

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

T.K., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Dayton, OH, Employer

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**Docket No. 17-0942
Issued: February 9, 2018**

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 30, 2017 appellant filed a timely appeal from a March 21, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from work for the period October 14, 2015 through February 3, 2016, causally related to her accepted employment-related left knee injuries.

FACTUAL HISTORY

OWCP accepted that on February 14, 1996 appellant, then a 29-year-old letter carrier, stepped in a hole and twisted her left knee, which caused a left knee strain, left medial meniscus tear, and chondromalacia of the left knee. It later accepted that, on January 16, 1997, she twisted

¹ 5 U.S.C. § 8101 *et seq.*

her left knee when she stepped out of her delivery vehicle, causing a new traumatic left knee strain and left lateral meniscus tear.² The employing establishment terminated appellant from employment, effective March 20, 1998, for failure to follow instructions.

On January 21, 1999 appellant underwent an authorized arthroscopic partial lateral meniscectomy.³ In an April 21, 1999 letter, Dr. Donald W. Ames, an attending orthopedic surgeon, opined that appellant required permanent work restrictions. He administered periodic left knee injections. Appellant participated in physical therapy in April and May 1999. She remained off work.

On October 26, 2006 and November 15, 2006 OWCP obtained a second opinion regarding appellant's work capacity from Dr. Alvars Vitols, an osteopathic physician Board-certified in orthopedic surgery. Dr. Vitols opined that appellant no longer had any residuals from the accepted left knee injuries, and returned her to full-time sedentary work.

OWCP found a conflict in the medical opinion evidence between Dr. Vitols, for the government, and Dr. Ames, for appellant, regarding appellant's work capacity and the presence of continuing injury-related residuals. To resolve the conflict, it appointed Dr. James Rutherford, a Board-certified orthopedic surgeon, as an impartial medical examiner. Dr. Rutherford submitted a February 12, 2007 report, in which he opined that the accepted left knee injuries had remained active and partially disabling. He found that appellant could perform full-time sedentary work with occasional lifting and carrying up to 15 pounds, occasional bending, standing, and walking, and no stooping, climbing, or crawling.

Based on Dr. Rutherford's opinion that appellant was no longer totally disabled from work, OWCP referred appellant for vocational rehabilitation. Following vocational testing and a job placement effort, appellant began work as a part-time receptionist and cleaner at a private sector flooring business in June 2008. As the flooring company could not offer her enough hours, appellant began work as a cashier/clerk at a private sector discount store effective July 19, 2008, earning wages of \$7.50 an hour. OWCP paid appellant wage-loss compensation for the difference between her date-of-injury wages and her actual earnings as a cashier/clerk.

By notice dated December 9, 2008, OWCP notified appellant of its proposal to reduce her wage-loss compensation benefits based on her ability to perform the constructed position of receptionist, Department of Labor, *Dictionary of Occupational Titles*, DOT #237.367.038, with entry level wages of \$415.20 a week in appellant's commuting area as of a March 30, 2008 labor market survey. It afforded her 30 days to submit additional evidence or argument pertinent to the proposed reduction of her wage-loss compensation. Appellant did not submit additional evidence on this issue.

By decision dated January 12, 2009, OWCP reduced appellant's wage-loss compensation effective January 10, 2009, based on her projected ability to earn \$415.20 a week as a

² OWCP accepted the January 16, 1997 claim under OWCP File No. xxxxxx958. The February 14, 1996 claim was developed under File No. xxxxxx811. OWCP had administratively combined File Nos. xxxxxx958 and xxxxxx811, with the latter serving as the master file.

³ OWCP paid appellant wage-loss compensation for temporary total disability on the daily rolls commencing January 21, 1999 and on the periodic rolls commencing October 10, 1999.

receptionist. It paid wage-loss compensation under the January 12, 2009 loss of wage-earning capacity determination (LWEC) on the periodic rolls commencing January 10, 2009.⁴

On February 17, 2012 appellant underwent an authorized left arthroscopic partial lateral meniscectomy, performed by Dr. Ames. OWCP paid appellant wage-loss compensation for temporary total disability commencing February 17, 2012.

In a March 6, 2012 compensation termination sheet, OWCP noted that appellant had been entitled to wage-loss compensation for temporary total disability following the February 17, 2012 surgery, “so terminating the LWEC.”⁵

To obtain updated information concerning appellant’s work capacity, on April 22, 2013, OWCP obtained a second opinion report from Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon. Dr. Fisher noted that appellant had remained unemployed. He opined that the accepted left knee chondromalacia had remained active and partially disabling. Dr. Fisher returned appellant to full-time limited duty, with walking and standing permanently restricted to two hours a day, and lifting, pushing, and pulling limited to 10 pounds frequently and 20 pounds occasionally. He found that appellant had attained maximum medical improvement.

As Dr. Fisher opined that appellant was no longer totally disabled from work, OWCP referred appellant for vocational rehabilitation on May 2, 2013. A May 8, 2013 labor market survey had identified the positions of receptionist (DOT #237.367.038) and hospital admitting clerk (DOT #237.367-038) as within the medical limitations provided by Dr. Fisher and commensurate with her vocational experience and aptitudes.

