

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

B.M., Appellant

and

**U.S. POSTAL SERVICE, HENRY McGEE
STATION, Chicago, IL, Employer**

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**Docket No. 07-1212
Issued: March 4, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2007 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated February 5 and March 15, 2007 terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective February 18, 2007; and (2) whether she has established that she has any continuing employment-related disability after February 18, 2007.

FACTUAL HISTORY

On June 1, 2004 appellant, then a 41-year-old letter carrier, filed an occupational disease claim alleging a tear in her right knee due to constant walking up and down stairs in her federal employment. She first became aware of the relationship between this condition and her employment on January 21, 2004. On May 2, 2004 appellant underwent a right knee

arthroscopy. She has not worked since May 14, 2004.¹ On June 23, 2004 the Office accepted appellant's claim for right knee chondromalacia patella. Appropriate compensation and medical benefits were paid.

Appellant was treated by Dr. Jay M. Brooker, a Board-certified orthopedic surgeon. In a November 4, 2004 duty status report, Dr. Brooker indicated that appellant could lift five pounds continually and eight pounds intermittently for eight hours a day, sit intermittently for eight hours a day and stand and walk for two to three hours a day. Appellant could not kneel, bend, stoop or twist. In a December 1, 2004 attending physician's report, Dr. Brooker noted that appellant had not yet been advised that she could return to work and listed the period of total disability as commencing May 20, 2004 through "pending." These comments were repeated in Dr. Brooker's attending physician's reports of December 17, 2004, January 4 and 17, and February 1, 2005.

On January 11, 2005 appellant underwent a functional capacity evaluation. Her physical therapists indicated that she had the capacity to function between the medium and medium-heavy categories of work.

In a February 3, 2005 progress note, Dr. Brooker indicated that appellant returned after her functional evaluation. He noted that she was improving and was able to perform the majority of her duties at work, with the restriction of no climbing, crouching or kneeling in order to prevent future recurrences. In reports dated February 16 to August 9, 2005, Dr. Brooker reiterated that appellant had not been released to return to work and that her total disability remained "pending."

On March 25, 2005 the employing establishment noted that appellant had been released to return to restricted work but that it would not extend a job offer to her. The Office was asked to refer appellant to vocational rehabilitation.

In a medical note dated May 16, 2005, Dr. Brooker stated that appellant had reached maximum medical improvement and should have permanent restrictions with no lifting over 20 pounds, no climbing, crouching or kneeling. Appellant had not shown that she could perform more than this without creating additional pain and dysfunction.

On November 7, 2006 the Office issued a notice of proposed termination of compensation for the reason that appellant no longer had any disability due to the work-related injury. The Office noted that "despite the results of the functional capacity examination on February 3, 2005, Dr. Brooker provided work restrictions of no climbing, crouching or kneeling and no lifting over 20 pounds." The Office noted that Dr. Brooker's restrictions were ordered to simply prevent future recurrences and were not the basis for compensation.

By letter dated November 15, 2006, appellant responded to the proposed notice of termination by stating that her right knee still bothered her.

¹ On March 4, 2004 the employing establishment informed appellant that it was removing her from federal service due to her submission of a false and altered medical documentation. Her last day in a pay status was May 14, 2004.

In a December 4, 2006 report, Dr. Brooker noted that appellant had recurrent anterior knee pain in both knees. He stated that she had a positive patellar apprehension to a mild degree and mildly positive patellar grind. Dr. Brooker noted that appellant has had “bilateral work-related chondromalacia and patellofemoral syndrome as a result of repetitive climbing, crouching, kneeling and lifting that occurs on a daily basis. He limited climbing, crouching, kneeling, lifting, standing and walking and noted that appellant would probably need repeat viscosupplementation injections. In progress notes dated December 27, 2006 and January 3, 10, 17 and 24, 2007, Dr. Brooker gave appellant Supartz injections.

By decision dated February 5, 2007, the Office terminated appellant’s compensation benefits as of February 18, 2007.

On February 26, 2007 appellant requested reconsideration. In a February 19, 2007 report, Dr. Brooker stated:

“[Appellant] had responded to the type of treatment I had given her in the past and therefore I ordered the same treatment to help alleviate her pain. The reasoning behind limiting her activities, specifically climbing, crouching, kneeling and lifting beyond a certain amount of weight, would be to allow her to function at a level that does not create pain. Yes, pain is a subjective symptom, however, it is very clear that there is a certain level beyond which a person can perform her activities. Whenever it was attempted to go beyond those activity levels, we would cause recurrences of her symptoms. Patellar instability is an objective finding on examination consistent of physical grinding of the patella on examination and physical ability of the patella to tilt on examination. Pain is associated with these findings as well and manifests as an apprehension sign.

“It would be irresponsible for me as an orthopedic surgeon to recommend that a person go back to doing activities that are going to lead to more damage to the knee. Therefore it is rather confusing that a person is arbitrarily telling [appellant] that she can no longer receive any benefits when the restrictions have not really been complied with for quite some time.”

By decision dated March 15, 2007, the Office denied modification of the February 5, 2007 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.³ The

² *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

³ *Id.*

Office's burden of proof includes the necessity of furnishing medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation.

The medical evidence of record does not support that appellant's disability ceased or is no longer related to the work injury. Dr. Brooker, appellant's treating physician submitted reports describing appellant's residuals from her injury. He noted that she remained partially disabled due to the work-related injury and provided information as to her physical limitations. In a May 16, 2006 note, Dr. Brooker indicated that appellant reached maximum medical improvement and would have permanent restrictions with no lifting over 20 pounds, no climbing or kneeling. On December 4, 2006 Dr. Brooker noted that appellant had bilateral work-related chondromalacia and patellofemoral syndrome. Although the Office only accepted appellant's claim for right knee chondromalacia patella, Dr. Brooker's report is significant in that he noted residuals to the right knee arising from the accepted injury. He noted that appellant complained of recurrent anterior knee pain in both knees and that she had a positive patellar apprehension to a mild degree and mildly positive patellar grind. Dr. Brooker limited climbing, crouching, kneeling, lifting, standing and walking. There is no medical evidence contradicting Dr. Brooker's opinion.

The Office appears to have placed the burden of proof on appellant when it stated that Dr. Brooker's reports were insufficient to show that appellant remained disabled. However, when terminating compensation benefits, the burden of proof is on the Office to prove that appellant's disability has ceased or was no longer related to her employment injury.⁵ The Office has provided no medical evidence establishing that appellant no longer has any disability or residuals as a result of her accepted right knee condition.

The medical evidence of record does not establish that appellant's disability ceased or is no longer related to her employment. The Office did not meet its burden of proof and improperly terminated her compensation benefits.⁶

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective February 18, 2007.⁷

⁴ See *Del K. Rykert*, 40 ECAB 284 (1988).

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Barry Neutach*, *supra* note 2.

⁷ In light of disposition of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 15 and February 5, 2007 are reversed.

Issued: March 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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