

FACTUAL HISTORY

On August 23, 1996 appellant, then a 46-year-old clerk, filed an occupational disease claim alleging that she developed bilateral knee conditions due to twisting and turning as well as throwing mail in the performance of duty. She first became aware of her condition on January 10, 1994 and first attributed this condition to her employment on that date. On September 6, 1996 Dr. Clarence Hart, a Board-certified orthopedic surgeon, performed a diagnostic arthroscopy of the right knee, which revealed arthritic tri-compartmental destructive joint disease of the right knee. He performed arthroscopy and shaving of areas of chondromalacia on appellant's left knee on November 14, 1996. Dr. Hart diagnosed chondromalacia of the patellofemoral joint and medial femoral condyle. OWCP authorized these surgeries.

OWCP accepted appellant's claim for aggravation of degenerative joint disease in the knees bilaterally on May 13, 1997. Appellant accepted a light-duty position and returned to work on June 10, 1997 as a modified distribution clerk. She stopped work on August 26, 1997. Appellant filed a recurrence of disability on January 8, 1998 alleging that she sustained a recurrence of disability on June 13, 1997. OWCP denied this claim by decision dated June 22, 1998. The Branch of Hearings and Review affirmed this decision on September 2, 1999. Appellant returned to work in the modified distribution clerk position in June 1998. She was to stand intermittently for no more than 20 minutes an hour totaling no more than two hours a day.

In a note dated March 24, 2000, Dr. Hart stated that appellant could work two consecutive days a week, sitting only. He diagnosed severe and advanced arthritic changes in both knees. Dr. Hart stated that appellant was working, that she was having increasing problems and that decreased function was expected with her condition.

In a letter dated April 13, 2000, OWCP directed appellant to file a recurrence of disability claim if her work restrictions had increased. Appellant filed a claim for continuing compensation on April 14, 2000 and requested compensation for total disability on March 25, 30, 31 and April 1, 6 and 7, 2000.

By decision dated June 12, 2000, OWCP denied appellant's claim for recurrence of disability finding that the medical evidence did not establish a change in the nature and extent of her injury-related condition.

Appellant requested an oral hearing. She testified that in her current position she was required to rise from a sitting position 15 to 20 times an hour. Appellant stated that when she returned to work in 1998 she was working in the same position 40 hours a week. Her supervisor responded on February 22, 2001 and stated that appellant exaggerated the number of times that she rose from her chair during the day. Stan Blasi, the postmaster, stated that appellant arose four to five times per shift and was allowed two breaks and a lunch hour in which to elevate her legs. Appellant submitted a notarized statement dated March 9, 2001 and asserted that she counted the number of times she arose in an eight-hour shift and this number was 57. She noted that her supervisor was only at the employing establishment for part of her workday.

Dr. Hart completed a report on February 5, 2001 and described appellant's knee condition and surgeries in 1996. He stated that repeating motions and activities that caused the joint to deteriorate were related to her work requirements. Dr. Hart stated, "I cannot find any other trauma outside of the relatively routine work activities, which would account for such acceleration of the normal process of osteoarthritis in the weight-bearing knee joints. This represents my opinion, and I believe she has an exacerbation of this preexistent disorder."

By decision dated March 28, 2001, the Branch of Hearings and Review remanded the case for OWCP to refer appellant to a Board-certified orthopedic surgeon for an opinion on the issues of whether appellant's employment duties had resulted in a worsening of her accepted conditions.

OWCP referred appellant for a second opinion evaluation on June 11, 2001. In a report dated August 2, 2001, Dr. Pedro M. Murati, a physician Board-certified in physical medicine and rehabilitation, examined appellant and found severe crepitus with no instability. He noted that both knees were very tender to manipulation. Dr. Murati diagnosed knee pain with severe crepitus bilaterally. In an addendum dated August 30, 2001, he stated that any activity that required any loaded flexion or extension of both knees would aggravate her condition due to the severity of her chondral cartilage loss. Dr. Murati recommended that appellant sit for eight hours a day, that she walk and stand for less than one hour and that she have 15-minute breaks every two hours. He stated that appellant should be allowed to sit with her knees extended.

