

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, OAKLAND PARK
POST OFFICE, Fort Lauderdale, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-363
Issued: June 5, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 21, 2006 appellant filed a timely appeal from the October 4, 2006 decision of the Office of Workers' Compensation Programs denying modification of its decision to terminate her wage-loss compensation. 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 for wage-loss benefits effective March 6, 2006; and (2) whether she met her burden of proof in establishing that she had continuing disability or residuals after March 6, 2006, causally related to the September 4, 2003 employment injury.

FACTUAL HISTORY

On September 12, 2003 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim, Form CA-1, alleging that she twisted her left knee when she slipped as she stepped out of her vehicle on September 4, 2003. She was initially diagnosed with a strained knee and

placed on light duty. On January 30, 2004 Dr. Joseph Fernandez, a Board-certified orthopedic surgeon, diagnosed recurrent medial meniscal tear, central aspect lateral meniscal tear and patella instability. By decision dated February 13, 2004, the Office accepted appellant's claim for tears of the medial meniscus and the lateral meniscus.

On April 8, 2004 appellant underwent an authorized arthroscopic surgery on her left knee. Following her surgery, Dr. Fernandez placed appellant on temporary disability and the Office placed her on its periodic rolls. On May 26, 2004 the Office requested an update on appellant's condition from Dr. Fernandez who responded on July 7, 2004 that appellant's recovery from the surgery was fair, but that he could not yet ascertain when she could return to work.

On May 27, 2004 the Office referred appellant's case to nurse Marilyn Van Houten for case management. In her initial report, dated July 20, 2004, Ms. Van Houten noted that appellant's condition had worsened since falling on the bathroom floor on May 31, 2004. She stated that Dr. Fernandez had ordered a magnetic resonance imaging (MRI) scan to determine why appellant's pain had not diminished. Dr. Fernandez reported on August 4, 2004 that the MRI scan revealed a recurrent tear on the medial meniscus. He recommended another surgery to repair the damage. The Office authorized the surgery, which was performed on August 17, 2004.

On November 1, 2004 Dr. Fernandez released appellant to work with limitations of 7 hours of sitting, 30 minutes of walking, 40 minutes of standing, no twisting and no driving. In Ms. Van Houten's November 5, 2004 report, she noted that Dr. Fernandez indicated that appellant should be able to sit or stand every five minutes to change positions. She also stated that appellant felt that she could only drive 20 to 30 minutes at a time, which would make it difficult to get to work, which was far from her home.

On November 24, 2004 appellant underwent a functional capacity evaluation. Therapist Brian Imler found that appellant could meet all of the requirements of her letter carrier position except lifting. He stated that she could sit, drive, reach and grasp continuously; stand, walk, half-squat and bend at the waist frequently and squat occasionally. In a report dated December 13, 2004, Dr. Fernandez disagreed with the finding that appellant could sit and drive continuously, stating that "at a certain point she has significant pain." He stated that she would have permanent restrictions and disability from her injury and opined that she would be unable to return to her job as a letter carrier. On January 19, 2005 Dr. Fernandez explained that patellofemoral symptoms like appellant's make it difficult to sit for extended periods of time, particularly with the knees bent. He stated that she was limited to driving 15 to 20 minutes at a time. Dr. Fernandez found that appellant had reached maximum medical improvement and had permanent loss of motion, atrophy of the quadriceps and weakness.

On February 3, 2005 the employing establishment offered appellant a light-duty position at her date-of-injury duty station based on Dr. Fernandez's November 1, 2004 work restrictions, including the restriction against driving. On February 7, 2005 appellant rejected the position based on the advice of Dr. Fernandez. In an attached report dated February 7, 2005, Dr. Fernandez stated that appellant had a permanent driving restriction of 15 to 20 minutes and that, if she needed to travel more than that to get to work, she would "need to be granted a

hardship transfer for transportation necessities.” On February 15, 2005 the employing establishment asked the Office for a suitability determination of the rejected position. On February 17, 2005 the Office informed the employing establishment that it needed more information about appellant’s driving limitations before it could make a determination about the suitability of the offered light-duty position. On the same date, the Office requested additional information about the restriction from Dr. Fernandez.

