

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHEN P. TAGGART and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia PA

*Docket No. 02-306; Submitted on the Record;  
Issued July 24, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 5, 1997, on the grounds that he had no residual medical condition or disability causally related to his accepted March 14, 1996 employment injury; and (2) whether the Office properly denied appellant's request for reconsideration.

This case was previously before the Board.<sup>1</sup> In a November 13, 2000 decision, the Board found that the Office did not meet its burden of proof to terminate appellant's compensation due to an unresolved conflict of medical opinion.

Subsequent to the Board's decision, the Office referred appellant for an impartial medical examination.

In a January 29, 2001 report, Dr. Bong S. Lee, a Board-certified orthopedist, selected as the impartial medical specialist, reviewed appellant's medical history and the statement of accepted facts and performed a physical examination. He addressed appellant's left knee, stating:

“[Appellant] obviously had preexisting degenerative joint disease and torn meniscus tear of his arthroscopic surgery on March 5, 1996 prior to the alleged incident on March 14, 1996 at his job.

“The subsequent [magnetic resonance imaging] (MRI) [scan] of the left knee following the incident on March 14, 1996 do not reveal any evidence of the meniscus tear, ligament injuries or condylar fracture. However,

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<sup>1</sup> Docket No. 99-2363 (issued November 13, 2000). Appellant sustained injury on March 14, 1996 accepted for a lumbar strain and sprain. The facts of the case as set forth in the Board's prior decision, are incorporated by reference.

Dr. [Michael J.] Mandarino's, [appellants treating physician and orthopedic surgeon] operative report o[f] May 1997 indicates conflicted evidence of MRI [scans], with indication of condylar fracture and more tearing of the menisci.

"It is difficult for me to evaluate whether or not the March 14, 1996 incident has any bearing on aggravation of [appellant's] left knee, which was already superimposed with preexisting arthritis or any degree of aggravation. Moreover, it is even more difficult because the incident of March 14, 1996 was only nine days postoperative previous arthroscopic surgery. Therefore, he did not have full recovery from the previous surgical intervention and it is not known whether his symptoms are related with his postop[erative] condition or any new injuries.

"In my opinion, even if [appellant] had an aggravation of the left knee as a result of [the] March 14, 1996 incident there does not appear to be any significant degree of aggravation, without any evidence of [the] MRI [scan] and one would expect to see that. Also, it is inevitable that this gentleman will continue to progress with the degenerative changes, regardless of the additional incident of March 14, 1996. I believe the subsequent total joint replacement is the inevitable result of the treatment for the advancing arthritis.

"In my opinion, [appellant's] present disability is not related to his left knee condition, as a result of the factors I have discussed above. He has an excellent result from the total joint replacement and his knee condition is quite good enough so that he can certainly return to his preinjury job of sedentary nature as a social worker.

"[Appellant] present disabilities are not due to his knee problem, but due to other multiple medical conditions which are quite self[-]evident."

In a March 8, 2001 letter, the Office requested additional information from Dr. Lee.

In a March 22, 2001 response, Dr. Lee wrote that appellant did suffer a knee strain as a result of the 1996 work injury and he went under arthroscopy surgery as a result of the strain, but this condition was already superimposed with preexisting degenerative condition at the time. He wrote that he was not sure that the condylar fracture described in the operative report was a result of the incident in 1996, because the MRI studies prior to the surgery did not reveal any evidence of condylar fracture, which he said can be easily visualized on an MRI [scan]. Dr. Lee further noted that the sprain itself should be resolved within three months, even if he had preexisting arthritis, which usually takes a little longer time to recover.

In a May 11, 2001 decision, the Office terminated appellant's disability effective September 5, 1997, finding that the weight of the medical evidence rested with the impartial medical examiner (IME), Dr. Lee. Specifically, the Office accepted his conclusion that appellant's knee condition would have resolved three months after the 1997 accepted surgery and that there was no objective evidence of appellant's knee worsening due to the accepted fall or subsequent surgery. The Office found the continued progression of the degenerative condition

was inevitable, regardless of the work injury and that a total knee replacement was the inevitable treatment for this preexisting condition.

