

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

C.L., Appellant)	
)	
and)	Docket No. 21-0451
)	Issued: February 11, 2022
U.S. POSTAL SERVICE, LAUDERRIDGE)	
CARRIER ANNEX, Fort Lauderdale, FL,)	
Employer)	
)	

Appearances:
*Jason Lomax, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 5, 2021 appellant, through counsel, filed a timely appeal from a September 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 2, 2020, as he no longer had disability or residuals causally related to his accepted October 30, 2017 employment injury.

FACTUAL HISTORY

On November 1, 2017 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-) alleging that on October 30, 2017 he sustained injuries to his left knee and upper lip when his truck door hit his upper lip and he fell while in the performance of duty. He stopped work that day. On December 18, 2017 OWCP accepted the claim for left knee sprain and contusion. It paid appellant on the supplemental rolls for disability from December 25, 2017 through March 3, 2018, and on the periodic rolls for disability as of March 4, 2018. On February 22, 2018 OWCP expanded the acceptance of the claim to include tear of left knee medial meniscus, sprain of left knee anterior cruciate ligament (ACL), and encounter for fitting and adjustment of other specified devices.

Medical documentation from Dr. Luis E. Grau, a physician specializing in family medicine, indicated that appellant was not able to return to work in any capacity.

In an August 7, 2018 letter, OWCP requested that Dr. Grau respond to questions regarding appellant's return to work.

In an August 15, 2018 report, Dr. Grau noted the history of appellant's October 30, 2017 employment injury and appellant's medical treatment, and set forth examination findings, including diagnostics and test results of the left knee. He diagnosed: other meniscus derangement of posterior horn of left knee medial meniscus; other meniscus derangement of left knee medial meniscus; unilateral post-traumatic osteoarthritis, left knee; unspecified fracture of upper end of left tibia; other fracture of left patella; other tear of left knee medial meniscus; left knee tear of anterior cruciate ligament; chondromalacia, left knee; transient synovitis, left knee; lateral subluxation of left patella; other instability, left knee; and "other meniscus derangements, other lateral meniscus, left knee." Dr. Grau opined that appellant was not medically able to perform the duties of mail carrier and did not have the required physical capacity needed to perform the regular mail delivery duties or modified duties due to his functional disability of the left knee.

An August 15, 2018 left knee magnetic resonance imaging (MRI) scan indicated tibial fracture, patellar fracture, medial meniscal tear, meniscal subluxation, synovitis, possible posterolateral corner instability, chondromalacia, and lateral patellar tilt. An August 17, 2018 left knee MRI scan reported paucity of medial tissue in the body and posterior horn medial meniscus, possibly related to the sequela of prior partial meniscectomy, intact cruciate and collateral ligaments, mild medial tibiofemoral and patellofemoral osteoarthritis, and bipartite patella.

From August 27 through December 11, 2018, Dr. Grau opined in medical reports, progress notes, and duty status reports (Form CA-17) that appellant was on a no work status due to work-related injury and that he must continue physical therapy three times weekly.

In a report dated December 11, 2018, Dr. Erick M. Salado, an orthopedic surgeon, related appellant's history of injury on October 30, 2017. Regarding appellant's medical history, Dr. Salado noted that appellant had undergone a left ACL repair with medial meniscectomy in 1999 and, following surgery, was able to return to work without restrictions. He related appellant's physical examination findings and diagnosed left knee chondromalacia, tear of the articular cartilage, contusion, and unilateral post-traumatic left knee osteoarthritis. Dr. Salado concluded that appellant should continue to ambulate assisted by a knee brace, avoid ambulatory activities, avoid standing, and remain in a nonwork status.

On February 6, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and list of questions, for a second opinion evaluation with Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a determination of whether appellant's work-related conditions had resolved and the extent and degree of disability remaining as a result of the accepted October 30, 2017 employment injury. The SOAF indicated that appellant stopped work on February 25, 2017 and had not returned.