By notice dated May 15, 2013, OWCP notified appellant of its proposal to reduce her wage-loss compensation based on her ability to perform the constructed position of receptionist, with entry level wages of \$415.20 a week. It afforded her 30 days to submit additional evidence or argument pertinent to the proposed reduction of her wage-loss compensation. Appellant did not submit additional evidence on this issue. In a June 26, 2013 decision, OWCP reduced her wage-loss compensation effective that day, based on her ability to earn \$415.20 a week in the constructed receptionist position. It found that these wages properly represented appellant’s LWEC.

Appellant remained off work. She underwent periodic injections by Dr. Ames for continued left knee immobility and pain. Dr. Ames diagnosed “left knee degenerative change secondary to the avascular necrosis of the lateral condyle of the femur,” and localized osteoarthritis of the left knee.

⁴ Appellant advised OWCP that she stopped working her private sector job in September 2009 after her left knee gave out. She remained off work. Appellant underwent periodic medical treatment for residuals of the accepted left knee injuries.

⁵ Dr. Ames provided periodic progress notes. To help determine appellant’s work capacity, OWCP obtained a second opinion report on July 31, 2012 from Dr. Albert E. Becker, Jr., a Board-certified orthopedic surgeon. Dr. Becker noted that appellant had not returned to work. He opined that appellant could not perform the duties of a receptionist due to continued left knee immobility and pain. Dr. Becker returned appellant to limited-duty work for four hours a day, with restrictions.

Dr. Ames submitted an October 14, 2015 medical report in which he opined that appellant was unsafe as her left knee had given way several times, causing her to fall. He noted that physical therapy had not been effective and that bracing “would not help this knee.” Dr. Ames recommended a partial left knee replacement. In a separate October 14, 2015 report, he explained that appellant had developed “avascular necrosis about the left knee lateral distal femur” and “post-traumatic osteoarthritis of the left knee in the lateral compartment.” Appellant’s symptoms had worsened such that she fell “on a regular basis because of giving way of the left knee secondary to pain.” Dr. Ames recommended a unicompartmental left knee replacement.

In a January 21, 2016 report, Dr. Ames noted that when he had examined appellant on October 14, 2015, he discussed her left knee condition. He opined that appellant’s left knee had worsened “to where the knee is giving out and she is falling and unsafe which is a concern for her to continue working.”

OWCP interpreted Dr. Ames’ January 21, 2016 letter to indicate that appellant had claimed a recurrence of total disability due a material change or worsening of the accepted left knee injuries. In a January 29, 2016 development letter, it notified appellant of the type of additional evidence needed to demonstrate a recurrence of total disability, including a comprehensive, narrative medical report from her attending physician supporting that her current condition had remained causally related to the accepted left knee injuries, and describing the specific job duties that appellant could no longer perform as of the date of the claimed recurrence of total disability. OWCP afforded appellant 30 days to submit such evidence.

On February 4, 2016 appellant underwent authorized partial left knee arthroplasty to address sequelae of the accepted left knee injuries. OWCP paid her wage-loss compensation for temporary total disability commencing February 4, 2016.⁶ Dr. Ames submitted reports dated January 21, February 4 and 22, 2016, in which he reiterated that appellant had been totally disabled from work commencing October 14, 2015. In a report dated May 9, 2016, he returned appellant to work effective August 8, 2016.

By decision dated May 27, 2016, OWCP denied appellant’s claim for wage-loss compensation for temporary total disability for the period October 14, 2015 to February 3, 2016 because the medical evidence of record failed to demonstrate a material worsening of the accepted left knee injuries. It found that Dr. Ames opined only that appellant might sustain a future injury were she to fall due to the deteriorated condition of her left knee. OWCP noted that fear of future injury was not compensable under FECA.⁷

In an appeal form postmarked June 24, 2016, appellant requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

To ascertain the nature and extent of appellant’s continuing injury-related condition, OWCP obtained a second opinion from Dr. Gerard Papp, an osteopath Board-certified in

⁶ OWCP continued to pay appellant wage-loss compensation for temporary total disability through February 4, 2017 and continuing. It placed her case on the periodic roll effective February 5, 2017.

⁷ *Supra* note 1.

orthopedic surgery. In a November 16, 2016 report, Dr. Papp opined that appellant no longer had any residuals of the accepted left knee injuries or any nonoccupational conditions of the left knee, but remained disabled from her date-of-injury position due to limited left knee motion caused by the February 4, 2016 authorized surgery. In a January 10, 2017 supplemental report, Dr. Papp opined that her left knee condition was idiopathic in nature. He posited that the objective loss of left knee extension could be attributed to noncompliance with physical therapy, although the medical record did not indicate any failure to cooperate. Dr. Papp found appellant medically unable to resume her date-of-injury position as a letter carrier, or perform the duties of a receptionist.

