

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

R.H., Appellant)
and) Docket No. 19-1604
DEPARTMENT OF HOMELAND SECURITY,)
FEDERAL AIR MARSHAL SERVICE,)
Chelsea, MA, Employer)
Issued: October 9, 2020

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 22, 2019 appellant filed a timely appeal from a January 25, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP)¹ and a February 21, 2019 nonmerit decision. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated October 5, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1604 (issued October 5, 2020). The Board's *Rules of Procedure* provide that an appeal in which a request for oral argument is denied by the Board will proceed to a decision based on the case record and the pleadings submitted. 20 C.F.R. § 501.5(b).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 21, 2019 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.*

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation benefits, effective January 25, 2019, as his accepted March 4, 2004 bilateral knee injuries had ceased without residuals; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 15, 2004 appellant, then a 27-year-old air marshal, filed a traumatic injury claim (Form CA-1) alleging that he injured his knees when thrown to the ground during a ground fighting training exercise while in the performance of duty. OWCP accepted the claim for a right medial meniscal tear with lateral collateral ligament sprain and chondromalacia of the patella, and a left knee contusion. On August 12, 2004 Dr. Mark J. Bulman, a Board-certified orthopedic surgeon, performed authorized right knee arthroscopy with debridement of the lateral tibial plateau and posterior horn of the lateral meniscus. He diagnosed a chondral flap injury of the lateral tibial plateau and fraying of the posterior horn of the lateral meniscus.

Following intermittent work absences, appellant separated from the employing establishment, effective December 21, 2004. On September 21, 2007 he returned to full-time private sector work as a juvenile probation officer within prescribed medical limitations.

By decision dated November 29, 2007, OWCP found that appellant's actual earnings of \$564.32 a week as a juvenile probation officer fairly and reasonably represented his wage-earning capacity. It paid him compensation for loss of wage-earning capacity based on the difference between his actual earnings and the current pay rate for his date-of injury position. Beginning October 21, 2008, appellant worked in a series of private-sector security jobs in an office setting.

In a January 20, 2009 report, Dr. Anthony Lombardo, a Board-certified orthopedic surgeon, noted appellant's symptoms of right knee pain and the "locking up" of the left knee. He diagnosed derangement of the right lateral meniscus, arthritis of the right lower leg, derangement of the posterior horn of the left medial meniscus, and left knee pain. Dr. Lombardo restricted appellant to light-duty work. He noted in a January 28, 2010 report that x-rays of both knees were essentially normal. In a January 27, 2011 yearly follow up report, Dr. Lombardo found appellant's condition unchanged.⁵

On November 20, 2018 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF), a set of questions, and the medical record to Dr. John Hearst Wellborn, Jr., a Board-certified orthopedic surgeon, to determine whether appellant was

⁴ Docket No. 08-1973 (issued May 1, 2009).

⁵ Appellant also submitted a February 5, 2014 report by a physician whose signature is illegible, and a January 21, 2015 report from Martin Kramer, a physician assistant.

able to return to work as an air marshal and whether appellant continued to have residuals of his accepted conditions.

In a December 11, 2018 report, Dr. Wellborn noted his review of the SOAF and medical records. He diagnosed chronic derangement of the posterior horn of the lateral meniscus of the right knee. Dr. Wellborn noted that OWCP had “not sent the operative report from 2004, but from reviewing the SOAF [appellant] has been accepted to have a medial meniscus tear, but reviewing the records he has report of having partial lateral meniscectomy done which would be objective residual of injury at work.” He opined that he could not explain why appellant experienced chronic postoperative right knee pain as imaging studies were normal and appellant did not have arthritis.

On December 20, 2018 OWCP notified appellant that it proposed to terminate his wage-loss compensation as the weight of the medical evidence, as represented by the report of Dr. Wellborn, established that appellant no longer had continued disability from work as a result of his accepted employment injury. It afforded appellant 30 days to submit additional evidence or argument if he disagreed with the proposed action.

Appellant subsequently submitted a January 6, 2019 letter by Dr. Bertrand Vandeville, a Board-certified family practitioner, referring him to Dr. Piers Barry, a Board-certified orthopedic surgeon, to evaluate appellant’s chronic right knee problem and to determine if appellant could return to his date-of-injury position.

By decision dated January 25, 2019, OWCP terminated appellant’s wage-loss compensation benefits, effective that day, finding that the report from Dr. Wellborn constituted the weight of the medical evidence and established that he was capable of performing the physical requirements of his date-of-injury position. OWCP noted that the claim remained open for medical benefits.

On February 8, 2019 appellant requested reconsideration. He contended that Dr. Bulman and Dr. Wellborn agreed that the accepted right knee condition was permanent.

In support of his request, appellant submitted a December 27, 2018 left knee x-ray report, an attorney authorization, and copies of evidence previously of record.

By decision dated February 21, 2019, denied appellant’s request for reconsideration of the merits of his claim.

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.⁶ 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

⁶ *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment injury.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 25, 2019.

OWCP accepted appellant's claim for a right medial meniscal tear with lateral collateral ligament sprain and chondromalacia of the patella, and a left knee contusion. It subsequently terminated his wage-loss compensation based on the report of Dr. Wellborn, a second opinion examiner.

Dr. Wellborn noted in his December 11, 2018 report, that he had not been provided a copy of the 2004 operative report, and that he could not identify the etiology of appellant's postoperative right knee pain. The Board notes, however, that a complete, legible copy of Dr. Bulman's August 12, 2004 operative note was scanned into the imaged case record on June 17, 2004 and on several subsequent dates.

Medical opinion evidence not based on a complete factual and medical history is of greatly diminished probative value.⁹ Once it undertook development of the medical evidence, OWCP had the responsibility to do so in a manner that would resolve the relevant issues in the case.¹⁰ As such, it should have obtained a supplemental report based upon a complete and accurate medical history.¹¹ The Board finds that, as Dr. Wellborn's medical opinion was not based upon the complete medical record because he had not reviewed the 2004 operative report, his opinion is insufficient to represent the weight of the medical evidence.¹²

As Dr. Wellborn's report is of diminished probative value, the Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 25, 2019.¹³

⁷ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁸ *W.J.*, Docket No. 18-1376 (issued March 27, 2019); *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ *R.D.*, Docket No. 17-0415 (issued April 13, 2018); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based on incomplete history have little probative value).

¹⁰ *Id.*

¹¹ *W.J.*, *supra* note 8; *Del K. Rykert*, *supra* note 8.

¹² See *W.J.*, *supra* note 8; see also *R.D.*, *supra* note 9.

¹³ In light of the Board's disposition of issue one, issue two is rendered moot.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 25, 2019.

ORDER

IT IS HEREBY ORDERED THAT the February 21 and January 25, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: October 9, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board