

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

W.B., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Seattle, WA, Employer**

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**Docket No. 15-1478
Issued: March 8, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 20, 2015 appellant filed a timely appeal from December 23, 2014 and May 11, 2015 merit decisions of the Office of Workers' Compensation Programs (OWCP).¹ 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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's December 23, 2014 decision was June 21, 2015. Since this fell on a Sunday the appeal would have been due the next business day which was Monday, June 22, 2015. Since using June 29, 2015, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is June 20, 2015, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the issuance of the May 11, 2015 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation benefits effective May 12, 2014 as his accepted conditions had ceased without residuals; and (2) whether appellant met his burden of proof to establish any continuing employment-related residuals or disability.

On appeal, appellant contends that if he had been referred to a referee physician to resolve the conflict in the medical opinion evidence, his wage-loss compensation benefits would not have been terminated.

FACTUAL HISTORY

On April 28, 2005 appellant, then a 42-year-old passenger screener, filed an occupational disease claim (Form CA-2) for knee pain and veins popping out on both legs. OWCP accepted that he sustained bilateral osteoarthritis of the lower legs, left plantar fibromatosis, asymptomatic varicose veins of the bilateral lower extremities, bilateral lateral meniscus tears, right hip enthesopathy, and right lateral popliteal nerve lesions due to factors of his federal employment, including prolonged standing.⁴ Appellant stopped work on April 28, 2005 and received intermittent wage-loss compensation beginning that date. OWCP authorized a right knee partial medial and lateral meniscectomy on June 18, 2007. It placed appellant on the periodic compensation rolls for total disability beginning July 3, 2011.

OWCP subsequently referred appellant to Dr. James Schwartz, an orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his June 17, 2013 report, Dr. Schwartz reviewed a statement of accepted facts, history of the injury, and the medical evidence of record. He conducted a physical examination and found that the examination was highly nonphysiologic. Appellant was not "touchable to identify range of motion or really localizable pain or tenderness." Dr. Schwartz noted that appellant had "such withdrawal from what appeared to be paresthesias, that any examination is inconclusive." He noted that the fact that appellant had electromyography (EMG) changes or sensory peroneal nerve decrease on the right side could not begin to explain his hypersensitivity. Appellant was sensitive proximal to the knee joint approximately two or three inches to the proximal tibia and extended from about mid-lateral over to anterior patella. Dr. Schwartz advised that this would involve at least three different nerves for this distribution and was nonphysiologic. He determined that appellant had reached maximum medical improvement (MMI) as treating nonphysiologic pain was not possible. Dr. Schwartz recommended evaluation for a psychiatric problem, such as somatoform disorder. He noted that the objective findings in this case did not support the level of pain complaints. Dr. Schwartz found no diagnosable pathology that could explain appellant's pain and ruled out reflex sympathetic dystrophy (RSD). He released appellant to work without restrictions.

⁴ The record before the Board also includes a claim for a traumatic injury sustained on April 10, 2008 which OWCP accepted for a left knee sprain under OWCP File No. xxxxxx264. OWCP File No. xxxxxx264 has been combined with the April 28, 2005 occupational disease OWCP File No. xxxxxx402.

In an October 16, 2013 letter, OWCP notified appellant that it proposed to terminate his wage-loss compensation benefits based on Dr. Schwartz' June 17, 2013 report. It afforded appellant 30 days to submit additional evidence or argument in disagreement with the proposed action.

Appellant submitted a January 14, 2014 report from Dr. William L. Clark, a Board-certified orthopedic surgeon, who diagnosed left bursitis greater trochanteric enthesopathy. Dr. Clark had treated appellant in 2010 for his hips, 2011 for his left knee, 2012 for his left hip, and again in 2014 for his left hip. He opined that appellant's left hip condition was causally related to his federal employment. Dr. Clark noted that it was present at the time appellant's claim was accepted for right hip enthesopathy, but was not accepted as an employment-related condition.

In a November 22, 2013 addendum report, Dr. Schwartz stated that there were no physiologically identifiable or explicable objective findings and reiterated his recommendation for a psychiatric evaluation.

OWCP referred appellant to Dr. Gary Hudak, a Board-certified psychiatrist, for a second opinion evaluation to determine the nature and extent of appellant's employment-related conditions. In his March 6, 2014 report, Dr. Hudak reviewed a statement of accepted facts, history of the injury, and the medical evidence of record. He diagnosed pain disorder associated with those psychological factors in the general medical condition and noted that appellant's stressors were unemployment, loss of former abilities, chronic pain, and financial stressors. Dr. Hudak found no psychiatric impairment that would prevent appellant from returning to full-time work. He concluded that appellant's perception of pain was subjective and as long as he believed that he had objective medical lesions his perception of pain would persist. Dr. Hudak released appellant to full-duty work without restrictions.

