United States Department of Labor
Employees' Compensation Appeals Board

Y.H., Appellant	)	
and	)	**Docket No. 17-1303**
	)	**Issued: March 13, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Whitestone, NY, Employer	)	

Appearances:
Stephen Larkin, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 28, 2017 appellant, through his representative, filed a timely appeal from an April 21, 2017 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 to consider the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was totally disabled from work during the period February 5 to July 17, 2016 causally related to his accepted employment conditions.

[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.*

FACTUAL HISTORY

On December 31, 2015 appellant, then a 60-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a bilateral knee condition as a result of repetitive walking and climbing required in his job. He noted that he first became aware of his condition on June 16, 2008 and realized that it was causally related to his federal employment on December 31, 2015. Appellant stopped work on September 8, 2015 and returned to work part time, four hours a day, restricted duty on July 18, 2016.

An October 6, 2015 magnetic resonance imaging (MRI) scan of the right knee revealed horizontal tear of the medial meniscus, chondromalacia, osteoarthritis, intra-articular loose bodies, synovitis and patellar tendon tendinosis. On November 4, 2015 Dr. Alexander Golant, a Board-certified orthopedist, performed a right knee arthroscopy with removal of loose body, partial medial meniscectomy, chondroplasty of the femoral trochlea and medial femoral condyle, limited synovectomy, and abrasion arthroplasty.[3] He diagnosed right knee medial meniscus tear, degenerative arthritis, loose bodies, synovitis, and osteophytes.

Appellant was seen by Dr. Chenzhong Fu, a Board-certified physiatrist, on December 3, 2015, who noted treating him since January 13, 2015 for bilateral knee pain. Dr. Fu related that appellant experienced bilateral knee pain from daily prolonged walking, carrying heavy mail, and frequently climbing steps during mail delivery. A right knee MRI scan revealed a meniscal tear. In November 2015 appellant had a right knee arthroscopy and postoperatively he underwent physical therapy and his orthopedist recommended that he not work full duty for three months. Dr. Fu noted that appellant's chronic right knee pain was frequent and recurrent, secondary to wear and tear, degenerative joint disease, and his job which required prolonged walking, mail carrying, and step climbing. He opined that appellant's bilateral knee degenerative and arthritic symptoms were consistent with such work duties. On February 2, 2016 Dr. Fu noted treating appellant for bilateral knee pain. Appellant reported working as a letter carrier since February 1996 which involved repetitive walking and climbing steps. He diagnosed a medial meniscal tear, chondromalacia, osteoarthritis, and tendinosis by MRI scan. Dr. Fu opined that repetitive walking and climbing steps several hours a day, over 20 years, would cause his conditions. He diagnosed torn meniscus, chondromalacia patella, osteoarthritis, and patellar tendinosis. Dr. Fu noted appellant's right knee arthroscopy and subsequent physical therapy. He indicated that the prognosis of bilateral knee degenerative disease was not favorable.

On March 29, 2016 OWCP accepted appellant's claim for torn meniscus of the right knee, right chondromalacia patellae, and right patellar tendinosis.

On April 20, 2016 appellant was treated by Dr. Xiao-ke Gao, a Board-certified neurologist, for a sprained right knee. He reported spraining his right knee when walking at work. Appellant was diagnosed with a meniscal tear and underwent right knee arthroscopic surgery in November 2015. Dr. Gao noted findings on examination of no motor deficits, no atrophy or fasciculations, intact sensory examination and deep tendon reflexes, normal gait, normal tandem walking, normal range of motion of the knee, and negative straight leg testing bilaterally. She referred appellant for physical therapy, two to three times a week for four weeks.

[3] This surgery was not authorized by OWCP as work related.

In an undated attending physician's report, Dr. Gao diagnosed right knee sprain due to walking. She indicated by checking a box marked "yes" that appellant's condition was caused or aggravated by an employment activity and noted that appellant was totally disabled since October 7, 2015. In a duty status report dated April 20, 2016, Dr. Gao noted that he was totally disabled.

On April 29, 2016 OWCP authorized physical therapy for 12 visits for the period April 27 to May 27, 2016.

Appellant filed several Form CA-7 claims for compensation for leave without pay (LWOP) for total disability during the periods January 2 to April 1, April 12 to 29, and April 30 to May 27, 2016. The employing establishment human resource specialist noted on the claim form that the claimed hours were verified.

