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

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| **D.S., Appellant** | ) | |
| **and** | ) | **Docket No. 12-1166** |
| | ) | **Issued: February 15, 2013** |
| **DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, JFK INTERNATIONAL AIRPORT, Jamaica, NY, Employer** | ) | |

*Appearances:*
*Thomas S. Harkins, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

### *JURISDICTION*

On May 3, 2012 appellant, through her attorney, filed a timely appeal from a November 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly terminated appellant's compensation benefits effective September 1, 2010 as she was no longer disabled; and (2) whether appellant met her burden of proof to establish that she had any disability after September 2, 2010 causally related to the accepted employment injury.

On appeal appellant's counsel contends that OWCP erroneously weighed the medical evidence. He alleged that the impartial medical examiner's opinion was erroneously given weight to terminate wage-loss compensation, that greater weight should have been given the

[1] 5 U.S.C. § 8101 *et seq.*

opinion of appellant's treating physician, that OWCP erroneously terminated wage-loss compensation when all physicians continued to indicate that appellant had restrictions, that she was on medication that the impartial medical examiner noted may have interfered with her work and that OWCP did not consider how her limitations interfered with her having to make restroom trips or walk to the lunchroom.[2]

## ***FACTUAL HISTORY***

On September 3, 2008 appellant, a liquidation specialist, filed a traumatic injury claim alleging that on August 27, 2008 someone bumped into her in the lunch room causing her to fall and sustain injuries to her left leg, lower back and right elbow. On October 23, 2008 OWCP accepted her claim for left knee contusion. It subsequently accepted appellant's claim for left knee, internal derangement. On February 13, 2009 appellant underwent an arthroscopy, synovectomy, partial medial and lateral meniscectomy, debridement and drilling osteoarthritis/osteonecrosis, abrasion chondroplasty, synovectomy, resection of suprapatellar plica left knee.

In a May 12, 2009 attending physician's report, Dr. Arnold Goldman, appellant's treating Board-certified orthopedic surgeon, indicated that appellant remained totally disabled due to her August 27, 2008 employment injury.

On June 9, 2009 OWCP referred appellant to Dr. Frank Hudak, a Board-certified orthopedic surgeon, for a second opinion. In a June 25, 2009 report, Dr. Hudak listed the diagnosis as status post aggravation of underlying osteoarthritis and chondromalacia of the left knee, as well as aggravation of, in all medical probability, preexisting medial and lateral meniscal tears as well as aggravation of preexisting plica. He opined that the aggravation was permanent and that at this point appellant has not reached *status quo ante, i.e.*, what the condition was prior to the accident. Dr. Hudak stated that the conditions were still active and causing objective symptoms with residual atrophy. He opined that appellant was temporarily moderately partially disabled related to the August 27, 2008 employment injury which superimposed upon the preexisting conditions. Dr. Hudak recommended lubricating injections into appellant's left knee and continuing physical therapy three times per week for six weeks. He opined that appellant was unable at this time to perform her regular duties of a liquidation specialist. Dr. Hudak also completed a work capacity evaluation, wherein he indicated that appellant could walk for two hours at work, stand for five hours, bend and stoop for one hour. He prohibited appellant from squatting or kneeling.

Dr. Goldman continued to submit reports indicating that appellant was disabled. In a report dated June 23, 2009, he noted that she indicated that her left knee was still "puffy and achy" at times. Dr. Goldman gave appellant a cortisone-type injection and noted that she remained totally disabled. In a March 16, 2010 report, he stated that it was his opinion with a reasonable degree of medical certainty that the current findings on examination were related to the accepted work-related injury. Dr. Goldman noted that the diagnosis was internal derangement of the left knee. He indicated that laboratory and surgical findings on February 13,

[2] Appellant's attorney also contends that this case was improperly reviewed under the clear evidence of error standard. Although the language in OWCP's decision dated November 22, 2011 is somewhat confusing, it is clear to this Board that OWCP did evaluate the evidence on the merits. Thus, the Board concludes that appellant's argument with regard to clear evidence of error is without merit.

2009 are consistent with medial and lateral meniscal tears and chondromalacia synovitis. Dr. Goldman noted that the pathology report documents fragments of fibrotendinous tissue and synovitis. He stated that the objective findings continued to reveal atrophy and limited range of motion. Dr. Goldman opined that appellant remained totally disabled at this time. He noted that she worked as a liquidator and could not perform the duties of this occupation at this time. Dr. Goldman stated that in terms of work tolerance, the only thing he believed appellant was capable of doing at that time was sitting eight hours a day.

