

FACTUAL HISTORY

On August 25, 1989 appellant, then a 33-year-old distributor, was involved in a motor vehicle accident when his postal vehicle was struck on the driver's side while in the performance of duty.² OWCP accepted conditions of: sprain of left knee, medial collateral ligament; sprain of neck, other synovitis and tenosynovitis, right; other tear of left medial meniscus of knee; unspecified internal derangement of left knee; other affections of right shoulder region; right sprain of shoulder and upper arm; and superior glenoid labrum lesion. Appellant lost time from work due to intermittent medical treatment and surgical procedures approved by OWCP in April 1990, December 1991, and October 1997 for the left knee and in September 2009 for the right shoulder.³ He stopped work on March 25, 2012 and has not returned. OWCP placed appellant on the periodic rolls on March 10, 2013.

In a December 22, 2016 report, Dr. Susan Liu, a Board-certified physiatrist, indicated that appellant's diagnoses were persistent cervical strain, lumbar strain/radiculopathy with a degenerative disc condition, status post right shoulder arthroscopy, and bilateral internal derangement of the knees with a medial meniscal tear of the posterior horn of the left knee. She noted that due to his work-related injuries he was retired on disability and that there was a possibility of future left knee surgery.

On February 22, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), a list of questions, and the medical record to Dr. Matthew Drake, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether he continued to suffer residuals of his accepted employment conditions. Dr. Drake completed a report on March 17, 2017 and opined that appellant had no residuals of his employment injuries and that he could return to work with no restrictions due to the occupational-related conditions. He indicated that appellant's current symptoms were related to preexisting cervical spine degenerative arthritis, preexisting bilateral knee arthritis, and preexisting right shoulder rotator cuff tendinosis, which were related to his age, but unrelated to the accepted employment injury of 1989. Dr. Drake further indicated that restrictions would be related to appellant's general age and health, not related to his employment injury of 1989.

In a letter dated June 28, 2017, OWCP informed appellant that there was a conflict of medical opinion evidence between Dr. Liu and Dr. Drake regarding whether appellant had residuals of his accepted employment-related medical conditions or continued disability from work as a result of the employment injury. Appellant was referred to Dr. Gary Pushkin, a Board-certified orthopedic surgeon, serving as the impartial medical examiner (IME). OWCP provided Dr. Pushkin with an updated SOAF, the medical record, and a series of questions.

² Appellant's traumatic injury claim (Form CA-1) is not of record, but is noted to have been filed on September 11, 1989.

³ On April 13, 2010 appellant filed an occupational disease claim (Form CA-2) alleging a back condition which he attributed to factors of his federal employment on May 27, 2008. OWCP assigned OWCP File No. xxxxxx697 to the claim, which it developed as a consequential injury. It administratively combined OWCP File Nos. xxxxxx697 and xxxxxx444 into OWCP File No. xxxxxx319, with OWCP File No. xxxxxx319 serving as the master file.

In an August 16, 2017 report, Dr. Pushkin reviewed the SOAF and the medical record.⁴ He set forth findings on examination and opined that appellant had no residuals of the employment injury. Dr. Pushkin reported that appellant complained of a constant ache in his neck and right shoulder, stiffness in his neck, neck pain and a crackling sensation at night, and constant achiness in his knees. He opined that appellant's current complaints were completely unrelated to the 1989 employment accident by either direct cause, aggravation, precipitation, or acceleration. Dr. Pushkin noted that there were no objective finding on examination, the various MRI scans over the years showed findings that, were consistent with normal aging and were unrelated to any industrial injury, there were no preexisting nonindustrial conditions in the records, and that all of appellant's current complaints were related to nonindustrial conditions. He explained that appellant sustained a "minor injury" in 1989 and that his current complaints were all related to normal aging and the degenerative processes that occur with aging. Dr. Pushkin opined that appellant could return to work at an unrestricted level, noting that there were no objective findings to support the need for restrictions to his neck, shoulder, knees, or lower back.

In a report dated August 23, 2017, Dr. Liu continued to opine that appellant's cervical and lumbar strains with degenerative disc disease, status post right shoulder arthroscopy, and bilateral internal derangement of the knees were causally related to the employment injuries from August 25, 1989 and May 27, 2008.

On September 13, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on the IME's report. It found that the special weight of the medical opinion evidence rested with his opinion and afforded appellant 30 days to submit additional evidence or argument if he disagreed with the proposed termination.

Appellant subsequently provided two reports from Dr. Liu dated September 27, 2017. In a September 27, 2017 progress report, Dr. Liu continued to opine that his diagnosed conditions were causally related to the employment injuries from August 25, 1989 and May 27, 2008. In a September 27, 2017 letter, she noted her disagreement with the findings of Dr. Drake and Dr. Pushkin, based upon her longstanding involvement in appellant's medical treatment. Dr. Liu noted the history of appellant's employment injuries and that he had been off work on retirement disability since March 24, 2012 because of his ongoing pain in his neck, right shoulder, both knees, and low back. She explained that he retired on disability around March 22, 2013, after the employing establishment could not accommodate his restrictions, and opined that he remained disabled as a result of the employment-related injuries. Dr. Liu noted that a recent MRI scan of appellant's left knee in 2015 revealed a complex tear of the posterior horn of the medial meniscus and that surgery was cancelled secondary to his medical issues. She also opined that he required continued pain management, which was reasonable and necessary.