In a letter dated April 8, 2014, OWCP notified appellant that it proposed to terminate his wage-loss benefits relying on the June 17, 2013 report from Dr. Schwartz and the March 6, 2014 report from Dr. Hudak. It afforded him 30 days to submit additional evidence or argument in response to the proposed action.

By decision dated May 12, 2014, OWCP terminated appellant's wage-loss compensation benefits effective that day. It found that the weight of the evidence was represented by Drs. Schwartz and Hudak. OWCP noted that the claim remained open for medical benefits.

On June 9, 2014 appellant requested an oral hearing before an OWCP hearing representative and submitted a March 31, 2014 report from Dr. Robert Sargent, a Board-certified family practitioner, who reviewed appellant's medical history and opined that any one of his accepted conditions permanently disabled him from performing his full duties and "therefore all of these conditions combined, on a more probable than not basis, permanently disable[d] [appellant] from performing his [federal] duties."

In a May 5, 2014 report Dr. Lawrence Murphy, a neurologist, stated that appellant was initially evaluated in 2012 for lower extremity pain and continued to complain of right leg pain when he was reevaluated in the fall of 2013. He reported that prior electrodiagnostic testing

confirmed a peroneal neuropathy. Dr. Murphy opined that appellant had “painful right peroneal sensory neuropathy which more probably than not was due to nerve damage arising as a consequence of his 2007 knee surgery.” He noted that this surgery was treatment for appellant’s work injury and explained that this did not imply surgical negligence as peroneal neuropathy was a known complication of knee surgery. Dr. Murphy concluded that appellant had a permanent nerve injury, peroneal neuropathy, which was his source of ongoing pain with hypersensitivity with even minimal tactile contact. He advised that the physical requirements of appellant’s job, including squatting, bending, stooping, and walking “would more probably than not aggravate his residual neuropathy.”

On October 22, 2014 an oral hearing was held before an OWCP hearing representative.

By decision dated December 23, 2014, OWCP’s hearing representative affirmed the termination of appellant’s wage-loss compensation benefits. However, the hearing representative found that, after the termination, appellant submitted medical evidence from Drs. Clark and Sargent that created a conflict with the opinion of Dr. Schwartz regarding whether appellant had any continuing disability from his date-of-injury position causally related to his accepted injuries. The hearing representative remanded the case for referral of appellant to an appropriate impartial specialist.

OWCP referred appellant to Dr. James Carney, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion between Drs. Schwartz, Clark, and Sargent. In an April 10, 2015 report, Dr. Carney examined appellant and reviewed his medical history and a statement of accepted facts. He found that appellant was morbidly obese and elicited pain behavior throughout the examination. Dr. Carney noted that appellant exhibited severe symptom magnification with any type of touching over the anterior and lateral aspect of the right knee. Gait was slow and antalgic, favoring the right more than the left. There was no evidence of thrust. Inspection of stance showed no obvious varus or valgus malalignment or recurvatum. Overall inspection of the bilateral lower extremities showed evidence of varicosities. The bilateral ankles had no obvious swelling or deformity. Foot and ankle palpation revealed tenderness at the insertion of the plantar fascia, bilateral heels, and left greater than right. There were no palpable cords or abnormalities. Range of motion of the ankles was dorsiflexion of 10 degrees and plantar flexion of 35 degrees. The hips were tender to palpation over the left and the right greater trochanters. Appellant had no pain with compression of the pelvis at anterior superior iliac spine. Hip range of motion was forward flexion to 100 degrees, external rotation to 50 degrees, and internal rotation to 40 degrees bilaterally. Appellant noted discomfort over the lateral hips with these maneuvers. Adduction was to 20 degrees bilaterally and abduction to 50 degrees bilaterally. Appellant noted pain over the greater trochanteric regions with this motion. Evaluation of both knees showed no effusion and no deformity.

Right knee palpation revealed intense hypersensitivity anteriorly and laterally. Dr. Carney noted that he “methodically traced this area of hypersensitivity and it did not correspond specifically to any peripheral nerve distribution.” Tinel’s test was negative as appellant had pain with tapping over the patellar tendon and lateral areas of the hypersensitivity region, but had no radiating sensations. Muscle strength testing was normal in both legs. Dr. Carney determined that appellant required no further medical treatment for his accepted

conditions and had reached MMI. He opined that appellant was capable of performing his regular duties and the only work restrictions he required were related to his morbid obesity, which was not employment related. Dr. Carney limited appellant to standing for four hours per day due to his preexisting degenerative conditions related to his morbid obesity.

