United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 18-0463**
	)	**Issued: February 7, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 5, 2018 appellant, through counsel, filed a timely appeal from an August 15, 2017 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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.*

[3] The Board notes that, following the August 15, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provide: "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 issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 12, 2016, as he no longer had residuals or disability causally related to his accepted September 9, 2009 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On November 16, 2009 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2009 he twisted his right knee ascending stairs when delivering mail while in performance of duty.[5] OWCP accepted the claim for a tear of the posterior horn of the medial meniscus, right knee, popliteal synovial cyst on the right, and partial rupture of a Baker's cyst, right knee.

On December 9, 2009 appellant stopped work and underwent approved arthroscopic repair of his right knee medial meniscus. The surgery was performed on September 9, 2009 by Dr. Thomas A. Corcoran, a Board-certified orthopedic surgeon. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls as of December 12, 2009.

In a February 25, 2016 report, Dr. Corcoran related that appellant continued to experience right knee pain. He diagnosed right knee degenerative joint disease and right knee synovitis and related that appellant should be on modified duty with no kneeling or stair climbing. Dr. Corcoran concluded that these conditions were causally related to appellant's employment injury and that appellant had no significant viable treatment options other than knee replacement surgery.

In a March 31, 2016 report, Dr. Corcoran diagnosed progressive right knee degenerative joint disease. He related that appellant needed to continue to work in a modified-duty capacity and that surgical and nonsurgical treatment options had been discussed.

By letter dated May 20, 2016, OWCP referred appellant to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of appellant's work-related disability. In a June 3, 2016 report, Dr. Thompson noted appellant's history of injury, history of medical treatment, and the statement of accepted facts (SOAF). He reviewed appellant's operative report, as well as x-rays of appellant's right knee, dated September 15, 2009 and April 27, 2015 and a magnetic resonance imaging (MRI) scan of the right knee dated October 25, 2009. Dr. Thompson described his examination findings and explained

[4] Docket No. 17-0229 (issued June 22, 2018). By decision dated December 15, 2015, OWCP granted appellant a schedule award for nine percent permanent impairment of the right lower extremity. On June 30, 2016 an OWCP hearing representative affirmed the December 15, 2015 decision. Appellant filed an appeal with the Board on November 9, 2016. By decision dated June 22, 2018, the Board affirmed the June 30, 2016 decision.

[5] Appellant had initially filed an occupational disease claim (Form CA-2) on September 14, 2009 alleging this September 9, 2009 incident and injury. In a December 7, 2009 memorandum to file, OWCP indicated that it appeared that appellant was actually alleging a traumatic injury claim.

that the evidence supported that appellant sustained a tear of the medial meniscus to his right knee at the time of the injury of September 9, 2009. He advised that appellant suffered from preexisting osteoarthritis of the right knee, which was documented by x-rays and MRI scans. Dr. Thompson opined that appellant suffered from tricompartmental arthritis, which was unrelated to the acute injury, which had resulted in a tear of the medial meniscus on September 9, 2009. He indicated that there was no aggravation or exacerbation of the preexisting conditions by the work-related injury. Dr. Thompson opined that he did not see objective evidence to document the need for any physical limitations. He indicated that appellant could immediately and safely return to work as a letter carrier without restrictions. Dr. Thompson opined that appellant's progress was good as it related to a meniscal tear and there was no indication for any additional formal medical treatment or additional diagnostic testing.

By letter dated September 14, 2016, OWCP provided Dr. Corcoran with a copy of Dr. Thompson's second opinion report and requested his opinion with regard to Dr. Thompson's findings.