On December 18, 2001 OWCP referred appellant for a second opinion evaluation with Dr. Scott Jahnke, a physician Board-certified in physical medicine and rehabilitation. In a report dated January 2, 2002, Dr. Jahnke opined that appellant's work duties could have aggravated her condition including repetitive standing and arising from sitting and sitting again. However, he also stated, "Unfortunately, there is no way to be certain that this would not progress on its own with activities of daily living. Most likely it would have a component of aggravation whether she worked at the [employing establishment] or not. However the fact that she was required to get up and get down on a regular basis at the [employing establishment] this mechanism would definitely cause an aggravation of the preexisting condition." Dr. Jahnke stated that appellant's work activities contributed to her degeneration as she was required to get up and down frequently during the course of the day. He concluded that appellant should do primarily a sitting job and that working every other day or every third day was probably an acceptable accommodation for her.

Dr. Jahnke also completed a work capacity evaluation on January 3, 2002 and indicated that appellant could work eight hours a day with a limitation of rising from sitting to standing no more than six to eight times a day. He indicated that appellant walk for one half hour, stand for one and one half hours and could not squat, kneel or climb.

OWCP granted appellant schedule awards for 38 percent impairment of the left lower extremity and 34 percent impairment of the right lower extremity on February 12, 2002.

In a letter dated April 18, 2002, OWCP stated that appellant's recurrence of April 1, 2000 had been accepted and requested that appellant submit a claim for compensation for any lost time for work.

The employing establishment offered appellant a light-duty position on May 16, 2002 as a modified distribution clerk. This position required appellant to distribute mail at a letter case while standing, using a rest bar or seated. Appellant was directed to adhere to Dr. Jahnke's work restrictions including walking no more than half an hour a day and standing no more than one and one half hours a day. The employing establishment stated that appellant was to rise from sitting to standing no more than six to eight times a day within an eight-hour workday.

Appellant filed a claim for compensation on July 10, 2002 and requested wage-loss compensation from March 25, 2000 through June 28, 2002.

In a letter dated August 8, 2002, OWCP informed appellant that the position offered by the employing establishment was suitable work and allowed her 30 days for a response.

By decision dated December 5, 2002, OWCP denied appellant's claim requesting compensation from March 25, 2000 to June 28, 2002 as causally related to her employment injury. Appellant requested an oral hearing on December 30, 2002. The Branch of Hearings and Review set aside OWCP's decision on May 5, 2004 finding that the medical evidence required further development as Dr. Jahnke's reports were contradictory regarding appellant's work restrictions and required clarification.

OWCP referred appellant for a second opinion evaluation with Dr. Pollock, a Board-certified orthopedic surgeon, on June 23, 2004. He examined appellant on July 14, 2004 and noted her history of injury. Dr. Pollock found loss of range of motion in the knees and severe degenerative changes on x-ray with marked loss of the medical joint space bilaterally and bone-on-bone deformity. He opined that appellant should continue to work two days a week with significant limitations on sitting, walking and standing. In a report of July 14, 2004, Dr. Pollock stated that appellant's job activities in 1997 did not cause a material worsening of her degenerative disease. He noted, "There is no evidence that standing for prolonged periods of time, bending, squatting or kneeling are a cause of degenerative arthritis of any joint that would occur unless there is some significant isolated injury." Dr. Pollock opined that appellant's degenerative joint disease would have occurred regardless of her work, which could have resulted in symptomatic aggravation of degenerative arthritis. He stated that appellant's restrictions were due to her underlying degenerative disease. Dr. Pollock found, "I believe it is impossible to state to what extent her activity has resulted in worsening of her symptoms. It is my belief that she would have progressed to this stage naturally.... Her weight factor is probably as important a factor as her work."