On May 9, 2016 OWCP requested that appellant submit additional information to support his claim for compensation commencing January 2, 2016. It noted that the evidence of record indicated that he stopped work on September 8, 2015 and did not return. OWCP reviewed the reports and recommendations of Dr. Fu and Dr. Gao. It indicated that additional evidence was needed to establish disability from work during the claimed periods due to the accepted conditions. OWCP advised that the medical evidence of record did not substantiate that the disability was caused by the work injury because it did not support ongoing, continued disability beyond three months postoperation as recommended by Dr. Fu. It held appellant's case open for 30 days to afford him the opportunity to submit the requested information.

Appellant submitted a note from Dr. Golant dated December 1, 2015, who advised that he was unable to return to work and would be reevaluated on January 19, 2016. Dr. Golant noted appellant's November 4, 2015 right knee arthroscopy. In a January 19, 2016 return to work slip, he indicated that appellant could not return to work until further notice. On March 22, 2016 Dr. Golant returned him to work on May 5, 2016. Appellant underwent physical therapy from May 12 to June 2, 2016.

On May 18 and June 7, 2016 appellant was treated by Dr. Gao who diagnosed meniscal tear and status post right knee arthroscopic surgery in November 2015. Appellant indicated that he could only walk for 15 minutes and had difficulty getting up and climbing stairs. Dr. Gao noted findings on examination of no motor deficits, no atrophy or fasciculations, intact sensory and deep tendon reflexes, normal gait, normal tandem walking, normal range of motion of the knee, and negative straight leg testing bilaterally. She diagnosed right knee pain and recommended physical therapy.

On June 10, 2016 appellant filed a Form CA-7 claim for compensation for the period May 29 to June 10, 2016. The employing establishment human resource specialist noted on the claim form that the claimed 80 hours were verified.

On May 5, 2016 appellant filed a Form CA-7 claim for compensation for LWOP during the period October 3, 2015 to April 1, 2016. The employing establishment verified the claimed 709.55 hours of leave buyback.

By decision dated June 16, 2016, OWCP denied appellant's claim for compensation for total disability for the period January 2, 2016 and continuing. It indicated that it had advised

appellant on May 9, 2016 that additional evidence was needed to establish disability beyond the three months recommended by Dr. Fu, but that such evidence had not been submitted.

In a June 2, 2016 work capacity evaluation form (OWCP-5c), Dr. Gao diagnosed torn meniscus of the right knee and chondromalacia patellae. She noted that appellant could not return to work with or without restrictions for one month. Dr. Gao advised that he had not reached maximum medical improvement and he was unable to walk at normal speed.

On June 20, 2016 appellant requested an oral hearing before an OWCP hearing representative, which was held on February 16, 2017.

A May 24, 2016 report from Dr. Golant was received on June 27, 2016, wherein he noted treatment of appellant for right knee pain status post right knee arthroscopy on November 4, 2015. He reported attending physical therapy, but noted continued knee pain with climbing stairs, standing, or walking longer than 10 minutes. Appellant indicated that he was unable to squat or kneel and was not ready to return to work due to his knee symptoms. Findings included intact motor strength in all extremities, intact sensory examination, nonantalgic gait, no swelling, tenderness of the patellae tendon and peripatellar, discomfort with range of motion, and no crepitus. Dr. Golant diagnosed arthritis of the knee and opined that appellant's residual symptoms were likely due to arthritis as the postsurgical inflammation should have subsided. He noted that appellant reported significant pain and functional limitations. Dr. Golant advised that there was clinical and radiographic evidence of articular cartilage wear consistent with osteoarthritis. He recommended intra-articular injections.

On June 22, 2016 OWCP authorized physical therapy for 12 visits from June 13 to July 13, 2016.

On June 24, 2016 appellant filed a Form CA-7 claim for compensation for total disability during the period June 11 to 24, 2016. The employing establishment noted that the claimed 80 hours of leave without pay was verified.

In a June 30, 2016 development letter, OWCP requested that appellant submit additional information to support his claim for compensation for the period October 3, 2015 to April 1, 2016. It advised that the medical evidence of record did not support this claimed period of disability. OWCP noted that appellant underwent surgery on November 4, 2015, but the surgery was not authorized by OWCP.

