United States Department of Labor
Employees' Compensation Appeals Board

P.Y., Appellant	)	
and	)	**Docket No. 09-2293**
	)	**Issued: September 1, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 14, 2009 appellant filed a timely appeal from a July 10, 2009 merit decision of the Office of Workers' Compensation Programs affirming a January 21, 2009 decision terminating his compensation and medical benefits for his accepted work injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to justify termination of appellant's compensation benefits effective January 21, 2009.

FACTUAL HISTORY

On May 21, 2001 appellant, then a 48-year-old temporary painter, injured his right knee while stepping off a ladder. The Office accepted aggravation of synovitis and degenerative osteoarthritis of the right knee and authorized arthroscopic surgery on December 11, 2001.

Appellant stopped work on May 28, 2001 and was terminated from his temporary employment effective July 27, 2001.

Appellant was initially treated by Dr. Ralph A. Gambardella, a Board-certified orthopedist, for right knee pain and swelling following the work injury. Dr. Gambardella noted appellant's history was significant for a nonwork-related right knee open meniscectomy in 1978 and a patellar tendon rupture in 1980. He diagnosed right knee post-traumatic synovitis, underlying post-traumatic degenerative osteoarthritis of the right knee and possible lateral meniscus tear of the right knee. On December 11, 2001 Dr. Gambardella performed an arthroscopic partial lateral meniscectomy with chondroplasty of lateral tibial plateau, chondroplasty of patella, debridement of anterior compartment, partial synovectomy with removal of loose body of intercondylar notch. He diagnosed recurrent lateral meniscus tear with chondromalacia of the lateral tibial plateau, lateral femoral condyle, chondromalacia of the patellofemoral joint with synovitis and intraarticular loose body and anterior cruciate ligament insufficiency. On March 27, 2002 Dr. Gambardella noted that appellant was permanent and stationary and could perform sedentary work with permanent restrictions.[1]

On February 13, 2006 the Office issued a proposed reduction of compensation and later finalized the decision on April 26, 2006 finding appellant partially disabled with the capacity to earn wages as a material lister, at the rate of $800.00 a week or $33,000.00 a year.

Appellant was treated by Dr. Michael Harris, a Board-certified orthopedist, from April 5 to May 10, 2007, for right knee pain. Dr. Harris diagnosed chronic patellar tendon rupture and possible osteoarthritis of the right knee. He noted that a May 10, 2007 magnetic resonance imaging (MRI) scan revealed severe triocompartmental osteoarthritis with Grade 4 chondromalacia of the medial and lateral knee joint, patellar alta with Grade 4 chondromalacia, status post total medial meniscectomy, lateral meniscectomy with complex tear and degeneration of the posterior horn. Dr. Harris recommended a total right knee arthroplasty. On March 22, 2007 appellant was treated by Dr. Gambardella, for a progressive onset of increased symptoms in the right knee with pain, swelling and catching. Dr. Gambardella diagnosed right knee post-traumatic degenerative osteoarthritis, triocompartmental and recommended a total right arthroplasty. He continued appellant's work restrictions of March 27, 2002.

After appellant claimed a recurrence of disability beginning May 7, 2007, the Office referred him to Dr. Joseph P. Conaty, a Board-certified orthopedist, for a second opinion. In an October 29, 2007 report, Dr. Conaty diagnosed patellofemoral arthritis of the right knee. He noted that the patellofemoral arthritis could have been aggravated by the malfunctioning patella secondary to the patellar tendon rupture with long-standing factors of aggravation beginning with the original injury; however, there were no medical records before the 2001 surgery. Dr. Conaty stated that appellant was a candidate for a total knee replacement. He opined that appellant could work full time with restrictions.

The Office requested that appellant provide his medical records from the employing establishment. Veterans Administration records indicated that appellant injured his right leg in

[1] On May 2, 2006 the Office granted appellant a schedule award for 15 percent permanent impairment of the right leg.

