 magnetic resonance imaging (MRI) scan of the right knee demonstrated multiple degenerative changes involving the entire knee joint, joint effusion, status post medial meniscectomy, and grade 1 sprain of the medial collateral ligament. The report noted that a repeat medial meniscal tear could not be excluded.

On February 14, 2014 appellant elected to receive Office of Personnel Management (OPM) retirement benefits for the period January 24, 2003 to December 31, 2006.

In a February 5, 2014 treatment note, Dr. Gesell noted appellant's complaint of increasing bilateral knee pain. He reviewed the right knee MRI scan and left knee x-rays and diagnosed right knee osteoarthritis and effusion and left knee osteoarthritis. In a February 17, 2012 report, Dr. Gesell noted her complaint of right knee pain. Following x-ray and physical examination, he diagnosed right knee osteoarthritis, status post right knee arthroscopic partial medial meniscectomy. Dr. Gesell continued to treat appellant.

In a July 2, 2014 treatment note, Dr. Gesell again reported appellant's complaint of bilateral knee pain. Bilateral knee examination demonstrated tenderness along the proximal medial tibia and medial joint line with crepitus and pain with knee range of motion. Lachman examination, posterior drawer, Steinmann, and McMurray's tests were negative. Patellofemoral examination demonstrated crepitus with active knee extension, and negative apprehension and compression tests. Appellant was able to actively flex and extend each knee against resistance with normal quadriceps and hamstring strength. No joint effusion was present in the left knee. The right knee had a small amount of joint effusion. Dr. Gesell advised that appellant had degenerative changes in her right knee, predominantly along the medial aspect, and only mild degenerative changes in the left knee. He diagnosed left knee pain and right knee osteoarthritis.

In correspondence dated July 14, 2014, Dr. Gesell noted that he began treating appellant's knees in February 2012. He related a past history of arthroscopic repair on the left in "2001" and 2010 on the right. Dr. Gesell indicated that appellant had work-related diagnoses of bilateral medial meniscus tears and that she currently had degenerative changes consistent with bilateral knee osteoarthritis, more advanced on the right. He opined that the degenerative changes were related to her medial meniscus diagnosis, explaining that the meniscus acts as a protective shock absorber in the knee. Dr. Gesell continued that damage to the medial meniscus, including surgical repair, could lead to damage to the articular cartilage in the knee which leads to early degenerative changes in the knee joint and osteoarthritis. He described appellant's current complaints of bilateral persistent knee pain with degenerative changes, advising that these were related to the meniscal tears she sustained while working at the employing establishment. Dr. Gesell concluded that there was no evidence of prior injury to her knees.

In September 2014, OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 27, 2014 report, Dr. Lakin described her medical and surgical history, and noted his review of the medical record. He indicated that appellant was currently working as a house aid and had complaints of right knee pain, which required the assistance of a cane. Dr. Lakin's examination of the right knee revealed

⁷ *Supra* note 3.

minimal effusion and minimal medial joint line tenderness. The left knee had no effusion and minimal patellar tenderness. Quadriceps and hamstring strength were 5/5 bilaterally, and there was no anterior or posterior varus or valgus instability in either knee. Dr. Lakin advised that appellant did not have signs of meniscal tears in either knee with minimal synovitis on the right. He opined that the swelling was not due to a work-related injury that occurred 12 years previously and was due to degenerative arthritis in the right knee, noting that she had been working several different jobs in the interim period. Dr. Lakin indicated that, while appellant had some disability due to the arthritis, this was not related to the work injury, and she could return to restricted duty. He further noted that the first MRI scan that showed degenerative changes in her right knee was in 2010, eight years after the work injury. Dr. Lakin concluded that any restrictions appellant had were due to the nonemployment-related arthritis of the right knee.

OWCP asked Dr. Lakin to clarify whether appellant's left knee condition had resolved. In a supplemental report dated December 16, 2014, Dr. Lakin again noted that the left knee examination was unremarkable, the meniscal tear had been surgically repaired, and the condition had resolved.

On March 3, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that Dr. Lakin's opinion that she no longer had disability or residuals due to the accepted conditions constituted the weight of the medical evidence.

Appellant, through counsel, disagreed with the proposed termination. Medical evidence submitted included a February 17, 2015 treatment note in which Dr. Gesell noted that she had a history of bilateral knee pain. Dr. Gesell provided physical examination and bilateral knee x-ray study findings. He indicated that appellant had advanced degenerative changes in her right knee consistent with osteoarthritis, which was aggravated the past week when she fell and landed on her right side. Dr. Gesell further opined that she had mild degenerative changes in her left knee. He prescribed a right knee brace and medication. In a treatment note dated April 2, 2015, Dr. Fox noted appellant's complaint of significant right knee pain and milder left knee pain and that she worked as a life skills instructor. He related her report that Dr. Gesell recommended a total knee replacement on the right. Following examination, Dr. Fox advised that he would like to discuss appellant's case with Dr. Gesell before proceeding with knee injections.

