

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

DELPHIA Y. JACKSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 04-165
Issued: March 10, 2004**

Appearances:
Delphia Y. Jackson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 23, 2003 appellant filed an appeal of an Office of Workers' Compensation Programs decision dated October 10, 2003, denying modification of its prior decisions that rescinded acceptance of permanent aggravation of bilateral knee degenerative arthritis and denied authorization for knee surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over Office decisions dated October 10, April 4 and March 20, 2003.

ISSUES

The issues are: (1) whether the Office met its burden of proof to rescind acceptance of a permanent aggravation of bilateral knee degenerative arthritis; and (2) whether the Office properly denied authorization for knee surgery.

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a decision dated August 21, 1989, the Board remanded the case for further development on the issue of whether appellant had an arthritis condition causally related to her federal employment. The Board found

that the conflict in the medical evidence had not been resolved by the physician selected as an impartial medical specialist.¹ By decision dated November 1, 2002, the Board set aside an Office decision dated October 18, 2001 denying authorization for knee surgery.² The Board found that the opinion of a referral orthopedic surgeon, Dr. Julie M. Wehner, was of diminished probative value as it was not based on the accepted facts in the case. The Board noted that the Office had accepted a permanent aggravation of bilateral knee degenerative arthritis, but Dr. Wehner had based her opinion as to knee surgery on a finding that appellant did not have an employment-related arthritis condition.

The pertinent history with respect to the current appeal indicates that, following the Board's August 21, 1989 decision, the Office referred appellant to Dr. James H. Breihan, a Board-certified orthopedic surgeon, as an impartial medical specialist. In a report dated July 16, 1991, Dr. Breihan diagnosed bilateral knee degenerative arthritis; he opined that appellant had a permanent aggravation of the condition causally related to her 1978 employment injury and her job duties.³ Dr. Breihan stated that appellant's job duties would aggravate a preexisting condition more than daily living activities. Based on the report of Dr. Breihan, the Office had accepted the condition of permanent aggravation of bilateral knee degenerative arthritis. The history of the case as discussed in the Board's prior decisions is incorporated herein by reference.

In a decision dated February 28, 2002, the Office terminated medical benefits.⁴ Subsequent to the Board's November 1, 2002 decision with respect to knee surgery, the Office determined that a conflict in the medical evidence existed between Dr. Breihan and the second opinion referral physician Dr. Wehner, as to whether the degenerative arthritis condition was employment related. The Office referred appellant, along with medical records, to Dr. Charles W. Mercier, a Board-certified orthopedic surgeon.

In a report dated February 18, 2003, Dr. Mercier provided a history and results on examination. He noted that appellant underwent total knee arthroplasties in October 2002. Dr. Mercier reviewed the medical history and indicated that appellant did not sustain a significant injury in December 1978 and she continued to work and did not seek additional medical care until eight years later. He further stated in pertinent part:

“In December 1978, [appellant] already had degenerative arthritis in both knees. Again, this would have become worse irregardless of her alleged December 1978 fall.

¹ Docket No. 89-904 (issued August 21, 1989).

² Docket No. 02-276 (issued November 1, 2002).

³ Appellant had filed both a traumatic injury claim on December 14, 1978 and an occupational disease claim on October 3, 1986.

⁴ This decision is not before the Board as it was issued more than one year prior to the filing of the current appeal. 20 C.F.R. § 501.3(d).

“Based on the information I have, all medical care, testing, lost time from work, work restrictions and disability for her osteoarthritis in both knees starting in 1986 was not caused by alleged events in December 1978 or aggravated by her work activities.

“Based on the above, her total knee surgery and continued use of an electric cart are also not work related.”

By decision dated March 20, 2003, the Office rescinded acceptance of a permanent aggravation of bilateral knee degenerative arthritis. The Office also denied reimbursement for knee surgery.

