

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability from December 20, 2008 through December 29, 2014 due to his accepted employment injury of aggravation of preexisting bilateral degenerative knee arthritis.

On appeal counsel argued that appellant had established that he was totally disabled as the employing establishment removed his light-duty position forcing him to accept disability retirement, and that appellant had properly elected to receive FECA benefits. He further argued that OWCP improperly ignored medical evidence in the July 20, 2016 decision and that appellant had established a consequential emotional condition.

FACTUAL HISTORY

This case has previously been before the Board. On January 29, 2009 appellant, then a 50-year-old housekeeper aid, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral aggravation of degenerative joint disease and torn menisci in his knees due to his employment activities. He claimed to have first become aware of his condition on March 24, 2006 and first attributed his condition to his federal employment on July 10, 2008. On the reverse of the form, appellant's supervisor indicated that appellant had retired from the employing establishment on December 19, 2008 receiving disability retirement benefits from the Office of Personnel Management (OPM).³ The record reflects that on December 3, 2008 appellant had accepted a temporary limited-duty assignment due to a previously accepted right hand injury working eight hours a day with no use of his right hand.⁴ Appellant's supervisor noted that appellant had reported no work-related injuries or illness to his knees prior to his retirement.

OWCP's statement of accepted facts (SOAF) found that appellant's regular-duty position required that all of his work was performed while standing or walking. This position also required sustained pushing, pulling, walking, bending, stooping, climbing, and lifting. Appellant was also required to lift up to 40 pounds and occasionally over 50 pounds. OWCP noted that starting in 2005 appellant began to perform limited-duty work as he could no longer kneel to clean baseboards and that at the time of his retirement in 2008 he was performing a one-handed job assignment.

In a report dated March 29, 2011, OWCP's second opinion physician, Dr. Bong S. Lee, found that appellant was disabled from his original job because of the advanced osteoarthritis of both knees. He indicated that appellant could walk and stand for four hours a day each, bend and stoop for four hours, as well as push, pull, and lift up to 20 pounds for four hours a day. Dr. Lee restricted appellant's squatting, kneeling, and climbing to two hours each.

³ OPM indicated on December 4, 2008 that it found appellant to be disabled for his position as a housekeeping aid due to bilateral knee condition.

⁴ Appellant injured his right hand on December 2, 2008. The employing establishment provided him with a light-duty assignment on December 3, 2008 with no use of his right hand. OWCP accepted that appellant sustained an employment-related right hand fracture in a separate claim. OWCP File No. xxxxxx532. OWCP also accepted bilateral carpal tunnel syndrome on September 22, 2011 in OWCP File No. xxxxxx081.

In an April 8, 2013 decision,⁵ the Board found that there was an unresolved conflict of medical opinion evidence between appellant's physician, Dr. Richard Zamarin, a Board-certified orthopedic surgeon, and Dr. Lee, the second opinion physician, regarding whether appellant's knee condition was causally related to his accepted employment activities. The Board set aside an October 31, 2012 OWCP decision and remanded the case for OWCP to refer the case to an impartial medical examiner.

On July 11, 2013 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Andrew J. Collier, a Board-certified orthopedic surgeon, for an impartial medical examination regarding the cause of appellant's bilateral knee conditions. Dr. Collier examined appellant on July 24, 2013 and noted his work history, employment duties and history of knee pain. He noted that appellant had marked bilateral genu varum with slight hyperextension on the left. Dr. Collier stated that both knees demonstrated minimal synovitis, no effusion, erythema or warmth with limited range of motion. He found marked varus, medial osteophytes, medial collapse, negative McMurray's, Lachman and Drawer signs. Dr. Collier stated that appellant had a waddling gait with his cane. He diagnosed severe degenerative arthritis in both knees. Dr. Collier stated:

“[Appellant] had no work-related injuries, traumas, etc., to cause this condition. The most likely cause of his symptomatology is his weight and obesity. Every step he takes of his life does contribute to his arthritis. Hence, his work-related activities would add to his condition but are not the sole cause of his condition. It does play a minor role. [Appellant] does have severe degenerative arthritis in both knees, again not caused by his work or work activities. This is not industrial.”

He completed a work capacity evaluation and indicated that appellant could work eight hours a day with restrictions. Appellant could stand and walk for one hour each a day each. He could not bend or stoop, operate a motor vehicle at work, push, pull, squat, kneel, or climb. Appellant could drive to and from work for one hour a day. He could lift up to 10 pounds for eight hours a day.

By decision dated August 8, 2013, OWCP denied appellant's claim finding that, as Dr. Collier opined that appellant's severe degenerative arthritis in both knees was due to his weight and not caused by his work or work activities, appellant had not met his burden of proof to establish his occupational disease claim. The Board reviewed the August 8, 2013 decision on June 10, 2014 and found that OWCP had not provided Dr. Collier with adequate information and remanded the case for OWCP to request a supplemental report.⁶

OWCP requested a supplemental report from Dr. Collier on September 10, 2014. Dr. Collier responded on September 23, 2014 and noted that appellant had severe degenerative arthritis in both knees and that he had sustained an employment-related acceleration of his preexisting condition. He noted that appellant's condition was permanent.

⁵ Docket No. 13-206 (issued April 8, 2013).

⁶ Docket No. 13-1979 (issued June 10, 2014).

On October 9, 2014 OWCP accepted appellant's claim for aggravation of preexisting bilateral degenerative knee arthritis. Appellant completed an election of benefits form on March 20, 2015 and filed a claim for compensation (Form CA-7) benefits effective December 20, 2008. On the reverse of the form, the employing establishment indicated that appellant had retired due to medical disability, last worked on December 19, 2008, and used leave without pay from December 20 to 29, 2014. Appellant also requested a schedule award on March 20, 2015 and submitted medical evidence regarding his permanent impairment.