By decision dated September 10, 2004, OWCP denied appellant's claim finding that Dr. Pollock's report was entitled to the weight of the medical evidence and did not support appellant's claim that her current disability was due to her employment duties. It denied appellant's claim for wage loss beginning March 25, 2000. Appellant requested an oral hearing on September 27, 2004. She testified on June 14, 2005 and stated that the employing establishment changed the method of performing her position from putting all the sorted mail into a large container which another party sorted into trays of destination, to requiring her to put the mail directly into the trays of destination. This change resulted in appellant's need to rise from a sitting position between 55 and 72 times a day when previously she rose 6 to 10 times a day. The employing establishment responded on July 17, 2005 and disagreed with her

description of her employment duties. Mr. Blasi stated that appellant did not get up except to go to the restroom, break or home. He stated, "If she runs out of mail, she does not get up to notify her supervisor. [Appellant] sits in her chair and does nothing until the supervisor on duty checks on her and finds out that she is out of mail to sort. The supervisor has another employee bring the mail to her to sort." In a separate statement, he again asserted that appellant did not and had never been required to get up out of her chair numerous times per shift to do anything." In a decision dated September 14, 2005, the Branch of Hearings and Review found that Dr. Pollock's report was not entitled to the weight of the medical evidence. Dr. Pollock remanded the case for OWCP to amend the statement of accepted facts, prepare specific questions regarding whether the aggravation of appellant's condition was temporary or permanent and request a supplemental report from Dr. Pollock.

A magnetic resonance imaging (MRI) scan of the right knee on December 16, 2005 demonstrated a tear in the posterior horn of the medical meniscus, subchondral cyst formation and prominent osteophyte formation.

Dr. Pollock responded on January 5, 2006 and stated that appellant's aggravation was permanent. He stated, "This is a progressive condition and probably has been to some degree aggravated by her work and to some degree the normal progression of degenerative disease." Dr. Pollock provided work restrictions and stated that a reduction from five to two days was appropriate.

Dr. Pollock completed a supplemental report on January 24, 2006. He stated that the most significant factor in her progressive arthritis was her weight. Dr. Pollock stated, "Her work probably has a minimal effect, if any.... It is most likely that her current knee condition would have reached this stage regardless of the kinds of employment she had undertaken." On February 27, 2006 he stated that appellant was capable of performing sedentary work and that continuing to perform sedentary work was not contributing to her pain and knee degeneration. In a report dated March 7, 2006, Dr. Pollock stated that he could see no reason why appellant could not work eight hours a day, five days a week. He opined that appellant could sit eight hours a day with 15-minute breaks twice a day.

In a May 1, 2006 decision, OWCP denied appellant's claim for recurrence of disability beginning March 25, 2000. It stated that there was no rationalized medical opinion evidence supporting her increased disability for work beginning March 25, 2000. Appellant requested reconsideration of this decision on June 27, 2006. She continued to work two days a week in her modified position.

OWCP informed appellant on August 22, 2006 that the offered position as a modified mail processing clerk working 40 hours a week with restrictions was suitable and allowed her 30 days to accept the position or offer her reasons for refusal.

By decision dated August 23, 2006, OWCP declined to modify the May 1, 2006 decision finding that appellant had not established a recurrence of disability on March 25, 2000. Counsel again requested reconsideration on September 1, 2006 and stated that OWCP had accepted appellant's March 2000 recurrence of disability on April 18, 2002.

On October 19, 2006 OWCP stated that appellant refused to accept the offered suitable work position and allowed 15 days for appellant to accept.

In a report dated September 27, 2006, Dr. John W. Ellis, a Board-certified family practitioner of professorial rank, reviewed the statement of accepted facts and medical history. He examined appellant and diagnosed aggravation of degenerative joint disease bilateral knee and bilateral knee strains with continued ligament laxity. Dr. Ellis stated, "In my opinion, this injury and impairment arose out of and in the course of the employee's employment with [the employing establishment] and is causally connected to the above[-]described accident."