In a February 25, 2019 report, Dr. Millheiser noted the history of the injury, including appellant's brief return to work, and his review of the SOAF and the medical record. He noted that appellant had an antalgic gait and was wearing a patellar guard brace and an ACL brace but did not use any ambulation aids, although he had crutches in his car. Dr. Millheiser reported examination findings, noting that appellant's subjective complaints appeared excessive compared with the objective findings. He explained that appellant had a year and four months of severe pain, but no atrophy, effusion or swelling, noting that some objective findings would be expected with such a long history. Dr. Millheiser advised that appellant's equivocal instability could be related to his 20-year-old surgery. He indicated that the ACL and the meniscus issues were old and preexisting and that there was no evidence to show that the employment injury or work factors caused, aggravated, accelerated or precipitated the diagnosed conditions other than a contusion of the knee and an abrasion of the lip, which have since cleared. Dr. Millheiser opined that the accepted conditions had resolved, noting that there appeared to be a significant exaggeration of complaints. Based on appellant's lack of objective findings and the findings of over-exaggeration, which included any motion in the ankle when he was supine and the knee pain with the lack of any effusion and the lack of atrophy in the knee, Dr. Millheiser opined that appellant could return to his date-of-injury position. Dr. Millheiser also opined that appellant no longer required further medical treatment. In an April 15, 2019 work capacity evaluation (Form OWCP-5c), he opined that appellant could return to his usual job without restrictions and that he could work at the heavy strength level.

Dr. Grau continued to hold appellant off work. In his April 22, 2019 report, he indicated that the medical conditions were continuously painful and existent and that it was premature to return to work, even on modified duty, as it would be counter-productive and could cause exasperation, acceleration, aggravation, or consequential injuries.

In a May 28, 2019 report, Dr. Grau reported that appellant continued to use the knee brace due to instability walking without brace. Examination findings of the left knee revealed no visual bony deformities, some muscular atrophy of the quadriceps muscle in comparison to the right knee, weak extremity against gravity, and no erythema, but crepitus on exploration of range of motion and limited flexion on active range of motion. No effusion, bulge/ballooning sign was detected, the

pes anserinus was not swollen, and the patella did not ballotte. Pain in the medial lateral compartment was noted. Based on the positive examination findings, appellant's symptoms and the MRI scan results of record, Dr. Grau indicated that appellant had left knee residual chronic pain and gait difficulties status post arthroscopic partial meniscectomy (1999), with reinjury in 2017. Also, based on MRI scan records, appellant demonstrated grade II-III osteoarthritis left knee, chondromalacia, left knee, unilateral post-traumatic osteoarthritis left knee, and left thigh muscle wasting and atrophy. Dr. Grau noted appellant's current diagnoses as left knee sprain, contusion, tear of the left knee medical meniscus, and sprain of the anterior cruciate ligament. He opined that appellant's left knee conditions were causally related to appellant's employment duties and defective postal vehicle equipment based on his history, job duties, physical examination and diagnostic testing. Dr. Grau opined that appellant should follow-up with an orthopedic surgeon (knee specialist) and that he could return to work with restrictions of no prolonged standing and walking with a brace.

On May 30, 2019 OWCP requested that Dr. Grau respond to Dr. Millheiser's narrative that appellant was capable of returning to full-duty work. A copy of Dr. Millheiser's February 25, 2019 report was provided.

On July 16 and August 13, 2019 the employing establishment instructed appellant to return to full-duty work.

On July 30, 2019 OWCP declared a conflict in the medical opinion evidence and indicated that a referral to an impartial medical examiner (IME) was necessary. It noted that Dr. Grau, the treating physician, indicated that appellant was unable to work while Dr. Millheiser, the second opinion physician, indicated that the work-related medical conditions had resolved and he could return to his date-of-injury position.