By letter dated April 23, 2010, OWCP referred appellant to Dr. Edmunde A.C. Stewart, a Board-certified orthopedic surgeon, in order to resolve a conflict in medical opinions between Drs. Hudak and Goldman with regard to the need for further medical treatment, the necessity for treatment for the accepted work condition and whether there existed continuing disability due to the accepted work injury. In a May 6, 2010 report, Dr. Stewart listed his diagnoses as status post contusion and sprain of the left knee joint of August 27, 2008; status post aggravation of underlying osteoarthritis of the left knee as well as aggravation of, in all medical probability, preexisting medial and lateral meniscal tears; and status post arthroscopic surgery of the left knee of February 13, 2009. He opined that these diagnoses would represent a permanent aggravation of a preexisting condition. Dr. Stewart opined that appellant was capable of returning to light sedentary occupation as a liquidation specialist. He opined that she should be limited to one hour a day of walking, standing two hours a day, bending and stooping to one hour a day, and lifting, pushing and pulling to 10 to 15 pounds. Dr. Stewart recommended no squatting or kneeling. He indicated that appellant should have 15-minute breaks every 2 hours. Dr. Stewart reviewed the position of liquidation specialist and noted that this appeared to be a light sedentary position and he opined that orthopedically she should be capable of full work in that position. He further opined that appellant had a moderate, partial disability related to the injury of August 27, 2008. Dr. Stewart saw no need for further physiotherapeutic measures. He further indicated that Synvisc injections could be authorized, but noted that barely 50 percent of people have lasting improvement from same. Dr. Stewart saw no need for further surgical intervention. He indicated that appellant's medication regimen should be professionally managed, especially since it appeared that she had been on narcotic medication for over a year and a half. Dr. Stewart further noted that the long-term narcotic medication usage may well interfere with her duties as a liquidation specialist.

On June 2, 2010 the employing establishment informed appellant that, pursuant to the medical report of Dr. Stewart, they expected her to return to her position as a liquidation specialist. The employing establishment noted that, although the position was basically sedentary, her job would be limited to her light-duty restrictions of walking no more than one hour a day, standing two hours a day, bending and stooping one hour a day, lifting, pushing and pulling 10 to 15 pounds and no squatting and kneeling.

By letter dated June 4, 2010, OWCP found that the position was suitable, and gave appellant 30 days to either accept the position or provide reasons for refusing it.

By letter dated June 30, 2010, appellant's attorney argued that the position was not within appellant's limitations and resubmitted the March 16, 2010 report by Dr. Goldman.

By letter dated July 12, 2010, OWCP informed appellant that the statement was insufficient to overcome the determination that she was physically able to perform the limited-duty assignment offered by the employing establishment. It informed her that, if she refused the

employment or failed to report to work when scheduled, compensation would be terminated within 15 days.

By letter dated July 21, 2010, appellant's attorney again advised OWCP that appellant was unable to perform the duties of the offered position.

On July 29, 2010 OWCP issued a notice of proposal to terminate appellant's compensation benefits as the medical evidence established that she was no longer disabled from work due to her accepted conditions. It noted that this would not affect her entitlement to medical benefits.

By letter dated August 20, 2010, appellant, through counsel, contended that any proposed termination was contrary to the medical evidence and FECA.

On September 1, 2010 OWCP finalized the notice of proposed termination and terminated appellant's compensation benefits effective that date as she was no longer totally disabled as a result of the employment injury and was capable of returning to her date-of-injury position.

Dr. Goldman, in reports dated from September 14, 2010 through April 13, 2011, continued to find that appellant was totally disabled from her occupation as a liquidator; he also noted that he gave appellant multiple injections in her left knee.

On August 16, 2011 appellant, through counsel, requested reconsideration. In support thereof, she submitted an October 25, 2010 report by Dr. Goldman, wherein he noted that he initially saw appellant on September 2, 2008 with regard to a work-related injury to her left knee on August 27, 2008. Dr. Goldman described appellant's injury and his treatment of her. He noted that, despite initial conservative management, she had persistent left knee pain, limited motion and atrophy. Dr. Goldman performed surgery on February 13, 2009. He opined that, within a reasonable degree of medical certainty, appellant's left knee condition resulted from the employment-related injury she sustained on August 27, 2008. Dr. Goldman noted that appellant remained on Percocet, Lidoderm patches and a TENS unit for pain management. He recommended continuation of a formal physical therapy program as the best treatment to maintain strength and motion. Dr. Goldman further opined that appellant remained totally disabled from her usual occupation as a liquidator. He noted that appellant may require formal work-up in the future for regional pain syndrome/reflex sympathetic dystrophy. In addition, Dr. Goldman noted that authorization for lubricating Supartz, Synvisc or Euflexxa injections will continue to be requested. He continued to submit reports indicating that appellant remained totally disabled from her usual occupation.

By decision dated November 22, 2011, OWCP denied modification of the termination decision.