Appellant submitted hospital records from an emergency room visit on April 10, 2015 where he was diagnosed with right hip pain, right knee pain, right peroneal nerve pain, and right lateral femoral cutaneous nerve radiculopathy. Also provided was a November 20, 2014 report from Dr. Clark who diagnosed status post arthroscopic surgery, patellofemoral chondromalacia of the left knee, and bilateral greater trochanteric bursitis, left greater than right.

In a January 7, 2015 report, Dr. Murphy diagnosed right knee weakness and right infrapatellar saphenous branch pain. Appellant reported that on a number of occasions he was going up the stairs when “pain hit and his knee gave out.”

By decision dated May 11, 2015, OWCP affirmed its May 12, 2014 decision finding that the weight of the evidence was represented by Dr. Carney. It found that appellant failed to establish any continuing employment-related residuals or disability causally related to his accepted injuries.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee’s benefits.⁵ After it has determined that an employee has disability causally related to his 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 OWCP’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant’s wage-loss compensation benefits effective May 12, 2014. OWCP accepted as employment-related bilateral osteoarthritis of the lower legs, left plantar fibromatosis, asymptomatic varicose veins of the bilateral lower extremities, bilateral lateral meniscus tears, right hip enthesopathy, and right lateral popliteal nerve lesions. To determine the nature and extent of his employment-related conditions, OWCP referred appellant to Dr. Schwartz.

In his June 17, 2013 report, Dr. Schwartz reviewed appellant’s history and noted findings. He observed that appellant’s physical examination was highly nonphysiologic. Appellant was not “touchable to identify range of motion” and had “such withdrawal from what appeared to be paresthesias, that any examination is inconclusive.” He noted EMG findings

⁵ See *S.F.*, 59 ECAB 642 (2008).

⁶ See *I.J.*, 59 ECAB 524 (2008).

⁷ See *J.M.*, 58 ECAB 478 (2007).

could not begin to explain his hypersensitivity. Appellant was sensitive proximal to the knee joint approximately two or three inches to the proximal tibia and extended from about mid-lateral over to anterior patella. Dr. Schwartz advised that this would involve at least three different nerves and was nonphysiologic. He recommended a psychiatric evaluation and noted that the objective findings did not support the level of appellant's pain complaints. Dr. Schwartz found no diagnosable pathology that could explain appellant's pain and ruled out RSD. He released appellant to work without restrictions.

In a November 22, 2013 addendum report, Dr. Schwartz reported that appellant had no physiologically identifiable or explicable objective findings and again recommended a psychiatric evaluation.

Thereafter, OWCP referred appellant to Dr. Hudak for a psychiatric evaluation. On March 6, 2014 Dr. Hudak reviewed appellant's history and diagnosed pain disorder associated with those psychological factors in the general medical condition and noted that his stressors were unemployment, loss of former abilities, chronic pain, and financial stressors. He found no psychiatric impairment that would prevent appellant from returning to full-time work. Dr. Hudak found that appellant's perception of pain was subjective and as long as he believed that appellant had objective medical lesions his perception of pain would persist. He released appellant to full-duty work without restrictions.

Prior to terminating wage-loss benefits, OWCP afforded appellant 30 days to submit additional evidence. Appellant did not submit any new medical evidence supporting continuing work-related disability prior to the termination of his wage-loss benefits.

The Board finds that Dr. Schwartz' reports represent the weight of the medical evidence at the time OWCP terminated wage-loss benefits. Dr. Schwartz' opinion was based on a full and accurate history, a review of the medical records, and he provided a rationalized medical opinion addressing the basis for his conclusion that appellant's ongoing disability was no longer related to the accepted conditions. Furthermore, OWCP also obtained an opinion from Dr. Hudak indicating that, from a psychiatric perspective, appellant was able to work without restrictions. At the time of the termination of wage-loss benefits, there was no current medical evidence supporting ongoing entitlement to wage-loss benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁸

Section 8123(a) of FECA provides in pertinent part: if there is disagreement between the physician making the examination for the United States and the physician of the employee, the

⁸ See *A.B.*, Docket No. 14-1510 (issued October 23, 2014).

Secretary shall appoint a third physician who shall make an examination.⁹ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish any continuing employment-related residuals or disability.