1970 when he fell from a telephone pole while in the Army. In 1972, appellant fell into a hole and injured his right knee and, in 1975, he again injured his right knee while playing basketball. He submitted an October 3, 1977 report, where he was treated for right knee effusion and instability with the chief complaint of recurrent pain and swelling. Appellant was diagnosed with laxity of the anterior cruciate and medial collateral ligament with quad atrophy. On November 10, 1977 he underwent a right medial meniscectomy with the creation of a new anterior cruciate ligament by using a piece of the patella tendon. In 1978, appellant had treatment and surgery for his Crohn's disease. On October 30, 1980 he sought treatment for a right knee injury occurring after a basketball game and was diagnosed with traumatic effusion of the right knee and in 1982 he sustained a patellar tendon rupture.

The Office referred appellant and the additional medical records to Dr. Conaty. In a February 20, 2008 report, Dr. Conaty diagnosed osteoarthritis of the right knee, status post arthroscopic partial lateral meniscectomy with chondroplasty of the lateral tibial plateau, chondroplasty of the patella, debridement of the anterior compartment and partial synovectomy with removal of loose body of intercondylar notch. He advised that the May 21, 2001 injury aggravated appellant's preexisting right knee condition and opined that the aggravation was temporary and by the time the surgery was performed on December 11, 2001 the temporary aggravation ceased. Dr. Conaty stated that the surgical findings were related to the preexisting degenerative changes present over 20 years and were consistent with the natural progression of the degenerative entity. He recommended a total knee replacement. Dr. Conaty advised that appellant could perform the duties of a material lister full time with walking and standing limited to four hours. In a May 8, 2008 supplemental report, he opined that the 2001 incident and resultant surgery did not alter the course of appellant's significant preexisting disease process; rather, it only provided a temporary aggravation which would have ceased with the surgery on December 11, 2001. Dr. Conaty noted that the surgical findings dealt with preexisting degenerative changes present over the span of some 20 years and were consistent with the natural progression of the degenerative entity. He opined that the proposed total knee arthroplasty was due to the preexisting, long-standing degenerative changes and not causally related to the work injury.

In a decision dated August 8, 2008, the Office denied appellant's claim for a recurrence of disability commencing on May 7, 2007. Thereafter, appellant requested an oral hearing.

In an August 19, 2008 report, Dr. Harris diagnosed right knee osteoarthritis and recommended a total knee replacement. He disagreed with Dr. Conaty's assessment and opined that appellant continued to have residuals of his work injury. Dr. Harris stated that the recommended right knee arthroplasty was causally related to the accepted work injury.

In a November 12, 2008 decision, an Office hearing representative set aside the August 8, 2008 decision and remanded the matter for further medical development. The hearing representative indicated that the Office had undertaken additional development of the claim, noting that there was a medical conflict between Dr. Harris and Dr. Conaty, which was unresolved pending an impartial medical examiner's report. The hearing representative further noted that a formal wage-earning capacity decision was in place when appellant filed his claim for total disability beginning May 7, 2007 and the Office should determine whether modification of the wage-earning capacity finding was warranted.

The Office found that, a medical conflict existed between Dr. Harris, appellant's treating physician, who opined that appellant was totally disabled and required a right knee arthroplasty because of his work injury and Dr. Conaty, an Office referral physician, who found that appellant had no residuals of his work injury and that the proposed total knee surgery was due to the preexisting condition. To resolve the conflict the Office, on October 14, 2008, referred appellant to a referee physician, Dr. Frank R. Barta, Jr., a Board-certified orthopedist.

