United States Department of Labor
Employees' Compensation Appeals Board

S.T., Appellant	)	
and	)	**Docket No. 18-1144**
	)	**Issued: August 9, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Long Beach, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2018 appellant filed a timely appeal from a March 13, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 5, 2015, as he no longer had residuals

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the March 13, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

or disability due to his accepted bilateral lower leg osteoarthrosis; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals on or after November 5, 2015.

FACTUAL HISTORY

On March 26, 2012 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he experienced bilateral knee pain as a result of his federal employment duties including delivering mail on uneven surfaces and repeatedly tweaking his knees. He explained that he worked as a mail handler for 19 years and did a lot of pushing and pulling of heavy objects. Appellant related that he also worked special delivery and as a collector for six years and had to get in and out of his truck and lift heavy tools approximately 85 times a day. He first became aware of his condition and realized that it resulted from factors of his federal employment on January 12, 2012. Appellant had not worked since February 11, 2011 due to a previously accepted claim. OWCP assigned the current claim OWCP File No. xxxxxx297.[3]

Appellant underwent magnetic resonance imaging (MRI) scans of his bilateral knees on January 24, 2012. MRI scans showed no meniscal tears or chondral defects of the left knee. The right knee MRI scan showed findings indicative of a localized osteochondral injury.

On July 2, 2012 OWCP accepted appellant's claim for bilateral lower leg osteoarthrosis. Appellant was released to work modified duty on January 12, 2012.

Under a separate claim, OWCP File No. xxxxxx384, OWCP referred appellant, along with a statement of accepted facts and a copy of the record, to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon serving as a second opinion examiner, to determine his work restrictions for vocational rehabilitation purposes and whether he sustained a bilateral knee degenerative joint disease as a result of his employment.

In a July 20, 2012 report, Dr. Ha'Eri noted that appellant's claim was accepted for cervical radiculopathy and bilateral epicondylitis. He reviewed appellant's history of injury regarding his cervical and upper extremity conditions and provided physical examination findings. Dr. Ha'Eri indicated that examination of appellant's bilateral knees showed mild crepitus with no deformity, swelling, or effusion. He noted that appellant could work part time with restrictions up to four hours. With regard to appellant's alleged bilateral knee injury, Dr. Ha'Eri opined that he did not agree that appellant suffered a work-related bilateral knee degenerative joint disease. He explained that the left knee MRI scan was normal and the right knee showed chondromalacia over the medial femoral condyle, which was of a degenerative nature and not connected to a work injury.

Appellant was also treated by Dr. Edward Mittleman, a family practitioner, who related in reports dated July 26 and September 21, 2012 that appellant complained of bilateral knee pain.

[3] Under OWCP File No. xxxxxx384, appellant has an accepted occupational disease claim for cervical radiculopathy, bilateral later epicondylitis, and bilateral medial epicondylitis, which arose on or about May 1, 2009. He also has an accepted traumatic injury claim for back muscle spasm, which arose on July 14, 2009. OWCP assigned the latter claim OWCP File No. xxxxxx559. It combined the two above-noted claims with the current claim, and designated OWCP File No. xxxxxx384 as the master file.

Physical examination of his bilateral knees showed medial joint line tenderness and minimal crepitance bilaterally. Lachman and anterior and posterior drawer tests were negative bilaterally. Dr. Mittleman diagnosed bilateral knee degenerative joint disease and left knee tendinitis.

In a February 26, 2013 report, Dr. Charles Herring, a Board-certified orthopedic surgeon, noted that appellant still complained of significant right knee pain. Upon physical examination of appellant's knees, he observed medial and lateral joint line tenderness. Dr. Herring diagnosed right knee medial femoral condyle osteochondral defect, left knee tendinitis, and bilateral knee degenerative joint disease. He requested authorization for right knee surgery.

On October 5, 2013 appellant returned to part-time modified duty, working five hours per day.