⁴ In reviewing the medical records and diagnostic testing with regards to appellant's knees, Dr. Pushkin noted that on April 19, 1990 appellant underwent a partial lateral meniscectomy of the left knee. The arthroscopy did not reveal medial compartment tearing, but revealed some degenerative tearing along the inner border of the lateral meniscus. He underwent a second arthroscopy on the left knee on December 5, 1991. There was no evidence of meniscal tear, medially or laterally. On October 21, 1997 appellant underwent a partial medial meniscectomy and chondroplasty arthroscopy of his right knee. Dr. Pushkin also noted that an October 16, 2015 magnetic resonance imaging (MRI) scan of both the left and right knee revealed degenerative changes and that the left knee had a degenerative tear in the posterior horn.

By decision dated October 18, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective November 12, 2017, finding that the IME's August 16, 2017 report was entitled to the special weight of the medical opinion evidence.

On October 30, 2017 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on May 10, 2018. He testified that while OWCP had authorized arthroscopic surgery of his left knee on March 21, 2016 he did not have the surgery because of his sleep apnea condition. Appellant indicated that he was going to have surgery in 2017, but his benefits had been terminated. He also noted that he developed arthritis. Appellant also testified that he had knee surgeries due to his injuries and that he did not believe that he would be having these problems, but for the employment injuries.

Dr. Liu, in progress reports dated October 24, 2017 through June 21, 2018, reiterated that appellant's medical conditions were the result of his employment-related injuries.

In an October 30, 2017 report, Dr. Michael Franchetti, a Board-certified orthopedic surgeon, indicated that he reviewed the reports of Drs. Drake and Pushkin and disagreed with their conclusions. Dr. Franchetti provided an impression of chronic cervical strain, chronic lumbosacral strain with lumbar radiculitis and disc herniations at L3-4, status post right shoulder surgery, and post-traumatic degenerative joint disease, both knees, with very symptomatic complex tear of degenerative medial meniscus, left knee. He opined that appellant continued to suffer from residuals of his employment-related knee injuries.

In a November 6, 2017 report, Dr. Jon D. Koman, a Board-certified orthopedic surgeon, noted the history of the 1989 motor vehicle collision and presented examination findings. He diagnosed a tear of the medial meniscus, left knee and opined that appellant would benefit from a left knee arthroscopy with meniscus debridement.

By decision dated July 24, 2018, OWCP's hearing representative affirmed the October 18, 2017 termination decision finding that Dr. Pushkin's opinion was entitled to the special weight of the medical evidence.

On September 19, 2018 appellant requested reconsideration. He noted that he was in his early 30s when his initial injury occurred and he still suffered from the same conditions 29 years later. Appellant indicated that he could not understand how his employment-related injuries could be attributed to aging as the conditions were never considered resolved.

In a September 5, 2018 report, Dr. Koman noted that appellant sustained a left knee torn medial meniscus from the August 25, 1989 employment injury. He indicated that the mechanism of injury was that of a valgus force to the left knee which caused the medial meniscus tear. Dr. Koman noted that appellant was approved for a left knee arthroscopic surgery on March 21, 2016, but the surgery was never performed due to his sleep apnea condition. He opined that appellant's continued symptoms on the medial side of his knee due to his medial meniscus tear and the need for a left knee arthroscopic procedure was due to the August 25, 1989 employment injury and not from normal aging. Dr. Koman indicated that normal aging in the knee would show x-ray and MRI scan evidence of more significant joint space narrowing given appellant's measured weight of 265 pounds and body mass index (BMI) of 38. He further indicated that, although

appellant underwent a prior left knee arthroscopy in 1990, after reviewing appellant's left knee MRI scan, he was unsure if appellant's meniscus tear was repaired or debrided. Nonetheless, Dr. Koman noted that appellant's medial meniscus tear continued to be a source of pain and opined that, had appellant not been involved in the accident, his medial meniscus would not be a current source of pain.

By decision dated December 12, 2018, OWCP denied modification of the July 24, 2018 decision finding that appellant had not submitted medical evidence of sufficient probative value to refute Dr. Pushkin's opinion.

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.⁵ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁸ 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.⁹

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ The implementing regulations provides that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP district medical adviser, OWCP shall appoint a third physician to make an examination. This is called an independent medical examination and

⁵ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ See *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ See *A.G.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

¹⁰ 5 U.S.C. § 8123(a); see *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹

In situations where there exist opposing reports of virtually equal weight and rationale and the case is referred for an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 12, 2017, as he no longer had residuals or disability causally related to his accepted employment injuries.

OWCP properly determined that a conflict in medical opinion arose between Dr. Liu, appellant's attending physician, and Dr. Drake, an OWCP referral physician, regarding appellant's current condition and the extent of his disability due to his accepted employment injuries. It properly referred appellant to Dr. Pushkin for an IME.