After OWCP's May 12, 2014 termination decision, appellant submitted additional medical evidence. On December 23, 2014 the hearing representative found that the medical evidence from Drs. Clark and Sargent, which appellant submitted after the proper termination of wage-loss compensation, created a conflict with the opinion of Dr. Schwartz regarding whether appellant had any disability from his date-of-injury position causally related to his accepted injuries. The hearing representative remanded the case for referral of appellant to an appropriate impartial specialist. Thereafter, OWCP referred appellant to Dr. Carney.

On April 10, 2015 Dr. Carney reviewed appellant's history, provided results on examination, and found no objective evidence of ongoing disability due to his employment-related conditions. He noted that appellant elicited pain behavior throughout the examination. Dr. Carney explained that appellant elicited severe symptom magnification with any type of touching over the anterior and lateral aspect of the right knee. Palpation about the right knee revealed intense hypersensitivity over the right knee anteriorly and laterally, but Dr. Carney noted that he "methodically traced this area of hypersensitivity and it did not correspond specifically to any peripheral nerve distribution." Dr. Carney documented other findings including normal muscle strength in the legs. He determined that appellant required no further medical treatment for his accepted conditions and had reached MMI. Dr. Carney opined that appellant was capable of performing his regular duties and the only work restrictions he required were related to appellant's morbid obesity, which was not an employment-related condition.

The Board finds that Dr. Carney's report represents the weight of the medical evidence and OWCP properly relied on his report in finding that, after a proper termination of appellant's wage-loss benefits, the medical evidence failed to establish any continuing employment-related disability. The Board finds that Dr. Carney had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Carney is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Carney addressed the medical records and made his own examination findings to reach a reasoned conclusion regarding appellant's condition.¹¹ He found

⁹ 5 U.S.C. § 8123(a). See also *R.C.*, 58 ECAB 238 (2006).

¹⁰ See *V.G.*, 59 ECAB 635 (2008).

¹¹ See *Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

no basis on which to attribute any continued disability to appellant's accepted conditions. Dr. Carney's opinion as set forth in his April 10, 2015 report is found to be probative evidence and reliable. The Board finds that his opinion is entitled to special weight and establishes that appellant had no continuing work-related disability subsequent to the May 12, 2014 termination decision.¹²

Following Dr. Carney's report, appellant submitted a November 20, 2014 report from Dr. Clark who diagnosed patellofemoral chondromalacia of the left knee and bilateral greater trochanteric bursitis, left greater than right. However, Dr. Clark failed to provide a well-rationalized explanation as to how and whether these conditions, not accepted by OWCP, are causally related to appellant's work injuries.¹³ Furthermore, as he was on one side of the medical conflict that was resolved by Dr. Carney, another report from him would generally be insufficient to overcome the weight accorded Dr. Carney's report as the impartial examiner or to create a new conflict.¹⁴

On January 7, 2015 Dr. Murphy diagnosed right knee weakness and right infrapatellar saphenous branch pain. He failed to provide a rationalized explanation as to how and whether these conditions, which had not been accepted by OWCP, are causally related to appellant's employment injuries.¹⁵ Thus, Dr. Murphy's report is of diminished probative value and insufficient to overcome the weight accorded to Dr. Carney's report as the impartial medical examiner or to create a new conflict.¹⁶

The April 10, 2015 hospital records from an emergency room visit on April 10, 2015 do not specifically address whether any diagnosed conditions are disabling and causally related to appellant's accepted injuries.¹⁷ The Board therefore finds that this evidence is insufficient to establish any continuing employment-related residuals or disability.

On appeal, appellant contends that OWCP did not wait until he submitted additional medical evidence before terminating his wage-loss benefits. As explained, OWCP properly terminated such benefits based on the evidence before it on May 12, 2014. Thereafter, it referred appellant to a referee physician, Dr. Carney, for an impartial medical examination and then relied upon his opinion finding that no further work-related disability had been established. Based on the findings and reasons stated above, the Board finds that appellant's argument is not substantiated.

¹² See *supra* note 10.

¹³ See *T.M.*, Docket No. 08-975 (issued February 6, 2009) (for conditions not accepted or approved by OWCP as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

¹⁴ See *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁵ See *supra* note 13.

¹⁶ See *Dorothy Sidwell*, *supra* note 14.

¹⁷ See *supra* note 13.

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 properly terminated appellant's wage-loss compensation benefits effective May 12, 2014. The Board further finds that he has not met his burden of proof to establish any continuing employment-related residuals or disability thereafter.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2015 and December 23, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 8, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board