A December 5, 2013 left knee MRI scan showed very mild chondromalacia patella, minimal subtle signal abnormality within the medial femoral condyle which may represent sequela of prior subchondral injury, and findings likely representing a subtle tiny oblique tear through the posterior horn of the medial meniscus. A right knee MRI scan report showed findings that likely represented a subtle oblique tear of the posterior horn of the medial meniscus and minimal focal osteochondral signal abnormality within the medial femoral condyle.

OWCP found that, a conflict in medical evidence existed between Dr. Mittleman, appellant's treating physician who opined that appellant had a right knee osteochondral injury and required surgery, and Dr. Ha'Eri, who opined that appellant did not suffer an employment-related right knee injury. It referred appellant to Dr. Daniel Kaplan, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict.

In a March 5, 2014 report, Dr. Kaplan indicated that he reviewed appellant's records and noted that appellant sustained injuries to his knees and cervical spine at work. Upon physical examination of his right knee, he observed mild medial joint line tenderness with no crepitance or effusion. Range of motion was 0 to 130 degrees. Examination of appellant's left knee revealed no effusion and range of motion of 0 to 135 degrees actively and passively. Dr. Kaplan discussed appellant's medical records. He diagnosed right knee mild degenerative joint disease. Dr. Kaplan reported that, based on appellant's history, he did not feel that this should be considered an employment-related injury. He opined that appellant had a mild degenerative change in the knee which was not unexpected given his age. Dr. Kaplan noted that appellant did not need surgery. He related that appellant had no disability or work restrictions due to his right knee, but his other injuries may affect his capacity to return to his regular work.

On June 18, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because his work-related injury had resolved. It found that the special weight of the medical evidence rested with Dr. Kaplan's March 5, 2014 report, in which he found that appellant had not sustained a work-related right knee condition. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

OWCP received a June 12, 2014 report by Dr. Mittleman who noted his disagreement with Dr. Kaplan's March 5, 2014 report. Dr. Mittleman indicated that appellant's claim had been

accepted for osteoarthritis of the bilateral leg and related that appellant continued to be symptomatic secondary to this progressive condition. He compared appellant's January 2012 bilateral knee MRI scans and his more recent MRI scans and opined that they showed a "progression of the pathology in both of [appellant's] knees, which is consistent with permanent aggravation of bilateral knee pathology." Dr. Mittleman described appellant's employment duties and explained that these types of activities produced pathology in the knees. He continued to treat appellant and provide medical reports dated September 24, 2014 to July 23, 2015.

OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective November 5, 2015, by decision of that same date. It found that the special weight of medical evidence rested with Dr. Kaplan, the impartial medical examiner (IME), who had determined in a March 5, 2014 report that appellant did not have residuals or disability due to a work-related right knee injury.

On May 19, 2016 appellant requested reconsideration.

In a letter dated May 11, 2016, Dr. Mittleman noted his disagreement with OWCP's termination decision. He indicated that Dr. Kaplan had not addressed appellant's medial meniscus oblique tear as documented in the December 5, 2013 MRI scan. Dr. Mittleman further contended that appellant's degenerative joint knee condition was related to his employment and referenced several medical studies which revealed that work conditions produced his knee pathology. He opined that, given appellant's repetitive activities as a letter carrier/mail handler, and the significant stresses and strains on his knee joints over time, it was more proper to consider that these work activities were the source of his degenerative knee disease and documented medial meniscus tear. Dr. Mittleman requested that the acceptance of appellant's claim be expanded to include bilateral medial meniscus tear.

By decision dated August 10, 2016, OWCP denied modification of the November 5, 2015 termination decision. It found that Dr. Mittleman's May 11, 2016 letter was insufficient to overcome the special weight of the medical evidence accorded Dr. Kaplan as the IME.

On October 18, 2016 appellant requested reconsideration.

In an October 7, 2016 letter, Dr. Mittleman again noted his disagreement with OWCP's decision to terminate appellant's wage-loss compensation and medical benefits. He explained that it was medically documented that a partial or total tear of the medial meniscus can occur when shearing forces are put to the knee, such as when a person quickly twists the knee.