In his August 16, 2017 report, Dr. Pushkin noted appellant's history, reviewed the medical record, and noted examination findings in great detail. He indicated that appellant's findings and symptoms were normal for his age, there were no objective findings on examination, and the various MRI scans over the years showed findings that were consistent with normal aging and were unrelated to an industrial injury. Dr. Pushkin opined that there were no employment-related residuals either by either direct cause, aggravation, precipitation, or acceleration and that appellant could return to work at an unrestricted level with regards to his neck, shoulder, knees, and lower back. He concluded that appellant's current complaints were all related to normal aging and degenerative processes that occur with aging.

The Board finds that the IME's opinion is entitled to the special weight. Dr. Pushkin's report was sufficiently well rationalized and based upon a proper factual background.¹³ OWCP properly relied upon his report in finding that appellant's employment-related conditions had resolved. Dr. Pushkin examined appellant, reviewed his medical records, and reported an accurate history. He indicated that appellant's accepted conditions had resolved and that his current findings and limitations were those one would expect to occur with normal aging and the degenerative process that also occurs with aging. Because Dr. Pushkin's report established that appellant no longer had residuals or disability related to his accepted employment-related conditions, the Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁴

¹¹ 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

¹² See *R.P.*, *supra* note 5; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ See *L.C.*, Docket No. 18-1759 (issued June 26, 2019); *D.M.*, Docket No. 17-1052 (issued January 24, 2019).

¹⁴ See *D.M.*, *id.*; *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

After receiving OWCP's notice of proposed termination, appellant submitted additional reports from Dr. Liu. However, Dr. Liu was on one side of the conflict which Dr. Pushkin had resolved. The Board has held that reports from a physician who was on one side of a medical conflict are insufficient to overcome the special weight accorded to the IME, or to create a new conflict.¹⁵

Dr. Franchetti opined in his October 30, 2017 report that appellant continued to suffer from residuals of his employment-related knee injuries. Although he supported causal relationship, he did not provide medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant's diagnosed conditions and the accepted factors of his employment. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.¹⁶ Appellant also submitted a medical report by Dr. Koman which indicated that appellant needed surgery for a torn left medial meniscus, but did not address the causality of this condition. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁷ Thus, the reports from Dr. Franchetti and Dr. Koman are insufficient to overcome the special weight accorded to the IME's opinion or to create a new conflict.

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective November 12, 2017.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates a claimant's compensation benefits, the burden shifts to appellant to establish continuing disability or residuals after that date, causally related to the accepted injury.¹⁸ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish continuing employment-related disability or residuals, on or after November 12, 2017 due to the accepted employment injuries.

¹⁵ See *C.L.*, Docket No., 18-1379 (issued February 5, 2019); *I.J.*, 59 ECAB 408 (2008).

¹⁶ *V.T.*, Docket No. 18-0881 (issued November 19, 2018); *T.M.*, Docket No. 08-0975 (February 6, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁷ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁸ See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *J.R.*, Docket No. 17-1352 (issued August 13, 2018).

¹⁹ *Id.*

Following the termination of his wage-loss compensation and medical benefits, appellant submitted a report dated September 5, 2018 from Dr. Koman in which he opined that appellant's continued symptoms on the medial side of his left knee were due to his medial meniscus tear and that the need for a left knee arthroscopic procedure was due to the August 25, 1989 employment injury and not from normal aging. Dr. Koman indicated that normal aging in the knee would show x-ray and MRI scan evidence of more significant joint space narrowing given appellant's measured weight of 265 pounds and his BMI. He further indicated that he was unsure if appellant's meniscus tear was repaired or debrided in the 1990 left knee arthroscopy, but concluded that his left medial meniscus tear continued to be a source of pain. Dr. Koman opined that, had appellant not been involved in the accident, his medial meniscus would not be a current source of pain. While his report is generally supportive of specific continuing employment-related residuals, it does not provide adequate medical rationale explaining how appellant's left medial meniscus tear, which was seen in a 2015 MRI scan, was caused or aggravated by the employment injury, for which he underwent previous arthroscopic left knee procedures.²⁰ Such rationale is particularly necessary as the record supports that appellant had preexisting degenerative left knee conditions and Dr. Koman failed to differentiate between the symptoms of the preexisting condition and the effects of the current condition.²¹ Therefore, this report is also insufficient to meet appellant's burden of proof.

Appellant has not submitted sufficiently rationalized medical evidence establishing employment-related disabilities or residuals on or after November 12, 2017 due to the accepted employment injuries. As such, the Board finds that he has not met his burden of proof.

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 OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 12, 2017, as he no longer had residuals or disability causally related to his accepted employment injuries. The Board further finds that appellant has not met his burden of proof to establish continuing employment-related disability or residuals, on or after November 12, 2017, due to the accepted employment injuries.

²⁰ *G.T.*, Docket No. 17-1959 (issued June 22, 2018).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *see K.P.*, Docket No. 18-0041 (issued May 24, 2019).

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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