United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 17-0415**
	)	**Issued: April 13, 2018**
DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Dallas, TX, Employer	)	

Appearances:
Debra Hauser, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 14, 2016 appellant, through counsel, filed a timely appeal from a November 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 wage-loss compensation and medical benefits, effective June 8, 2016, as his accepted injuries had ceased

[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.*

without residuals; and if so, (2) whether appellant met his burden of proof to establish continuing disability and residuals after June 8, 2016.

On appeal counsel contends that the opinion of the impartial medical examiner was too speculative to resolve the conflict of medical opinion.

FACTUAL HISTORY

OWCP accepted that on August 1, 2013 appellant, then a 50-year-old special response team member, was manning the turret gun of an armored personnel vehicle that struck an obstacle throwing him against a guardrail, then to the metal floor plates, causing a chest wall contusion, left elbow contusion, left forearm contusion, right knee effusion, right lateral meniscus tear, lumbosacral sprain, and other unspecified soft tissue disorders. He sought treatment in a hospital emergency room that same day. Dr. Roland Medellin, an attending physician, diagnosed contusions[3] and prescribed medication. Appellant presented to the emergency room on August 19, 2013 with increased right flank pain. In an August 19, 2013 report, Dr. Medellin diagnosed multiple contusions of the left elbow, forearm, and chest wall resulting from the August 1, 2013 armored vehicle incident.[4]

Dr. James Galbraith, an attending osteopath specializing in family practice, followed appellant from October 28, 2013 to March 17, 2014. He diagnosed left forearm, elbow, and lumbar strains, and internal derangement of the right knee.[5] Appellant returned to full-time modified-duty work.

Dr. Bradley Eames, an attending osteopath Board-certified in anesthesiology, followed appellant from April 1 to December 2, 2014. He noted a history of a 2006 right knee arthroscopy, with the subsequent August 1, 2013 work injury. Dr. Eames diagnosed lumbar facet joint inflammation "secondary to direct trauma to the lumbar spine resulting in joint sprain and possible joint capsular disruption," lumbar facet joint inflammation, and traumatic effusion of the right knee with possible internal derangement and cartilage tear. He noted that lumbar facet injections improved appellant's symptoms.

Dr. Greg T. Podleski, an attending osteopath Board-certified in orthopedic surgery, provided reports from June 12, 2014 through January 26, 2015 diagnosing an acute right lateral meniscus tear, and internal derangement and effusion of right knee due to the August 1, 2013 work

[3] August 1, 2013 x-rays of the left forearm, left elbow, ribs, and right knee were normal. Cervical spine x-rays showed degenerative changes from C5 through C7.

[4] Appellant participated in physical therapy in September 2013, from January through April 2014, and July 2014 through July 2015. Dr. Julian Crutchfield, a chiropractor, working under the supervision of Dr. Ed Wolski, an attending Board-certified anesthesiologist, performed manual manipulation and physical therapy modalities from September 2015 through April 2016.

[5] January 15, 2014 right knee x-rays showed mild spurring of the tibial spine and dorsal superior patellar spurring. A March 7, 2014 lumbar magnetic resonance imaging (MRI) scan showed a broad-based L4-5 disc bulge associated with facet hypertrophy, a left posterior paracentral disc protrusion at T12-L1 and L1-2, and mild disc space narrowing and dehydration at T12-L1, L1-2, and L4-5.

injury. He recommended arthroscopic repair. Dr. Podleski opined that the August 1, 2013 workplace incident directly caused derangement of the lateral meniscus.[6]

Dr. Steven L. Remer, an attending Board-certified anesthesiologist, began treating appellant on August 6, 2014 for chronic lumbar pain. He diagnosed facet arthrosis. On October 30, 2014 Dr. Remer performed bilateral lumbar medial branch blocks at L4, L5, and S1. In a January 12, 2015 report, he recommended a lumbar facet rhizotomy.

Dr. Podleski performed an authorized right knee arthroscopy on February 10, 2015, with repair of the anterior horn of the lateral meniscus. During the procedure, he saw and photographed a complete anterior cruciate ligament (ACL) tear not visible on MRI scans.[7] Dr. Podleski submitted periodic reports through December 28, 2015 opining that appellant's right knee effusion and complete ACL tear, with an "empty wall sign" visualized during February 10, 2015 surgery, were directly related to the August 1, 2013 workplace injury when appellant was thrown against the turret guardrail.