## ***LEGAL PRECEDENT -- ISSUE 1***

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[3] After it has determined that an

[3] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

employee has disability causally related to his federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Under FECA, the term disability means the incapacity, because of an employment injury, to earn wages that the employee was receiving at the time of injury.[6] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[7] An employee who has a physical impairment causally related to a federal employment injury, but nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as the term is used in FECA.[8] Whether a particular injury causes an employee to be disabled for employment and the duration of the disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[9]

Section 8123(a) of FECA provides in pertinent part: 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] 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.[11]

## ***ANALYSIS -- ISSUE 1***

OWCP accepted appellant's claim for left knee contusion and internal derangement of the left knee. After appellant underwent surgery on February 13, 2009, Dr. Goldman, appellant's treating physician, continued to indicate that appellant was totally disabled from her regular employment due to the August 27, 2008 employment injury. The second opinion physician, Dr. Hudak, indicated that appellant still had active symptoms and was moderately partially disabled due to the work incident. In order to resolve the conflict between Dr. Goldman and Dr. Hudak with regard to appellant's remaining disability, OWCP referred appellant to Dr. Stewart for an impartial medical examination. Dr. Stewart found that appellant had residuals from the injury, but opined that appellant was capable of returning to her light sedentary occupation as a liquidation specialist. He established that appellant's medical conditions no

[4] *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[5] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[6] *D.M.*, 59 ECAB 164 (2007).

[7] *See Merle J. Marceau*, 53 ECAB 197 (2001).

[8] *See* 20 C.F.R. § 10.5(f); *Robert A. Flint*, 47 ECAB 369 (2006); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[9] *Fereidoon Kharabi*, 42 ECAB 291 (2001).

[10] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[11] *Sharyn D. Bannick*, 54 ECAB 537 (2003); *V.G.*, 49 ECAB 635 (20008); *Gary R. Sieber*, 46 ECAB 215 (1994).

longer rendered her physically unable to return to work as she was physically able to perform the duties of her basically sedentary position of liquidation specialist on a full-time basis.

The Board finds that OWCP properly gave special weight to the well-rationalized opinion of the impartial medical examiner, Dr. Stewart, and terminated appellant's compensation for wage loss. The Board finds that Dr. Stewart's opinion was sufficiently thorough, probative and well rationalized and constituted sufficient medical evidence to rely upon in terminating appellant's compensation benefits.

The Board is not persuaded by appellant's contentions that benefits were improperly terminated. Although Dr. Stewart did indicate that appellant's medication regimen should be professionally managed and did note that long-term narcotic medication may well interfere with her duties as a liquidation specialist, there is no indication at this point in time that this statement was more than a speculative indication of a possible outcome for staying on medication. The fact that the medication needed to be monitored does not indicate that appellant was disabled from her position. Appellant's counsel contends that Dr. Goldman's report indicated that she was disabled. However, Dr. Goldman was on one side of the conflict in medical evidence which was resolved by the opinion of the impartial medical specialist, Dr. Stewart. The employing establishment indicated that appellant could return to her employment and remain within her physical limitations as set by Dr. Stewart. The argument that appellant would overstep these limitations by trips to the bathroom or lunch room is without any support. Accordingly, OWCP properly terminated appellant's compensation effective September 1, 2010 on the grounds that she was no longer disabled.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***LEGAL PRECEDENT -- ISSUE 2***

As OWCP met its burden of proof to terminate compensation, the burden shifted to appellant to establish that she had ongoing disability causally related to her accepted injury.[12] In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that she had an employment-related disability that continued after termination of compensation benefits.[13]

## ***ANALYSIS -- ISSUE 2***

After OWCP's termination of appellant's compensation benefits on September 1, 2010 based on the report of the impartial medical examiner Dr. Stewart, appellant submitted new medical evidence addressing her condition. Specifically, appellant submitted further reports by her treating physician, Dr. Goldman who continued to indicate that appellant remained totally disabled from her usual occupation. However, Dr. Goldman was on one side of the conflict resolved by Dr. Stewart. Subsequently submitted reports of a physician on one side of a resolved conflict of medical opinion are generally insufficient to overcome the weight of the impartial

[12] *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

[13] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

medical specialist to create a new conflict of medical opinion.[14] There is no finding in this new report to suggest that Dr. Stewart should not remain the weight of the medical evidence. The Board finds that the reports of Dr. Goldman are insufficient to overcome the weight of the well-rationalized opinion of Dr. Stewart. Appellant has failed to meet her burden of proof.

## ***CONCLUSION***

The Board finds that OWCP properly terminated appellant's compensation benefits effective September 1, 2010. The Board further finds that appellant did not meet her burden of proof to establish that she had any disability after September 2, 2010 causally related to the accepted employment injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 22, 2011 is affirmed.

Issued: February 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[14] *Richard O'Brien*, 53 ECAB 234 (2001); *see also R.A.*, Docket No. 10-844 (issued December 22, 2010).