

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GWENDOLYN MERRIWEATHER and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, Pa.

*Docket No. 97-2137; Submitted on the Record;  
Issued June 3, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

In the present case, the Office has accepted that appellant, a mail handler, sustained aggravation of left meniscus tear, requiring arthroscopic repair, as a result of an employment injury on August 23, 1991, during which her left knee popped while she was picking up two flats of mail. The Office issued a notice of proposed termination of compensation on August 13, 1996. The Office terminated appellant's compensation benefits on September 21, 1996, on the grounds that the weight of the medical evidence established that appellant's disability resulting from the injury of August 23, 1991 had ceased.

The Board finds that the Office did not meet its burden of proof in this case.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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 disabling condition has ceased or that it is no longer related to the employment.<sup>1</sup>

Following the employment injury, appellant continued to treat with Dr. Todd M. Kelman, an osteopathic physician. Dr. Kelman submitted numerous progress notes to the record indicating that appellant had degenerative joint disease of the left knee, which was exacerbated by her employment injury, and that the employment injury had caused an extension of a tear in the medial meniscus, which had required arthroscopic treatment in September 1991. He opined in many of his notes that appellant continued with synovitis of the left knee and patellofemoral crepitus, and that she remained disabled from her regular work. On September 26, 1991 an

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<sup>1</sup> *Patricia A. Keller*, 45 ECAB 278 (1993).

Office medical adviser reviewed the case record. In response to the Office's question as to whether appellant had any condition causally related to her August 23, 1991 employment injury, the medical adviser answered "yes; aggravation of meniscus degenerative disc disease."

On March 6, 1992 the Office prepared a statement of accepted facts wherein it indicated that appellant had sustained an aggravation of left meniscus tear on August 23, 1991. The Office also noted that "claimant [has a] past medical condition a work-related injury to her back and knees in 1981, knee surgery in 1984, several other work-related injuries from 1978 to August 23, 1991 involving back and knee. In October 1991, she was involved in a nonwork-related motor vehicle accident, incurring a whiplash injury to her neck and upper back." The statement of accepted facts made no findings regarding the diagnosed condition of degenerative joint disease of the left knee.

In April 1992, the Office referred appellant to Dr. Henry S. Weider, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 1, 1992, Dr. Weider reported that appellant had sustained aggravation of preexisting partial tear of the medial meniscus and aggravation of preexisting degenerative joint disease. He opined that despite arthroscopic surgery, appellant continued to have significant functional problems with both knees, but especially the left and that she was disabled from work as a mail handler.

Dr. Kelman performed a second arthroscopy of the left knee and chondroplasty of the medial femoral condyle of the left knee on October 10, 1993. He reported appellant's postoperative diagnosis as extensive synovitis of the left knee, and degenerative joint disease of the left knee. On May 18, 1994 Dr. Kelman approved appellant's return to a modified part-time position. Appellant returned to work on June 25, 1994.

On February 1, 1995 the Office referred appellant to Dr. John Duda, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of appellant's continuing work-related disability. In a report dated February 27, 1995, Dr. Duda reported that examination of appellant's left knee revealed no effusion, no synovitis and no apparent clinical instability. He noted that appellant's x-rays from 1991 documented relatively advanced medial compartment and patellofemoral joint degenerative joint disease, even at her young age. Dr. Duda opined that appellant had premature underlying degenerative joint disease of the left knee, and a strain that was superimposed on her degenerative joint disease. He noted that appellant had two subsequent surgeries which documented her underlying arthritic changes. Dr. Duda concluded that appellant's strain was treated appropriately and healed without sequelae. He stated that appellant's current left knee problems were due to obesity and underlying advanced degenerative changes of the left knee. Finally, Dr. Duda stated that appellant's work-related injury would not preclude her from returning to her prior job, full time. He did not comment as to whether appellant's underlying degenerative joint disease was aggravated by her employment injury.

In January and February 1995, Dr. Kelman submitted progress notes to the record wherein he documented appellant's increasing pain of both knees. He indicated that appellant's right knee complaints could be related to appellant's placement of greater weight upon her right knee, to avoid use of the left knee.