Appellant provided a June 7, 2016 report from Dr. Gao who diagnosed meniscal tear and status post right knee surgery. Appellant reported that he could only walk 15 minutes and had difficulty getting up and climbing stairs. Dr. Gao noted an essentially normal examination, diagnosed right knee pain, and recommended physical therapy. In an undated work capacity evaluation, she diagnosed right torn meniscus and chondromalacia patellae. Dr. Gao noted that appellant could work two to four hours a day, light duty, for one month. Appellant underwent physical therapy from June 8 to December 22, 2016.

On July 1, 2016 appellant was seen by Dr. Tsai C. Chao, a Board-certified physiatrist, for progressive right knee pain since 2008. He reported worsening symptoms which prevented him from working beginning in September 2015 with difficulties in walking and stair management. Appellant underwent arthroscopic surgery on November 4, 2015 and was treated by Dr. Gao

without improvement. Right knee examination revealed positive crepitus with patellar compression pain, increased right knee pain on resisted knee extension, swelling and tenderness to the medial joint lines, no significant joint effusion, limited range of motion of right knee, and significant right quadriceps atrophy. Dr. Chao diagnosed traumatic arthritis of the right knee and impaired ambulation. He recommended an x-ray and MRI scan of the right knee, physical therapy, and a home exercise program. Dr. Chao opined with reasonable degree of medical probability, if the history provided was accurate, appellant's physical injury was causally related to cumulative trauma to his right knee since June 16, 2008 while working as a city carrier. He advised that appellant remained temporarily and totally incapacitated.

On July 18, 2016 the employing establishment offered appellant a limited-duty assignment as a carrier for four hours a day, effective July 18, 2016. Appellant accepted the job offer and returned to work. In a report of termination of disability (Form CA-3), OWCP noted that appellant returned to work limited duty as a lobby monitor on July 18, 2016.

Appellant was treated by Dr. Gao on July 5 and 12, August 2 and 30, September 6, October 4 and 25, and December 6, 2016 for right knee pain and patellar tendinitis. Dr. Gao restated appellant's history and current complaints. She advised that due to his degenerative disease of the right knee appellant had chronic pain with difficulty walking. Dr. Gao noted that appellant was disabled from work since November 2015 due to pain and an inability to squat. Findings included difficulty with heel to toe walking, difficulty climbing on the examination stool due to right knee pain, knee pain upon flexion, and an inability to squat due to pain. Dr. Gao diagnosed meniscus tear of the right knee and right knee pain with chondromalacia. She recommended physical therapy and home exercises. Dr. Gao noted that appellant had returned to work on July 18, 2016 for four hours a day. In duty status reports (CA-17 forms) dated September 6, October 4 and 25, and December 6, 2016, she diagnosed right meniscal tear and noted that appellant returned to work part-time four hours per day on July 18, 2016. In attending physician's reports (CA-20 forms) dated August 30, October 4 and 25, and December 6, 2016, Dr. Gao diagnosed meniscus tear, osteoarthritis, and chondromalacia. She checked a box marked "yes" indicating that appellant's condition was caused or aggravated by a work activity. Dr. Gao noted that appellant was totally disabled from work for the period October 18, 2015 to July 18, 2016 and partially disabled from work beginning July 18, 2016.

On September 7, 2016 OWCP authorized physical therapy for 12 visits from September 6 to December 31, 2016.

On December 30, 2016 OWCP requested that Dr. Gao provide an estimated date that she expected appellant to return to work full time with or without restrictions.

In an undated report, Dr. Gao reviewed appellant's history and treatment. She advised that, although it was predicted that appellant would require three months of physical therapy postsurgery to be able to return to work, recovery was not an exact science. Dr. Gao indicated that appellant was continuing to undergo physical therapy so that he could recover from surgery. She advised that postoperative physical therapy was requested with the expectation that appellant would be able to return to limited-duty work at the end of June or July. Dr. Gao opined that appellant was totally disabled from September 8, 2015 to July 17, 2016. In attending physician's reports dated January 31 and April 11, 2017, she diagnosed tear of the meniscus and chondromalacia. Dr. Gao checked a box marked "yes" indicating that appellant's condition was

caused or aggravated by his work. She reiterated appellant's total disability until July 18, 2016 and his partially disability beginning July 18, 2016. An April 11, 2017 duty status report (Form CA-17) noted that appellant was working limited duty four to six hours daily.