In response, on October 24, 2016 OWCP received numerous progress reports from Dr. Corcoran dated from November 17, 2009 through May 16, 2016. In his November 17, 2009 report, Dr. Corcoran related diagnoses of right knee medial meniscus tear and right knee degenerative joint disease, and related that appellant would undergo right knee arthroscopy. He also noted that appellant could only perform light-work duties. Throughout the years, Dr. Corcoran continued to provide medical evidence of appellant's right knee degenerative joint disease, which he opined was due to appellant's employment injury. As of August 4, 2015 and through May 16, 2016, he related diagnoses of right knee degenerative joint disease and right knee synovitis. Dr. Corcoran again noted that appellant's restrictions of no kneeling or stair climbing. He opined in each of his reports that appellant's conditions resulted from his work-related injury.

On October 25, 2016 OWCP proposed to terminate appellant's medical benefits and wage-loss compensation. It found that he no longer had any residuals or continuing disability from work stemming from the employment injury. OWCP accorded the weight of the evidence to Dr. Thompson because he provided a well-rationalized medical opinion. It afforded appellant 30 days to provide evidence or argument against the proposed termination of his FECA benefits.

In a November 8, 2016 response, counsel opposed the proposed termination of appellant's wage-loss compensation and medical benefits. He argued that the accepted injury also caused aggravation of degenerative joint disease of the right knee, based upon Dr. Corcoran's opinion.

OWCP received an October 20, 2016 report from Dr. Corcoran, relating that appellant continued to have right knee pain and that appellant's physical examination revealed significant osteophytosis, crepitus, and limited range of motion. Dr. Corcoran diagnosed right knee degenerative joint disease, right knee synovitis, and right knee meniscus tear. He opined that he disagreed with Dr. Thompson's finding that appellant was capable of full duty. Dr. Corcoran explained that appellant was a candidate for total knee replacement and should work in a sedentary position, with limited stair climbing, walking, and climbing. He also indicated that the underlying degenerative joint disease was aggravated by the work injury.

OWCP also received a November 14, 2016 MRI scan of the right knee read by Dr. Antoni J. Parellada, a diagnostic radiologist, which revealed marked tricompartmental osteoarthritis with small intra-articular bodies in the posterior cruciate ligament recess and in a small Baker's cyst and diffuses fraying of the free edge of the medial meniscus with marked extrusion.

In a November 21, 2016 report, Dr. Corcoran indicated that he had reviewed the November 14, 2016 MRI scan and explained that the findings showed significant tricompartmental osteoarthritis with an intra-articular loose body in the posterior cruciate ligament recess. Dr. Corcoran diagnosed right knee degenerative joint disease, recommended modified-duty work and total knee replacement surgery.

By decision dated December 20, 2016, OWCP finalized the proposed termination of appellant's wage-loss compensation and medical benefits. It accorded the weight of medical evidence to the second opinion physician, Dr. Thompson.

OWCP thereafter received a December 9, 2016 report from Dr. Christopher Selgrath, a Board-certified orthopedic surgeon. Dr. Selgrath related appellant's physical examination findings and diagnosed primary osteoarthritis of the right knee. He noted that appellant had right knee arthroscopy in 2009. Dr. Selgrath advised that the MRI scan and x-rays showed 50 percent joint space narrowing of the medial compartment of the right knee, tricompartmental degenerative joint disease (DJD) as well as meniscal diffuse fraying and extrusion consistent with the prior surgery. He opined that there was no acute finding of meniscal pathology that would warrant arthroscopic intervention. Dr. Selgrath explained that most of the pain was consistent with degenerative joint disease of the right knee. He provided a prescription for Naprosyn and recommended appellant for hyaluronic acid injections as he had failed conservative treatment.

In a December 19, 2016 report, Dr. Corcoran advised that appellant had consulted with Dr. Selgrath and a knee replacement surgery was not recommended at that time. He explained that appellant went back to regular duty, but was unable to tolerate her symptoms. Dr. Corcoran reviewed x-rays from December 9, 2016 and advised that they showed medial compartment narrowing, degenerative changes, and osteophytic spurring bilaterally. He diagnosed right knee synovitis and right knee degenerative joint disease. Dr. Corcoran recommended modified duty, use of nonsteroidal medications, and a home exercise program.