In a June 26, 2001 letter, appellant requested reconsideration, arguing that he did not suffer a condylar fracture, as Dr. Lee and Dr. Smith, the previous IME had found.

In support of his request, appellant submitted a June 2001 report from his treating physician, Dr. Mandarino and his operative reports from March 5, 1996 and May 13, 1997.

In his June 5, 2001 report, Dr. Mandarino wrote that Dr. Lee was incorrect in finding a condylar fracture. The fracture he found on appellant involved only the articular cartilage, not the bone and, therefore, it would not be seen on x-rays and have only a 10 percent chance of being seen on an MRI. He further noted that “You will note in the March 5, 1996 operative note that there is no mention of any fracture only degenerative change. The only mention of a fracture is the March 13, 1997 operative note. To the best of my knowledge the only trauma to appellant’s left knee was the incident while working.”

The Office referred Dr. Mandarino’s reports and the record to the district medical director. In a September 24, 2001 response, the district medical director wrote that Dr. Mandarino’s opinion was a reiteration of his previous opinion that was part of the conflict and the two operative reports were already part of the record sent to Dr. Lee, so there was no new evidence or argument.

In a September 24, 2001 decision, the Office denied appellant’s reconsideration request finding that he failed to raise a new legal argument or submit new evidence.

The Board finds the Office properly terminated appellant’s compensation effective September 5, 1997.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>3</sup> After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.<sup>4</sup>

The Office determined that there was a conflict in the medical opinion between Dr. Mandarino, appellant’s attending Board-certified orthopedist and the government’s physician, Dr. Arthur Newman, a Board-certified orthopedic surgeon, acting as an Office referral physician, on the issue of whether appellant continued to have residuals of the accepted

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<sup>2</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

March 14, 1996 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Lee, a Board-certified orthopedist, for an impartial medical examination and an opinion on the matter.<sup>5</sup>

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Lee, the impartial medical specialist selected to resolve the conflict in the medical opinion. His report establishes that appellant had no disability after September 5, 1997 due to his March 14, 1996 employment injury.

The Board has carefully reviewed the opinion of Dr. Lee and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Lee's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Lee provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition, which comported with this analysis.<sup>7</sup> Dr. Lee provided medical rationale for his opinion by explaining that the MRI prior to the 1998 surgery, but after the 1996 accepted injury did not show any evidence of a condylar fracture as would be expected to be seen and that the subsequent joint knee replacement was the inevitable result of the treatment for the advancing arthritis.

The Board also finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>8</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>9</sup> To be entitled to a merit review of an Office decision denying or terminating a

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<sup>5</sup> Section 8123(a) of the Act 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." 5 U.S.C. § 8123(a).

<sup>6</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>7</sup> *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>8</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>10</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>11</sup>

The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>12</sup>

The Board has held that the submission of evidence, which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</sup>

While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>14</sup>

In the present case, appellant has not established that the Office abused its discretion in its September 24, 2001 decision, by denying his request for a review on the merits of its May 11, 2001 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office. Dr. Mandarinino's operative reports were already part of the record and, therefore, are not new evidence. His June 5, 1996 report is essentially a reiteration of earlier arguments he raised and thus are not new arguments. Finally, Dr. Mandarinino was on one side of the conflict of medical opinion, which was referred to Dr. Lee as the impartial medical specialist and, therefore, his subsequent reports are insufficient to outweigh or create a new conflict with Dr. Lee's opinion.<sup>15</sup>

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<sup>10</sup> 20 C.F.R. § 10.138(b)(2).

<sup>11</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>12</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>13</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>14</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>15</sup> *See Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The decisions of the Office of Workers' Compensation Programs dated September 24 and May 11, 2001 are hereby affirmed.

Dated, Washington, DC  
July 24, 2002

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member