By decision dated October 27, 2006, OWCP declined to consider the merits of appellant's claim. In a letter dated December 1, 2006, it indicated that this decision would be set aside and a merit review conducted.

Appellant returned to work full time on November 7, 2006. OWCP authorized bilateral total knee replacements on December 8, 2006. Dr. James R. Lairmore, a Board-certified orthopedic surgeon, performed a left unicondylar knee arthroplasty on January 17, 2007.

In a decision dated August 8, 2007, OWCP found that the modified mail processing clerk position fairly and reasonably represented appellant's wage-earning capacity.

Appellant requested reconsideration on August 14, 2007.

By decision dated April 2, 2008, OWCP reviewed the merits of appellant's claim and found that the medical evidence was not sufficient to establish a change in the nature and extent of appellant's employment-related condition such that she had sustained a recurrence of disability.

Appellant requested reconsideration on August 26, 2009 and stated that her doctor addressed the specific question of her need to work two days a week. She resubmitted Dr. Ellis' September 27, 2006 report. Dr. Ellis also submitted a report dated February 1, 2009 and stated that appellant was unable to work a full-time position due to the severe pain and ongoing problems with her knees.

By decision dated June 26, 2009, OWCP denied modification of decisions dated April 2, 2008, May 1 and August 23, 2006 which denied appellant's claim for recurrence of disability, finding that appellant had not submitted sufficient medical evidence to warrant modification of its prior decisions.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his

or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.²

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.³ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing March 25, 2000 and her employment injury.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁵

ANALYSIS

The Board finds that this case is not in posture for a decision due to an unresolved conflict of medical opinion evidence. Appellant's physicians, Drs. Hart and Ellis, completed reports on February 5, 2001 and September 27, 2006, respectively, each of which reviewed appellant's history of injury and medical history. Dr. Hart stated that the repeated motions and activities that caused appellant's knee joints to deteriorate were related to her work requirements and opined that she had a work-related exacerbation of her osteoarthritis. Dr. Ellis opined that appellant's knee injuries "arose out of and in the course of the employee's employment with [the employing establishment] and is causally connected to the above-described accident." Beginning on March 24, 2000, Dr. Hart stated that appellant could work only two consecutive days a week and that she should only be required to sit. These reports support causal relationship between appellant's employment and a continued permanent aggravation of her bilateral knee osteoarthritis, a change in her underlying employment-related condition which result in increasing disability for work.

OWCP referred appellant to several second opinion physicians including Drs. Murati, Jahnke and Pollock. It found that Dr. Pollock's reports were entitled to the weight of the evidence and established that appellant's job activities in 1997 did not cause a material worsening of her degenerative disease and that appellant's restrictions were due to her underlying degenerative disease. On March 7, 2006 Dr. Pollock stated that he could see no reason why appellant could not work eight hours a day, five days a week. He opined that appellant could sit eight hours a day with 15-minute breaks twice a day. Dr. Pollock did not

² 20 C.F.R. § 10.5(x).

³ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

⁵ *See Nicolea Brusio*, 33 ECAB 1138, 1140 (1982).

support that appellant's underlying condition was impacted by her employment and found that she could work 40 hours a week with restrictions.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁶ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷ The Board finds that there is an unresolved conflict of medical opinion evidence between appellant's physicians, Drs. Hart and Ellis, and OWCP's second opinion physician, Dr. Pollock, regarding whether appellant's employment duties resulted in a permanent or continuing aggravation of her bilateral knee osteoarthritis and whether her increasing disability for work beginning March 25, 2000 was due to such an aggravation. On remand, OWCP should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to resolve the conflict. After this and such other development, it should issue an appropriate decision.

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion evidence such that the case must be remanded for further development.

⁶ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁷ *R.C.*, 58 ECAB 238 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2009 decision is set aside and remanded for further development consistent with this decision of the Board.

Issued: July 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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