In a November 13, 2008 report, Dr. Barta indicated that he reviewed the records provided to him and examined appellant. He reviewed appellant's job requirements, noted a history of appellant's work-related injury and reviewed treatment following the injury. Dr. Barta noted examination findings of distal right thigh atrophy, mildly antalgic gait, a high right patella, no swelling or deformities of the knees and a well-healed parapatellar incision scar and two lateral arthroscopy incision scars of the right knee. He noted a negative Lachman's, pivot-shift, posterior drawer and MacMurray's test with a positive anterior drawer test. Dr. Barta diagnosed right knee patella alta preexisting since an October 30, 1982 patella tendon rupture and December 31, 1982 surgery, right knee patellofemoral degenerative arthritis, inevitable progression of preexisting disease in the patella alta, Crohn's disease with arthritis of multiple joints of the lower extremities, including the right knee and a history of a December 22, 2001 arthroscopic surgery of the right knee. He opined that the degenerative arthritis was a consequence of the previous knee injuries, the patella tendon rupture and the malposition of the patella and the likely systemic arthritis associated with Crohn's disease. Dr. Barta noted that any aggravation of appellant's condition due to the May 21, 2001 injury was over at the time appellant was declared permanent and stationary on July 5, 2002 and any continuing degeneration of the patellofemoral compartment was due to the preexisting gross patella alta which would progress independently of the May 21, 2001 incident. He opined that whatever residual problem from the 2001 injury and subsequent surgery ceased by July 5, 2002. Dr. Barta noted that appellant was diagnosed with Crohn's disease and Hepatitis C, which caused immunocompromise and that these additional risks could lead to metastatic infection if he were to proceed with a total knee replacement. He opined that surgery was indicated; however, not a total knee replacement. Dr. Barta recommended a patellectomy because appellant's pain was due almost exclusively to the patella alta and patellofemoral degenerative osteoarthritis, which was not an industrial injury but the inevitable progression of the preexisting disease due to the patella alta. He noted that appellant could return to work full time in a sedentary position with a minimum of physical effort with some degree of walking or standing permitted.

On December 16, 2008 the Office issued a notice of proposed termination of all compensation benefits based on Dr. Barta's November 13, 2008 report finding that residuals of the accepted conditions had resolved.

Appellant submitted a January 5, 2009 statement from Aureliano Galvez, an employment specialist, who noted that there were no positions available for a material lister. Also submitted was a January 13, 2009 report from Dr. Harris who noted appellant's complaints of continued pain in the right knee and diagnosed osteoarthritis of the right knee. He recommended a total knee replacement and opined that appellant was totally disabled.

In a January 21, 2009 decision, the Office terminated appellant's compensation benefits.

On January 30, 2009 appellant requested an oral hearing which was held on May 27, 2009. He submitted a January 13, 2009 report from Dr. Harris, previously of record.

In a decision dated July 10, 2009, the hearing representative affirmed the January 21, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[4]

ANALYSIS

The Office accepted appellant's claim for aggravation of synovitis and degenerative osteoarthritis of the right knee. It found that, a conflict in medical opinion existed between appellant's attending physician, Dr. Harris, who indicated that appellant had disability and residuals of his work-related conditions and required a total knee replacement, and Dr. Conaty, an Office referral physician, who determined that residuals of the accepted conditions had ceased. Consequently, the Office properly referred appellant to Dr. Barta to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[5]

The Board finds that, under the circumstances of this case, the opinion of Dr. Barta is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related aggravation of synovitis and degenerative osteoarthritis of the right knee has ceased.

In his report of November 13, 2008, Dr. Barta provided a comprehensive review of appellant's history and set forth extensive findings from examination. He diagnosed right knee patella alta preexisting since an October 30, 1982 patella tendon rupture and December 31, 1982 surgery, right knee patellofemoral degenerative arthritis, progression of preexisting disease in the patella alta, Crohn's disease with arthritis of multiple joints of the lower extremities, including

[2] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[3] *Mary A. Lowe*, 52 ECAB 223 (2001).

[4] *Id.; Leonard M. Burger*, 51 ECAB 369 (2000).