In an April 17, 2015 report, Dr. Robert Bayless, an attending Board-certified orthopedic surgeon, related appellant's complaints of severe, chronic right knee pain. On examination, he found no ligamentous laxity, and no evidence of an ACL tear.

March 26, 2015 nerve conduction velocity (NCV) and electromyography (EMG) studies of the lower extremities showed bilateral L5-S1 radiculopathy.

Dr. Wolski noted work restrictions on April 22, 2015 due to appellant's postsurgical status.

In May 7, 2015 reports, Dr. Robert A. Helsten, Board-certified in pain management, requested that OWCP expand appellant's claim to accept a right ACL sprain. He explained that when appellant was "thrown backward, then forward" against the turret ring on August 1, 2013, his knees locked, causing hyperflexion and buckling, resulting in the ACL tear. Dr. Helsten noted that a right knee MRI scan confirmed "degeneration of the anterior cruciate ligament at its tibial attachment involving the posterior lateral bundle fibers." He also requested that OWCP accept lumbar radiculitis due to "torsional and compressive forces" in the August 1, 2013 incident, causing L5 and S1 nerve root impingement. Dr. Helsten provided periodic progress reports.

On October 12, 2015 OWCP obtained a second opinion from Dr. R. David Bauer, a Board-certified orthopedic surgeon. Dr. Bauer reviewed a statement of accepted facts (SOAF) and the medical evidence of record. On examination, he found "diffuse, widespread nonanatomic tenderness" in the lumbar spine, and full range of motion of the right knee without effusion or

[6] On July 2, 2014 Dr. Donald Mackenzie, an attending Board-certified spine surgeon, diagnosed a lumbar sprain and lumbar facet injury, caused by the August 1, 2013 incident as appellant's body armor "had ridden up during the flexion component" of the impact and "did not protect his back which was injured when it struck the ring." A July 8, 2014 right knee arthrogram and MRI scan showed a small superior articular surface tear of the mid third of the anterior horn of the lateral meniscus and a partial thickness chondral loss at the lateral femoral condyle.

[7] A February 18, 2015 computerized tomography (CT) angiography scan showed right suprapatellar joint effusion. A March 12, 2015 right knee MRI scan showed "[s]table mild cystic degeneration of the anterior cruciate ligament at its tibial attachment involving the posterior lateral bundle fibers," and a horizontal tear of the lateral meniscus. Appellant participated in physical therapy in March and April 2015.

instability. Dr. Bauer diagnosed a right knee strain or effusion, status post lateral meniscus repair, "[n]o evidence of [ACL] tear," and history of a lumbar contusion. He asserted that there was no evidence of an ACL sprain as there was no instability. Dr. Bauer opined that the ACL findings observed by MRI scan were due to idiopathic degeneration and not to the August 1, 2013 work-related injury. He opined that appellant no longer had evidence of a lumbar injury and characterized abnormal EMG and NCV findings as false positives. Dr. Bauer attributed any residual lumbar symptoms to idiopathic degenerative changes. He concluded that appellant could perform full-duty work with no restrictions.

By notice dated November 3, 2015, OWCP proposed to terminate wage-loss compensation and medical benefits based on Dr. Bauer's opinion that the accepted injuries had ceased without residuals. It afforded appellant 30 days to submit additional evidence or argument. Counsel responded by December 2, 2015 letter, contending that Dr. Bauer's medical reasoning was too vague and inconsistent to represent the weight of the medical evidence. She submitted additional evidence.

In a November 9, 2015 report, Dr. Donald Mackenzie, an attending Board-certified spine surgeon, disagreed with Dr. Bauer's opinion that appellant's lumbar condition was "related to degenerative change rather than injury." He noted that appellant had "no back pain until the injury of August 1, 2013 and had had continuous back pain since that time." Dr. Mackenzie explained that a "simple back strain would have healed," and that appellant required facet injections and physical therapy to increase strength and function.

Dr. Helsten explained in a November 30, 2015 report updated February 17, 2016 that it was not uncommon for an MRI scan to not demonstrate a total ACL tear later visualized during surgery. Based upon Dr. Podleski's surgical experience, he concurred with his finding of right ACL tear. Dr. Helsten disagreed with Dr. Bauer's characterization of the March 26, 2015 electrodiagnostic studies showing L5-S1 radiculopathy as a "false positive." He found the electrodiagnostic results accurate and persuasive.[8] Dr. Helsten administered lumbar trigger point injections.