During the hearing, conducted on February 1, 2017, appellant contended that Dr. Ames' reports demonstrated her total disability for work commencing October 14, 2015. She provided progress reports from Dr. Ames dated from June 20, 2016 through January 4, 2017. Dr. Ames held appellant from work due to postoperative knee pain. Appellant participated in physical therapy. In a February 20, 2017 report, Dr. Ames opined that she was unable to perform the duties of a cashier/clerk from October 2015 through February 2016 "due to severe osteoarthritis and avascular necrosis of the knee joint" as she could not "stand for long periods and squat often."

By decision dated March 6, 2017, a hearing representative affirmed OWCP's May 27, 2016 decision, finding that the medical evidence of record failed to demonstrate a material worsening of the accepted left knee injuries, sufficient to warrant modification of the June 26, 2013 LWEC determination. OWCP found that Dr. Papp's opinion as second opinion examiner represented the weight of the medical evidence.

In a March 17, 2017 file memorandum, OWCP advised that it would set aside Dr. Papp's November 16, 2016 and January 10, 2017 reports as they were equivocal and contradictory.

By decision dated March 21, 2017, OWCP reversed the March 6, 2017 decision, and found that appellant had met her burden of proof to modify the June 26, 2013 LWEC determination. It found that Dr. Ames' October 14, 2015 medical report demonstrated that the accepted left knee injuries had worsened such that appellant could no longer perform the duties of a receptionist, the position on which OWCP had based the June 26, 2013 LWEC determination. OWCP authorized payment of wage-loss compensation for total disability commencing February 4, 2016. However, it further found that the medical evidence of record failed to demonstrate that appellant was totally disabled from all work for the period October 14, 2015 through February 3, 2016.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁹ Under FECA, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-

⁸ *Supra* note 1.

⁹ *Joe D. Cameron*, 41 ECAB 153 (1989).

earning capacity.¹⁰ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled from work as a result of the accepted employment injury.¹¹ Whether a particular injury causes an employee to become disabled from work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹²

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.¹³

ANALYSIS

OWCP accepted that appellant sustained left knee strains, a left medial meniscus tear, left lateral meniscus tear, and chondromalacia of the left knee. It paid wage-loss compensation for temporary total disability from January 21, 1999 through June 2008, followed by compensation for partial wage loss through January 9, 2009, and compensation under a formal LWEC determination effective January 10, 2009. Appellant stopped work on February 17, 2012 to undergo authorized left knee surgery. OWCP set aside the LWEC and resumed payment of total disability compensation commencing February 17, 2012.

By LWEC determination dated June 26, 2013, OWCP reduced appellant's wage-loss compensation based on her projected earnings in the selected position of receptionist. It paid her wage-loss compensation under the LWEC through February 3, 2016. Appellant underwent partial left knee arthroplasty on February 4, 2016. OWCP resumed payment of compensation for temporary total disability effective February 4, 2016. In its March 21, 2017 decision, however, it found that the medical evidence did not establish that appellant was totally disabled from all work for the period October 14, 2015 through February 3, 2016.

Appellant has the burden of proof to demonstrate by the weight of the substantial, reliable and probative evidence that she was totally disabled from work for the claimed period due to the accepted left knee injuries.¹⁴

In support of her claim, appellant provided medical reports from Dr. Ames, an attending Board-certified orthopedic surgeon. In his report of October 14, 2015, Dr. Ames explained that appellant could not be safe at work as she had fallen several times when her left knee gave way. In a January 21, 2016 letter, he recalled that, on October 14, 2015, he found that appellant was "falling and unsafe which is a concern for her to continue working." Dr. Ames submitted reports dated from January 21 to February 22, 2016, in which he noted that appellant had been totally

¹⁰ See *Prince E. Wallace*, 52 ECAB 357 (2001).

¹¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹² *Gary J. Watling*, 52 ECAB 278 (2001).

¹³ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁴ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

disabled from work commencing October 14, 2015. However, he did not explain how and why the accepted left knee injuries would totally disable appellant from work for the claimed period. In the absence of such medical rationale, Dr. Ames' opinion is insufficient to meet appellant's burden of proof.¹⁵ Insofar as he held appellant from work out of concern that she might continue to fall, the Board has held that fear of future injury is not compensable.¹⁶

The Board notes that OWCP advised appellant by January 29, 2016 letter of the type of evidence needed to establish her claim for wage-loss compensation, including her physician's well-reasoned explanation of how the accepted injuries disabled her from all work for the dates claimed. However, appellant has not submitted such evidence. Therefore, she failed to meet her burden of proof to establish total disability from work for the period October 14, 2015 through February 3, 2016.

On appeal, appellant contends that Dr. Ames' October 14, 2015 medical report demonstrates total disability from all work for the period October 14, 2015 through February 3, 2016. As explained above, she has not submitted sufficient rationalized evidence to establish disability for work for the claimed period.

Appellant may submit additional 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 failed to meet her burden of proof to establish total disability from work for the period October 14, 2015 through February 3, 2016, causally related to her accepted employment-related left knee injuries.

¹⁵ *Supra* note 13.

¹⁶ *L.J.*, 59 ECAB 408 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 21, 2017 is affirmed.

Issued: February 9, 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