[5] *Solomon Polen*, 51 ECAB 341 (2000). *See* 5 U.S.C. § 8123(a).

the right knee and a history of the December 22, 2001 arthroscopic right knee surgery. Dr. Barta opined that any aggravation of appellant's right knee osteoarthritis due to the May 21, 2001 injury was resolved by the time appellant was declared permanent and stationary on July 5, 2002 and any continuing degeneration of the patellofemoral compartment due to the preexisting gross patella alta would continue independently of the May 21, 2001 incident. He opined that the present degenerative arthritis was the consequence of the previous knee injuries, the patella tendon rupture and the malposition of the patella and the likely systemic arthritis associated with Crohn's disease. Dr. Barta recommended a patellectomy but opined that the need for this surgery was not due to the accepted condition but was due to appellant's long-standing degenerative conditions that preexisted his 2001 work injury. He noted that appellant could return to work full time in a sedentary position with a minimum of physical effort with some degree of walking or standing permitted.

The Board finds that Dr. Barta had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Barta is a specialist in the appropriate field. He offered no basis to support that appellant had residuals or work-related disability from the accepted aggravation of synovitis and degenerative osteoarthritis of the right knee. Dr. Barta's opinion as set forth in his report of November 13, 2008 is found to be probative evidence and reliable. The Board finds that Dr. Barta's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits for the accepted conditions of aggravation of synovitis and degenerative osteoarthritis of the right knee.

After issuance of the pretermination notice and after termination of benefits, appellant submitted a January 13, 2009 report from Dr. Harris who diagnosed osteoarthritis of the right knee and recommended a total knee replacement. Dr. Harris opined that appellant was totally disabled. He did not though specifically address how any continuing condition or medical restrictions and disability were causally related to the accepted employment injuries. Additionally, Dr. Harris was on one side of a medical conflict that Dr. Barta resolved.[6] This report is insufficient to overcome that of Dr. Barta or to create a new medical conflict.

As noted, appellant had received a loss of wage-earning capacity determination on April 26, 2006. The Board has held that once a loss of wage-earning capacity is determined, it remains in place unless modified.[7] A modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[8] In certain situations, however, if the medical evidence is sufficient to meet the Office's burden of proof to terminate benefits, the same evidence may also negate a loss of wage-earning capacity such that a separate evaluation of the existing wage-

[6] *See E.H.*, 60 ECAB ___ (Docket No. 08-1862, issued July 8, 2009); *Dorothy Sidwell*, 41 ECAB 857 (1990) (reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict).

[7] A wage-earning capacity determination remains in effect until it is properly modified. *See Katherine T. Kreger*, 55 ECAB 633 (2004); *see also A.P.*, 60 ECAB ___ (Docket No. 08-1822, issued August 5, 2009).

[8] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

earning capacity determination is unnecessary.[9] The Office's burden to demonstrate no further disability is effectively the same, irrespective of whether there is an existing determination in place finding loss of earning capacity. Case law may suggest that a threshold evaluation of the wage-earning capacity needs to be performed before there is a termination of benefits. The Board finds, however, that the burden is often substantially the same, the evidence is the same and the process of terminating benefits need only be done once. While a claimant may still have unrelated medical conditions or impairments, the medical evidence must establish that the employment-related disability and medical conditions no longer exist.

In this case, as the Board finds that the Office properly terminated benefits based on Dr. Barta's report finding that all residuals of the work injury had ceased, no further analysis on the modification of the wage-earning capacity is necessary.[10]

On appeal, appellant asserts that he needs surgery and that he was unable to find employment as a material lister. The evidence, as discussed, establishes that appellant's continuing conditions are not due to the 2001 work injury but are due to his preexisting conditions. Consequently, any need for surgery or loss of wages is not due to the employment injury.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate benefits effective January 21, 2009.

[9] *A.P.*, *supra* note 7.

[10] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 10 and January 21, 2009 are affirmed.

Issued: September 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board