On October 9, 2019 OWCP referred appellant to Dr. Marc Hammerman, a Board-certified orthopedic surgeon, for an impartial medical examination on October 16, 2019 to resolve the conflict in medical evidence.

On October 17, 2019 Dr. Hammerman's office notified OWCP that appellant indicated that he had an issue with the distance he would have to travel for the appointment. Dr. Hammerman's office advised that he no longer wanted to perform an impartial medical examination due to appellant's harassing behavior towards his staff.

On February 5, 2020 OWCP advised appellant of its notice of proposed termination of his wage-loss compensation and medical benefits. It found that Dr. Millheiser's opinion represented the weight of the evidence and established that he had no further injury-related conditions or disability. Appellant was advised that he had 30 days to submit additional evidence.

In a March 6, 2020 letter, appellant, through counsel, argued that OWCP did not resolve the conflict in medical evidence and that appellant was ready, willing, and able to attend an impartial medical examination, if scheduled.

By decision dated May 1, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits, effective May 2, 2020, finding that he no longer had disability or residuals

causally related to his accepted October 30, 2017 employment injury. It found that the opinion of Dr. Millheiser constituted the weight of the evidence.

On May 19, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 3, 2020. Counsel offered legal arguments as to why referral to an IME was required.

By decision dated September 4, 2020, an OWCP hearing representative affirmed OWCP's May 1, 2020 decision, terminating his wage-loss compensation and medical benefits, effective May 2, 2020. The hearing representative found the reason for the declaration of the conflict was erroneous when it was declared as Dr. Grau had released appellant for work with restrictions on May 28, 2019 and did not find him totally disabled as noted by OWCP. Thereafter, on August 23, 2019, Dr. Grau noted no objection to the lifting of restrictions or modifications as proposed by Dr. Millheiser.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

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 an IME) who shall make an examination.⁸

³ *T.H.*, Docket No. 20-0312 (issued July 6, 2021); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ *A.C.*, Docket No.19-1522 (issued July 27, 2020); *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *T.L.*, Docket No. 18-0536 (issued November 27, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *S.P.*, Docket No. 20-0196 (issued June 24, 2020); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁷ *S.P.*, *id.*; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

⁸ 5 U.S.C. § 8123(a). *C.R.*, Docket No. 19-1132 (issued October 1, 2020).

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 2, 2020.

OWCP accepted appellant's claim for left knee sprain, contusion, tear of left knee medial meniscus, sprain of left knee ACL, and encounter for fitting and adjustment of other specified devices. These diagnoses were properly listed in the February 6, 2019 SOAF provided to Dr. Millheiser prior to appellant's February 25, 2019 second opinion evaluation.

In his February 25, 2019 report, Dr. Millheiser noted appellant's history of the injury, as well as his review of the SOAF and the medical records. He concluded that appellant's ACL and meniscus issues were old and preexisting, and that there was no evidence to show that the employment injury or work factors caused, aggravated, accelerated, or precipitated the diagnosed conditions other than a contusion of the knee and an abrasion of the lip, which had resolved. While Dr. Millheiser reviewed appellant's medical record in detail, he did not accept the facts as presented in the SOAF in rendering his medical opinion. OWCP procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or IME renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁹

Dr. Millheiser indicated that he had reviewed the SOAF and medical reports of record and ultimately concluded that appellant's accepted left knee ACL and meniscus conditions were not due to the accepted employment injury. Contrary to the SOAF, he opined that the mechanism of injury did not cause the accepted conditions. The Board has held that the report of a second opinion examiner who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is deficient.¹⁰ Dr. Millheiser's report is therefore insufficient to carry the weight of the medical evidence. The Board thus finds that OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 2, 2020.

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). *M.D.*, Docket No. 18-0468 (issued September 4, 2018); *see also D.E.*, Docket No. 17-1794 (issued April 13, 2018); *K.V.*, Docket No. 15-0960 (issued March 9, 2016); *Paul King*, 54 ECAB 356 (2003).

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 11, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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