In a May 15, 2015 decision, OWCP terminated appellant's wage-loss compensation and medical benefits, effective May 8, 2015. It found that the weight of the medical evidence rested with the opinion of Dr. Lakin who advised that the knee conditions had ceased with no residuals.

On May 26, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative. Dr. Fox submitted procedure notes dated May 7 and 19, and June 1, 2015, in which he described corticosteroid injections to her right knee. In June 4, 2015 correspondence to counsel, Dr. Gesell described appellant's medical history and treatment regarding her knees, indicating that he began treating her on February 17, 2012. He noted that he last saw her on February 17, 2015 following a recent fall on her right knee for which he fitted her with a hinged knee brace. Dr. Gesell indicated that he reviewed Dr. Lakin's reports dated October 27 and December 16, 2014. He advised that appellant was initially treated by his associate Dr. Johnson for a left knee work injury, noting that Dr. Johnson first mentioned a right

knee problem in 2004 when she was no longer working for the employing establishment. Dr. Gesell related that he had been treating appellant for degenerative changes in her right knee. He opined that her right knee symptoms were not related to her work-related left knee injury. Dr. Gesell continued that when appellant's right knee symptoms worsened, she would benefit from a right total knee replacement. He concluded that she had mild degenerative changes in her injury-related left knee, but did not believe that there is a correlation between the two knees.

At a hearing, held on September 11, 2015, counsel maintained that the termination should be reversed because Dr. Lakin's opinion had insufficient rationale. He asserted that Dr. Gesell provided a rationalized opinion regarding the progression of appellant's knee degenerative changes.⁸

By decision dated December 1, 2015, an OWCP hearing representative affirmed the May 15, 2015 decision terminating appellant's compensation and medical benefits. She found that OWCP appropriately accorded the weight of the medical opinion evidence with Dr. Lakin, an OWCP referral physician.

LEGAL PRECEDENT -- ISSUE 1

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.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that on April 24, 2002 appellant sustained a left knee meniscus tear and synovitis. Appellant had left knee arthroscopic surgery on November 2, 2002. The claim was expanded to include a right knee meniscal tear, which was repaired arthroscopically on August 13, 2010.¹¹ OWCP terminated appellant's wage-loss compensation and medical benefits effective May 8, 2015, based on the opinion of Dr. Lakin, an OWCP referral physician. The Board, however, finds Dr. Lakin's opinion is insufficiently rationalized to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.

The medical evidence relevant to the May 8, 2015 termination included Dr. Lakin's reports dated October 27 and December 16, 2014. On October 27, 2014 Dr. Lakin noted appellant's complaints of right knee pain, which required the assistance of a cane. He advised

⁸ Counsel also requested that OWCP resolve the issue of appellant's entitlement to wage-loss compensation. OWCP continued to develop the issue of appellant's entitlement to wage-loss compensation up to the date of the termination, May 8, 2015.

⁹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁰ *Id.*

¹¹ *Supra* note 3.

that she did not have signs of meniscal tears in either knee and only had minimal synovitis on the right which, he opined, was not due to a work-related injury and was due to degenerative arthritis in the right knee. Dr. Lakin concluded that, while appellant had physical restrictions, these were not due to the April 2002 employment injury, but were due to the nonemployment-related arthritis of the right knee. Following an OWCP request for additional information, on December 16, 2014, he indicated that appellant's left knee examination was unremarkable noting that the meniscal tear had been surgically repaired and that the condition had resolved. Dr. Lakin did not sufficiently explain the basis for his conclusory opinion.

Dr. Gesell, an attending Board-certified orthopedic surgeon, supported continuing medical residuals due to the accepted conditions. On July 14, 2014 he advised that appellant had degenerative changes consistent with bilateral knee osteoarthritis, more advanced on the right. Dr. Gesell opined that the degenerative changes were related to her medial meniscus diagnosis, explaining that the meniscus acts as a protective shock absorber in the knee, also noting that surgical repair could lead to damage to the articular cartilage in the knee which would lead to early degenerative changes in the knee joint and osteoarthritis. He opined that appellant's current complaints of bilateral persistent knee pain with degenerative changes were related to the meniscal tears she sustained during her federal employment.

As there is no clear, well-rationalized medical opinion evidence establishing that appellant's accepted conditions had resolved without residuals requiring further medical treatment and that appellant had no disability for work due to her accepted conditions, OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits effective May 8, 2015.¹²

In light of the Board's disposition regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective May 8, 2015.

¹² *J.J.*, Docket No. 16-0984 (issued November 17, 2016).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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