Appellant filed claims for compensation (Form CA-7) requesting wage-loss compensation from December 20, 2008 through December 29, 2014.

In a letter dated June 5, 2015, OWCP requested additional medical evidence in support of appellant's claim for total disability for the period beginning December 20, 2008. Counsel responded and argued that the employing establishment separated appellant onto disability retirement.

By decision dated January 7, 2016, OWCP denied appellant's disability claim. Also on January 7, 2016 it granted appellant a schedule award for 26 percent permanent impairment of both his right and left lower extremities. The period of the schedule awards was from December 30, 2014 through November 12, 2017.

On June 21, 2016 counsel requested reconsideration of the January 7, 2016 decision denying wage-loss compensation. He alleged that the employing establishment had refused to accommodate appellant's bilateral knee conditions. Counsel contended that appellant was approved for disability retirement beginning in 2008 based on the employing establishment's certification that there was no work within appellant's restrictions. He resubmitted Dr. Collier's September 23, 2014 report and work capacity evaluation, and a request for treatment for an alleged emotional condition.

On June 21, 2016 OWCP received verification that on December 4, 2008 OPM had approved appellant's application for disability retirement due to his bilateral knee condition. Appellant indicated that he had not requested accommodations from the employing establishment and that he used the chairs with rollers in the offices he cleaned to help him to clean and obtain the trash in those areas. His supervisor at that time had completed a statement on June 12, 2008 in connection with the application for disability retirement that appellant's performance of his position of housekeeping aid was fully successful. He noted that appellant was observed performing his housekeeping duties while sitting down, including emptying trash, taping biohazard boxes, and mopping floors. The supervisor noted that appellant's absence required him to shift workloads and requirements. Appellant also indicated that appellant had received a sick leave restriction letter and a sick leave warning letter. In response to the question as to whether any efforts had been made to accommodate appellant or whether appellant had been reassigned to a new permanent position, the employing establishment response, "N/A." On an accompanying portion of an Agency Certification of Reassignment and Accommodation Efforts, an authorized agency official checked a box marked "No" in response to the question of whether reasonable effort for accommodation had been made, this option further noted "the medical evidence presented to the agency shows that accommodation is not possible due to

severity of medical condition and the physical requirements of the position.” The reverse of this form, which would have indicated who had signed the form, is not contained in the record.

Counsel also submitted a portion of a report from Dr. Harry A. Doyle, a Board-certified psychiatrist, dated June 20, 2016, diagnosing adjustment disorder with depressed mood and attributing this condition to appellant’s bilateral wrist pain, bilateral carpal tunnel syndrome, and aggravation of preexisting bilateral degenerative knee arthritis.

By decision dated July 20, 2016, OWCP denied modification of its prior decision and determined that appellant had failed to submit the necessary medical opinion evidence to establish total disability from December 20, 2008 through December 29, 2014 due to his accepted employment injuries.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁸

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁹ Findings on examination are generally needed to support a physician’s opinion that an employee is disabled for work. When a physician’s statements regarding an employee’s ability to work consist only of repetition of the employee’s complaints that she hurts too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁰ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹¹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹² Rationalized medical evidence is medical

⁷ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁹ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

evidence which includes a physician's detailed medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³ Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability from December 20, 2008 through December 29, 2014 due to his accepted employment injury of aggravation of preexisting bilateral degenerative knee arthritis.

On October 9, 2014 OWCP accepted appellant's claim for aggravation of his preexisting degenerative bilateral knee arthritis. The SOAF relates that appellant was required to do all the duties of a housekeeping aid, but beginning in 2005 he was excused from cleaning baseboards as he could no longer do that. On December 3, 2008 appellant accepted a temporary limited-duty assignment at the employing establishment working eight hours a day with no use of his right hand. He completed an application for disability retirement on May 7, 2008 and on December 4, 2008 OPM approved his disability retirement due to his bilateral knee condition. Appellant retired from the employing establishment on December 19, 2008 and began receiving disability retirement benefits.

Appellant must establish that his total disability on and after December 19, 2008 was due to his accepted employment-related condition of aggravation of preexisting bilateral degenerative knee arthritis. There is no medical evidence supporting appellant's total disability for work during the period claimed. In the December 8, 2008 report, Dr. Zamarin did not address appellant's ability to work. On March 29, 2011 OWCP's second opinion physician, Dr. Lee, found that appellant was only partially disabled from his original job because of the advanced osteoarthritis of both knees. Dr. Collier, the impartial medical examiner, with regard to knee conditions, completed a report on July 24, 2013 and opined that appellant was capable of working with restrictions. There is no medical evidence in the record supporting appellant's claim for total disability on or after December 20, 2008.

Counsel argued that appellant had accepted OPM disability retirement benefits because the employing establishment withdrew his light-duty assignment. Appellant has not submitted factual evidence supporting this allegation. In fact, shortly before his disability retirement, the employing establishment provided appellant with a light-duty assignment on December 3, 2008 due to his right hand injury. This change of work requirements suggests that the employing establishment was willing to provide work within appellant's established medical restrictions,

¹³ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁴ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

but that he chose to leave his December 3, 2008 light-duty position and accept disability retirement benefits.

Counsel further argued that OWCP failed to accept appellant's consequential emotional condition. As OWCP has not issued a final decision on this issue, the Board will not address this claim for the first time on appeal.¹⁵

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish total disability from December 20, 2008 through December 29, 2014 due to his accepted employment injury of aggravation of preexisting bilateral degenerative knee arthritis.

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁵ 20 C.F.R. § 501.2(c).