On January 5, 2017 OWCP authorized physical therapy for 12 visits from December 19, 2016 to March 19, 2017. On February 23, 2017 it authorized physical therapy for 12 visits from February 14 to June 14, 2017. Appellant attended physical therapy from January 24 to March 23, 2017.

By decision dated April 21, 2017, OWCP's hearing representative affirmed the decision dated June 16, 2016, as modified. He noted that appellant was disabled for three months after surgery from November 4, 2015 to February 4, 2016 and was entitled to compensation for wage loss for this period. However, the hearing representative advised that the evidence of record failed to support work-related disability from February 5 to July 17, 2016.

LEGAL PRECEDENT

Section 8102(a) of FECA[4] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general, the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[5] This meaning, for brevity, is expressed as disability from work.[6]

For each period of disability claimed, the employee has the burden of proving that he or she was disabled from work as a result of the accepted employment injury.[7] Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.[8]

The Board has interpreted section 8103, which requires payment of expenses incidental to the securing of medical services, as authorizing payment for loss of wages incurred while obtaining medical services. An employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for loss of wages for time spent incidental to such treatment. The rationale for this entitlement is that, during such

[4] 5 U.S.C. § 8102(a).

[5] 20 C.F.R. § 10.5(f). *See also William H. Kong,* 53 ECAB 394 (2002); *Donald Johnson,* 44 ECAB 540, 548 (1993); *John W. Normand,* 39 ECAB 1378 (1988); *Gene Collins,* 35 ECAB 544 (1984).

[6] *See Roberta L. Kaaumoana,* 54 ECAB 150 (2002).

[7] *See William A. Archer,* 55 ECAB 674 (2004).

[8] *See Fereidoon Kharabi,* 52 ECAB 291, 292 (2001).

required examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.[9]

ANALYSIS

The Board finds this case not in posture for decision.

OWCP's hearing representative failed to make adequate findings in his April 21, 2017 decision, which granted appellant wage-loss compensation for the period November 4, 2015 to February 4, 2016, but found the evidence insufficient to support work-related disability from February 5 to July 17, 2016. The Board finds that it is unclear what absences are incidental to the accepted injuries of torn meniscus of the right knee, right chondromalacia patellae, and right patellar tendinosis.

In a development letter dated June 30, 2016, OWCP noted that the right knee arthroscopic surgery performed on November 4, 2015 was not authorized by OWCP. In the April 21, 2017 decision, the hearing representative noted that appellant was disabled from work for three months after surgery from November 4, 2015 to February 4, 2016 and was entitled to compensation for wage loss for this period based apparently on the recovery time for surgery. However, OWCP's hearing representative made no clear finding on whether the surgery giving rise to the accepted disability should be authorized and OWCP did not consult an OWCP medical adviser regarding this matter.[10] Further, OWCP did not consider whether appellant was entitled to compensation for wage loss incidental to medical treatment for his work-related injuries which was incurred during the claimed periods.[11] As noted, it authorized physical therapy from April 27 to May 27, 2016, June 13 to July 13, 2016, September 6 to December 31, 2016, December 19, 2016 to March 19, 2017 and February 14 to June 14, 2017. The authorized physical therapy overlaps the period of compensation for wage loss requested by appellant from January 2 to July 17, 2016. However, the hearing representative did not address whether appellant was entitled to compensation for wage loss incidental to attending authorized physical therapy for his work-related injuries.

Proceedings under FECA are not adversary in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[12]

The Board finds that the case must be remanded to OWCP for preparation of a statement of accepted facts and referral of the matter to an OWCP medical adviser, consistent with OWCP

[9] *Sean O'Connell*, 56 ECAB 195 (2004).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.10(f) (September 2010) (where the claimant fails to request prior authorization for surgery, OWCP should instruct the claimant to submit the minimum documentation from the appellant's physician, as well as the operative report, and then refer the case for an evaluation of the written record by an OWCP medical adviser).

[11] *See supra* note 9.

[12] *John W. Butler*, 39 ECAB 852 (1988).

procedures, to determine whether the November 4, 2015 arthroscopic surgery should be considered authorized and if so, the period of temporary total disability incidental to the surgery. OWCP shall also consider what, if any, periods of disability are incidental to the authorized physical therapy or other authorized medical treatment. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: March 13, 2018
Washington, DC

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

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

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