On January 28, 2016 Dr. Remer performed lumbar facet rhizotomy from L4 through S1, authorized by OWCP.

OWCP determined that there was a conflict of medical opinion between Dr. Bauer, for the government, and Dr. Podleski, for appellant, regarding whether the accepted injuries remained active, and whether the accepted August 1, 2013 employment injury caused lumbar radiculopathy and a right ACL tear. OWCP noted that one aspect of the conflict concerned the interpretation of imaging studies, as Dr. Podleski had visualized an ACL tear during the authorized February 10, 2015 arthroscopy that had not been demonstrated by MRI scans. To resolve the conflict, OWCP selected Dr. Bernie L. McCaskill, a Board-certified orthopedic surgeon, as impartial medical specialist. OWCP provided a copy of the medical evidence of record and a SOAF.

Dr. McCaskill submitted a May 17, 2016 report reviewing the medical evidence of record. On examination, he found positive supine straight leg raising tests at 20 degrees on the right and

[8] January 20, 2016 lower extremity diagnostic studies interpreted by Dr. Helsten showed possible lumbar nerve root disease.

30 degrees on the left, and diffuse right knee tenderness. Dr. McCaskill diagnosed "spondylogenic lumbosacral spine pain, chronic, anatomic etiology undetermined (by history)," and "right knee pain, chronic, anatomic etiology undetermined (by history)." He characterized right knee and lumbar spine imaging study reports as demonstrating only idiopathic degeneration, with no traumatic changes. Dr. McCaskill noted, however that there were no images in the evidence of record from an August 9, 2013 cervical spine CT scan, a March 7, 2014 lumbar MRI scan, and MRI scans of the right knee performed on March 7 and July 8, 2014, and March 12, 2015. He also questioned Dr. Podleski's surgical finding of an ACL tear as the copies of the arthroscopic photographs provided by OWCP were of insufficient clarity. Dr. McCaskill thus concluded that there were no objective findings showing a ligament rupture. Regarding lumbar radiculopathy, he acknowledged that electrodiagnostic studies documented abnormal findings in both legs inconsistent with appellant's clinical history. Dr. McCaskill characterized appellant's lumbar and right knee complaints as disproportionate to objective imaging and electrodiagnostic findings. He commented that although appellant had attained maximum medical improvement (MMI), it was "possible that the patient might have some degree of significant residual symptoms from his work-related injuries of August 1, 2013 without the presence of objective evidence of residual injuries."

By decision dated June 9, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 8, 2016, finding that the medical evidence of record established that the accepted injuries had ceased without residuals. It accorded Dr. McCaskill's opinion the special weight of the medical evidence.

On August 3, 2016 appellant, through counsel, requested reconsideration. Counsel contended that the medical evidence of record established that the accepted conditions remained active and partially disabling. She also asserted that Dr. Bauer's report was too inconsistent to have created a conflict with appellant's physicians, and that Dr. McCaskill's report was too vague to represent the special weight of the medical evidence. Counsel provided additional evidence.

In a June 30, 2016 report, Dr. Wolski opined that appellant's accepted conditions remained active. As demonstrated by May 6, 2015 and July 5, 2016 physical performance tests and pain questionnaires, appellant continued to have postoperative right knee pain when walking, standing, and squatting, "postoperative debilitating pain in [appellant's] right knee during and after daily" exercise needed to maintain required fitness levels and chronic low back pain with bilateral radiculopathy. Dr. Wolski contended that Dr. McCaskill's opinion on the presence of the diagnosed ACL tear was unreliable because OWCP failed to provide him with high quality reproductions of the clear, detailed photographs Dr. Podleski obtained during the February 10, 2015 right knee arthroscopy. He explained OWCP's low resolution, small format scans of the surgical photographs were insufficient to demonstrate the diagnosed ACL tear. Dr. Wolski provided clear, large format copies of Dr. Podleski's surgical photographs. He opined that the extension and compression forces of the August 1, 2013 accident on appellant's lumbar spine were sufficient to cause L4-5 and L5-S1 disc bulges as demonstrated by MRI scan, resulting in bilateral L5 and S1 radiculopathy.[9]

[9] Counsel also submitted physical therapy and prescription notes.