By decision dated October 19, 2017, OWCP denied modification of the August 10, 2016 decision. It found that the additional medical evidence submitted was insufficient to overcome the special weight of Dr. Kaplan's March 5, 2014 impartial medical report.

On January 12, 2018 appellant requested reconsideration.

In a January 10, 2018 letter, Dr. Basimah Khulusi, Board-certified in physical medicine and rehabilitation, contended that Dr. Kaplan's opinion had no probative value. She referenced ECAB decisions *James Washington, Jr.*, 42 ECAB 182 (1990) and *Robert O. Tondee*, 37 ECAB 325 (1994), which held that a medical expert or physician should not address legal issues in a case

and should only address the medical questions certified. Dr. Khulusi then claimed that Dr. Kaplan had made "an error of law" when he opined that appellant's degenerative joint disease of the right knee was not employment related since appellant's claim was already accepted for bilateral osteoarthritis. She requested that OWCP obtain another impartial medical opinion.

By decision dated March 13, 2018, OWCP denied modification of the October 19, 2017 decision. It found that Dr. Khulusi's new January 10, 2018 report did not contain examination findings or medical rationale to establish that appellant still suffered residuals or disability of his accepted bilateral knee condition.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[4] It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[5] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[8]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[9] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10] When there exists 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

[4] *L.C.*, Docket No. 18-1759 (issued June 26, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[8] *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P., id.*

[9] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[10] 20 C.F.R. § 10.321.

such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 5, 2015.

In a March 5, 2014 report, Dr. Kaplan, the IME selected to resolve a conflict in medical opinion evidence, noted that appellant sustained injuries to his knees at work. Upon physical examination of appellant's right knee, he observed mild medial joint line tenderness with no crepitance or effusion. Range of motion was 0 to 130 degrees. Dr. Kaplan indicated that he reviewed appellant's history and discussed his medical records. He diagnosed right knee mild degenerative joint disease. Dr. Kaplan opined that appellant's right knee condition was not an employment-related injury. He explained that appellant had a mild degenerative change in the knee which was not unexpected given his age. Dr. Kaplan concluded that appellant had no disability or work restrictions due to his right knee. Based on this report, OWCP terminated appellant's wage-loss compensation and medical benefits, effective November 5, 2015.

The Board finds that OWCP had requested that Dr. Kaplan resolve a conflict in medical opinion evidence regarding whether appellant had an employment-related right knee osteochondral injury and required surgery. OWCP did not request that Dr. Kaplan opine as to whether appellant's accepted bilateral osteoarthritis condition had resolved. Accordingly, in his March 5, 2014 report, Dr. Kaplan diagnosed degenerative joint disease of the right knee and opined that appellant's right knee condition was not causally related to his employment. He explained that appellant's condition was degenerative and not unexpected due to appellant's age. Dr. Kaplan did not address whether appellant's accepted bilateral lower leg osteoarthrosis had resolved.

The Board finds that Dr. Kaplan failed to properly address whether appellant's accepted bilateral lower leg osteoarthrosis had ceased, and thus, cannot form the basis for the termination of appellant's wage-loss compensation and medical benefits.[12] It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate history are of limited probative value.[13] Although Dr. Kaplan acknowledged that appellant had an employment-related bilateral knee injury, he did not provide an opinion on whether appellant's accepted injury had ceased. He did not even acknowledge that appellant's claim had been accepted for bilateral lower leg osteoarthrosis. Instead, Dr. Kaplan merely determined that appellant's right knee degenerative condition was not related to his employment. As such, this report is of limited probative medical value.

[11] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[12] *See M.R.*, Docket No. 17-0634 (issued July 24, 2018).

[13] *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

The Board therefore finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 5, 2015, based on the report of Dr. Kaplan, the IME.[14]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 5, 2015.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 9, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[14] Due to the disposition of issue 1, issue 2 is moot.