On December 30, 2016 counsel requested an oral hearing before an OWCP hearing representative, which was held on May 31, 2017. During the hearing, he explained that appellant had always tried to keep working, with intermittent time loss. Counsel argued that Dr. Corcoran, who had treated appellant for many years, maintained that appellant required continued work restrictions and continued medical treatment. He also noted Dr. Corcoran's opinion that appellant's employment injury exacerbated his degenerative joint disease of the right knee. Counsel also explained that the MRI scan on November 14, 2016 showed marked tricompartmental osteoarthritis in appellant's right knee along with tearing or fraying of the edge of the medial meniscus in the right knee. Furthermore, he argued that, if any probative value was given to the opinion of Dr. Thompson, there was at least a conflict in medical opinion between Drs. Thompson and Corcoran, and a referee opinion would be necessary to resolve the conflict.

By decision dated August 15, 2017, OWCP's hearing representative affirmed the December 20, 2016 decision with respect to the termination. He found that OWCP had properly terminated appellant's medical and wage-loss compensation benefits based on Dr. Thompson's opinion. OWCP's hearing representative, however, also found that there was an unresolved conflict in medical opinion as to whether the September 9, 2009 employment injury caused or contributed to the development of underlying degenerative joint disease of appellant's right knee and whether appellant was capable of full-duty work or was restricted to modified work, due to the effects of the right knee condition. He indicated that the SOAF should be amended to include a description of the duties of appellant's preinjury position of letter carrier, with the physical requirements of the position. OWCP's hearing representative recommended that, upon return of the case, appellant should be referred for an impartial medical examination.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[6] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[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) of FECA 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]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 12, 2016.

The evidence of record establishes that, as of December 20, 2016, the date OWCP terminated appellant's wage-loss compensation and medical benefits, there was disagreement

[6] *L.G.*, Docket No. 19-0142 (issued August 8, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

[7] *A.D.*, Docket No. 18-0497 (issued July 25, 2018). In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury. *See* 20 C.F.R. § 10.5(f); *Jason C. Armstrong*, 40 ECAB 907 (1989).

[8] *K.L.*, Docket No. 19-0729 (issued November 6, 2019*); J.K.*, Docket No. 18-1250 (issued June 25, 2019).

[9] *Id.*

[10] 5 U.S.C. § 8123(a). *See also G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that OWCP improperly terminated the claimant's wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion specialist).

between Dr. Thompson, OWCP's second opinion physician, and Dr. Corcoran, appellant's treating physician, as to whether appellant had residuals and disability from his accepted September 9, 2009 employment injury. Dr. Thompson found in his June 3, 2016 report that appellant's right knee medial meniscus tear had been surgically addressed and that appellant's right knee tricompartmental arthritis was preexisting and had not been aggravated by the accepted injury. He also opined that appellant could return to full-duty work and did not require further medical treatment for his right knee. In contrast, Dr. Concoran had reported through the years that appellant's right knee degenerative joint disease was causally related to his accepted employment injury and required work restrictions. In his November 21, 2016 report, he related that he had reviewed appellant's November 14, 2016 MRI scan of the right knee, which revealed marked tricompartmental osteoarthritis with small intra-articular bodies in the posterior cruciate ligament, small Baker's cyst, and diffuse fraying of the free edge of the medial meniscus, with marked extrusion. Dr. Corcoran again opined that appellant required modified work and continued medical treatment. The two physicians, thus, disagreed on the nature and extent of a period of disability caused by appellant's accepted employment injury. The Board finds that there remains an unresolved conflict of medical evidence between the opinions of Dr. Thompson and Dr. Corcoran as to whether appellant had residuals or disability from the accepted employment injury, as December 20, 2016, the date OWCP terminated compensation benefits.[11] Thus, the Board finds that OWCP did not meet its burden of proof as it should have referred appellant for an impartial medical evaluation prior to the termination of his wage-loss compensation and medical benefits.[12]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 12, 2016.

[11] *B.S.*, Docket No. 19-0711 (issued October 17, 2019).

[12] *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 7, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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