In decisions dated April 4 and October 10, 2003, the Office denied modification.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office’s authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁵ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁶ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.⁷ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁸

ANALYSIS -- ISSUE 1

In this case, the Office sought to rescind acceptance of a permanent aggravation of bilateral knee degenerative arthritis based on the opinion of Dr. Mercier. According to the March 20, 2003 Office decision, a “new conflict” existed between referral physician Dr. Wehner and Dr. Breihan, the physician selected as an impartial medical specialist in 1991, and therefore Dr. Mercier was serving as an impartial medical specialist. Section 8123(a) of the Federal Employees’ Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁹ A conflict under 5 U.S.C. § 8123 cannot exist unless there is a conflict between an attending physician and an Office physician; Dr. Breihan was not an attending physician and cannot create a conflict with

⁵ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁶ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁷ *See* 20 C.F.R. § 10.610.

⁸ *Alice M. Roberts*, 42 ECAB 747 (1991).

⁹ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

Dr. Wehner. Dr. Mercier is not considered an impartial medical specialist in this case and his report is not entitled to special weight.¹⁰

Moreover, although the Office acknowledges that acceptance of the arthritis condition was based on Dr. Breihan, the March 20, 2003 Office decision finds that Dr. Breihan failed to clearly explain his opinion on causal relationship. It is a fundamental principle of the law on rescission, as developed by the Board, that the Office should not be second-guessing a prior adjudicating claims examiner and simply arrive at a different conclusion on the same evidence.¹¹ In this case the Office had found that Dr. Breihan, as an impartial medical specialist, had resolved a conflict in the medical evidence. With respect to a rescission of acceptance, the Office should not attempt to second guess the prior adjudicating official's assessment of Dr. Breihan's report.

Accordingly, Dr. Breihan's report remains entitled to the special weight accorded to an impartial medical specialist that properly resolved a conflict in the medical evidence. In order to rescind acceptance of the arthritis condition, the Office must show that the weight of the evidence establishes that acceptance was erroneous. Dr. Wehner provided her opinion, in an August 22, 2001 report, that the knee osteoarthritis was not caused by work duties, noting that walking, standing and sitting are part of normal life patterns and do not contribute to osteoarthritis in the general population. It is not clear whether the term "contribute" was intended to include both causation and aggravation; Dr. Wehner did not provide a fully rationalized opinion as to the accepted condition. Dr. Mercier noted in his history the December 1978 employment injury, without discussing appellant's specific work duties. He opined that appellant's osteoarthritis was not aggravated by work activities, without providing a complete factual background and medical rationale in support of his opinion.

The Board, therefore, finds that the reports of Drs. Wehner and Mercier are not of such probative value that they are sufficient to meet the Office's burden of proof to rescind acceptance of a permanent aggravation of bilateral knee degenerative arthritis. The weight of the evidence remains with Dr. Breihan, the orthopedic surgeon selected as an impartial medical specialist.

LEGAL PRECEDENT -- ISSUE 2

Under section 8103 of the Act, the Office has the authority to provide medical services, appliances and supplies to an employee injured while in the performance of duty which the Office considers likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of monthly compensation.¹² In interpreting section 8103, the Board had recognized that the Office has broad discretion in approving services provided under the Act.¹³

¹⁰ His report can still be considered for its own intrinsic value. *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹¹ See, e.g., *Gareth D. Allen*, 48 ECAB 438 (1997); *Major Jefferson, III*, 47 ECAB 295 (1996); *Carolyn F. Allen*, 47 ECAB 240 (1995); *Daniel E. Phillips*, 40 ECAB 1111 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

¹² 5 U.S.C. § 8103.

¹³ *Janice Kirby*, 47 ECAB 220 (1995).

ANALYSIS -- ISSUE 2

The basis for the denial of reimbursement for knee surgery was that the knee arthritis was not employment related. As the Board noted in the prior appeal, Dr. Wehner's opinion on knee surgery was based on her opinion that aggravation of arthritis was not employment related. Similarly, Dr. Mercier opines that the knee surgery was not employment related based on his opinion that the degenerative arthritis was not employment related. Based on the above discussion and the Board's finding on rescission, the reports from Drs. Wehner and Mercier are of diminished probative value on this issue as they are not based on the accepted facts of the case. The case will be remanded to the Office for an appropriate decision on the knee surgery.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to rescind acceptance of a permanent aggravation of bilateral knee degenerative arthritis. The case will be remanded for an appropriate decision as to knee surgery.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 10, April 4 and March 20, 2003 are reversed with respect to rescission of the accepted arthritis condition and the case is remanded for appropriate action with respect to reimbursement for knee surgery.

Issued: March 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member