In April 1995, the Office determined that a conflict existed in the medical opinion evidence as to whether appellant had any residuals of the accepted employment injury. On April 26, 1995 the Office referred appellant to Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated June 8, 1995, Dr. Fabiani stated that appellant had bilateral degenerative joint disease of both knees, mostly medial compartment and anterior compartment, in the patella femoral joints. He stated that this diagnosis was supported by not only clinical, but radiological findings and appellant's own complaints of difficulty going up and down stairs and getting out of chairs. Dr. Fabiani explained that appellant had complaints and findings in both knees, which could not be attributed to the accepted employment injury. He further explained that appellant had patella femoral malalignment and arthritic changes dating from 1984, which became progressive and worsened, and noted that spurs were present in both compartments, especially the medial, early in 1991 and 1992. Dr. Fabiani noted that the popping of appellant's knee during the accepted employment injury was a tear of the medial meniscus, and that it was easily torn because of degeneration already present. He stated that the accepted condition of aggravation of meniscus tear had been adequately taken care of by the arthroscopic surgeries. Dr. Fabiani offered no opinion as to whether appellant sustained an aggravation of the degenerative joint disease due to the accepted injury, and if so, whether such aggravation continued. In concluding his report, Dr. Fabiani observed that appellant's right knee did not wear out because she was putting more stress on this knee than the left knee. He explained that appellant had similar changes in the patella femoral joint, and in the medial condyle, of both knees. Finally, Dr. Fabiani noted that while appellant was partially disabled for employment, this partial disability was due to arthritis of both knees and her weight of 300 pounds.

In a progress note dated August 14, 1996, Dr. Kelman noted that appellant had increased symptoms and intermittent bouts of swelling of the left knee. He again recommended arthroscopic debridement of the left knee.<sup>2</sup>

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), 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.

In the present case, the Office found that a conflict existed in the medical opinion evidence, between Drs. Kelman and Duda, necessitating appellant's referral to an impartial medical specialist.

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.<sup>3</sup>

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<sup>2</sup> On November 22, 1995 Dr. Kelman reported that appellant had permanent impairment of both knees of 10 percent. On April 2, 1996 Dr. Kelman reported that appellant might benefit from arthroscopic evaluation of the left knee, during which further evaluation of the meniscus could be performed to determine if any additional degenerative changes had occurred.

<sup>3</sup> *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

The Board finds that Dr. Fabiani's report is not entitled to special weight because it was not based upon a proper factual background. Dr. Kelman, as well as the Office medical adviser who reviewed the case record on September 26, 1991, and Dr. Weider, the Office's second opinion physician who examined appellant on May 1, 1992, all stated that appellant had sustained both aggravation of preexisting partial tear of the medial meniscus and aggravation of preexisting degenerative joint disease as a result of the August 23, 1991 employment injury.

Prior to referring appellant for another second opinion evaluation in 1994, and the impartial medical examination in 1995, the Office made no findings as to whether to accept that appellant had also sustained an aggravation of preexisting degenerative joint disease as a result of the accepted injury. In an addendum to the statement of accepted facts dated November 30, 1994 the Office only noted that appellant had returned to work on June 25, 1994 and had stopped intermittently thereafter. The Board also notes that the statement of accepted facts indicated in very unclear and general terminology that appellant had sustained prior work-related knee injuries during the 1980's. The Office's lack of specific detail in this case in identifying appellant's previous work-related left knee injuries, as well as the Office's deficient findings regarding the diagnosis of degenerative joint disease, deprived the physicians requested to review the case of a proper factual basis upon which to form a medical opinion. The purpose of a statement of accepted facts is to allow a physician to form an impression of the individual and evidence to be evaluated. The statement of accepted facts should state the conditions claimed and accepted by the Office, so that the physician can assess whether the diagnoses given in the medical evidence to be reviewed, as well as his own diagnoses, are consistent with the condition(s) for which the claim was filed or accepted.<sup>4</sup>

In referring appellant to Dr. Fabiani on April 26, 1995 the Office advised Dr. Fabiani:

"The issue to be resolved is the cause and extent of impairment residual to the work-related injury or employment conditions. The enclosed copy of a statement of accepted facts presents the facts acknowledged in connection with this individual's claim for compensation benefits and these facts should serve as a frame of reference for your opinion."

In his report Dr. Fabiani noted that appellant's past medical history was important because she had been hospitalized for four weeks due to a work injury causing injury to her back and knees. He further noted, "But she never reported her knees and nothing was noted to her knees until 1984 when she began having trouble and she had surgery, which he described as a lateral release of both patella which caused a patella femoral malalignment." Dr. Fabiani concluded that appellant had patella femoral malalignment and arthritic changes from 1984 which progressed and worsened. While noting the importance of appellant's early work-related knee injuries, Dr. Fabiani did not explain the significance of such injuries and did not offer any opinion as to whether appellant's degenerative knee condition was aggravated by her 1991 employment injury.

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<sup>4</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts* (Chapter 2.809.12) (June 1995).

By the time this case was referred to an impartial medical specialist, the Office should have clarified the history of appellant's previous work-related knee injuries, if any. Appellant's history of prior employment injuries can not be elicited from this case record. The Office should have also made findings as to whether appellant's diagnosed degenerative joint disease of the left knee was aggravated by her 1991 employment injury. As Dr. Fabiani lacked the proper factual background upon which to base his medical opinion, his opinion regarding the status of appellant's work-related left knee condition was of limited probative value.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits in this case.

The decision of the Office of Workers' Compensation Programs dated September 21, 1996 is hereby reversed.

Dated, Washington, D.C.  
June 3, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member