By decision dated November 16, 2016, OWCP denied modification of its termination decision, finding that Dr. McCaskill's opinion remained controlling, as it was thorough and "based on all relevant evidence."

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[10] Having determined that an employee has a disability causally related to his federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[11] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[12]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[13] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[14]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[15] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[16] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[17]

ANALYSIS

OWCP accepted that the August 1, 2013 work injury resulted in a chest wall contusion, left elbow contusion, left forearm contusion, right knee effusion, right lateral meniscus tear, lumbosacral sprain, and other unspecified soft tissue disorders.

[10] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[11] *Id.*

[12] *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[13] *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[14] *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

[15] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[16] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[17] *Anna M. Delaney*, 53 ECAB 384 (2002).

OWCP terminated benefits and denied expansion of the claim to include a right ACL tear and bilateral lumbar radiculopathy, based on the opinion of the impartial medical examiner, Dr. McCaskill, a Board-certified orthopedic surgeon, who found that the accepted employment-related conditions had resolved without residuals. It bears the burden of proof to justify modification or termination of benefits.[18]

Dr. Bauer, a Board-certified orthopedic surgeon and an OWCP second opinion physician, opined in an October 12, 2015 report that the accepted conditions had ceased without residuals, and that the accepted August 1, 2013 work-related injury did not cause a right ACL tear or lumbar radiculopathy. Dr. Podleski, an attending Board-certified orthopedic surgeon, submitted reports from February 10 through December 28, 2015 explaining that during a February 10, 2015 right knee arthroscopy authorized by OWCP, he clearly visualized a complete ACL tear with an empty wall sign. He submitted arthroscopic photographs from the procedure documenting this finding. OWCP declared a conflict in medical opinion evidence between Dr. Bauer, the second opinion physician, and Dr. Podleski on the issue of appellant's continuing residuals and need for medical treatment due to his accepted injuries and whether he had sustained a right ACL tear and lumbar radiculopathy. These conflicts required referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a).

OWCP referred appellant to Dr. McCaskill to resolve this conflict of medical opinion evidence. It based its decision to terminate appellant's wage-loss compensation and medical benefits on Dr. McCaskill's May 17, 2016 report.

In his May 17, 2016 report, Dr. McCaskill reviewed appellant's history of injury and history of medical treatment. His findings on physical examination were reported as normal, except for bilaterally positive supine straight leg raising tests, and diffuse tenderness of the right knee. Dr. McCaskill noted that he did not have the benefit of the films from the August 9, 2013 cervical spine CT scan, March 7, 2014 lumbar MRI scan, and March 7 and July 8, 2014, and March 12, 2015 MRI scans of the right knee. Many of these studies were performed close to the date of the August 1, 2013 employment injuries. It is also unclear whether Dr. McCaskill reviewed the photos from Dr. Podleski's authorized February 10, 2015 arthroscopic procedure which allegedly demonstrated an ACL tear.

In determining the probative value of an impartial medical examiner's report, the Board considers the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed by the physician on the issues addressed to him or her by OWCP.[19] As the films from the diagnostic imaging studies of record were not available for Dr. McCaskill's review, his opinion is based on an inaccurate medical history. He did not have all the relevant diagnostic studies and attendant information to provide informed answers to the questions put to him. Medical opinion evidence not based on a complete factual and medical history is of greatly diminished probative value.[20] As such,

[18] *M.P.*, Docket No. 16-0551 (issued May 19, 2017); *see also K.B.*, Docket No. 15-0011 (issued April 7, 2015).

[19] *James T. Johnson*, 39 ECAB 1252, 1256 (1988).

[20] *Victor J. Woodhams*, 41 ECAB 345 (1989); *see Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history have little probative value).

Dr. McCaskill's opinion is of insufficient probative value to carry the special weight of the medical evidence as an impartial medical examiner.

Because Dr. McCaskill's report lacks dispositive probative value, the Board finds that OWCP erred in relying on his opinion as the basis to terminate wage-loss compensation and medical benefits for the accepted employment injuries. The Board shall reverse the termination of all compensation benefits, effective June 8, 2016 as OWCP has not met its burden of proof.[21]

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 8, 2016.[22]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 16, 2016 is reversed.

Issued: April 13, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[21] *Curtis Hall*, 45 ECAB 316 (1994).

[22] In light of the Board's disposition of the first issue, the second issue is moot.