On April 6, 2005 Dr. Fernandez reported that appellant was experiencing sharp severe stabbing pain in the anterior aspect of the left knee. He diagnosed patellofemoral dysfunction in the left knee with weak quadriceps.

On April 19, 2005 appellant was referred to Dr. Ismael Montane, a Board-certified orthopedic surgeon, for a second opinion of her remaining disability and the causal relationship between her employment injury and her current medical condition. On May 12, 2005 Dr. Montane reviewed her medical history and conducted a physical and diagnostic examination. He reported that she complained of persistent pain in the left knee, including shooting pain from the medial to lateral aspects and a burning sensation along the anterior aspect of the knee, proximal leg and medial patella. Dr. Montane found that her left knee range of motion was 10 to 75 degrees and that she had complete motor strength, normal sensation, and equal and “brisk” deep tendon reflexes in the lower extremities, though she did walk with a slight limp. He diagnosed genu valgus, internal derangement of the left knee with medial meniscus tear, chondromalacia patella and femoral condyle, patella femoral instability and status post medial transfer tibial tubercle. Dr. Montane found that all of these conditions were medically connected to the accepted employment injury. He noted that appellant’s subjective complaints outweighed the objective findings, but found that she had continuous problems with her left knee. Dr. Montane found that she had reached maximum medical improvement on February 17, 2005, six months after her second surgery. He stated that her torn medical meniscus was directly connected to her employment injury and that the other diagnosed conditions, which were consistent with a short obese woman with bilateral genu valgus, were preexisting, but may have been aggravated by the employment injury. Dr. Montane opined that appellant continued to suffer residuals from the injury, but that she should improve. He stated that appellant had physical limitations attributable both to her employment injury and her preexisting conditions, but that she was employable in a position that did not require prolonged standing or walking. Dr. Montane agreed with the functional capacity evaluation and found that she should have no limitations on driving an automobile with automatic transmission, because her right leg, which is used for accelerating and breaking, was unimpaired.

On July 11, 2005 Dr. Fernandez reported that appellant had experienced several episodes of her quadriceps giving way because of muscle weakness and fatigue. He noted that her range of motion, which he found to be 0 to 85 degrees, had diminished by 5 degrees. Dr. Fernandez stated that a stationary bike would allow her to progress physically and prevent worsening of her condition.

On August 12, 2005 Dr. Montane submitted a work capacity evaluation form noting that appellant could perform all aspects of her usual job except lifting and carrying more than 30 pounds. He stated that she could sit and drive a vehicle for eight hours per day and walk and

stand for six hours per day. Dr. Montane recommended 15-minute breaks, but did not state their frequency.

On August 30, 2005 the Office provided Dr. Montane's report and the functional capacity evaluation to Dr. Fernandez for comment. On September 12, 2005 Dr. Fernandez responded that he disagreed with both, stating that his recommendations were more accurate because he had worked with appellant since January 2004 and seen her in the office over 15 times. He noted that functional capacity evaluations, which were interpreted by physical therapists and not physicians, could be "highly inaccurate" because there was a significant amount still to be learned about them. Dr. Fernandez reiterated his opinion that appellant could drive for only 15 to 20 minutes at a time and stated that hand controls and hand brakes could be useful.

On October 7, 2005 the employing establishment submitted an investigative report of appellant's activities to the Office, including a 30-minute surveillance video compilation and photographs. The report was based on surveillance of appellant's walking and driving activities on nine days from May 31 to September 27, 2005. It included evidence that, on certain days, she sat for as long as two hours without standing, drove for as long as an hour, carried groceries and other objects, walked around stores and climbed stairs at a graduation ceremony held in a stadium. Most of the observed periods of driving were 25 minutes or less at a time.

By letter dated November 25, 2005, the Office informed appellant that she was being referred to an impartial medical examiner, Dr. Richard Glatzer, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Fernandez and Dr. Montane. On December 27, 2005 the employing establishment supplemented its October 7, 2005 investigative report with surveillance conducted on December 13, 2005, the day of appellant's examination by Dr. Glatzer.

On January 17, 2006 Dr. Glatzer reported the findings of his physical examination and medical history review. He reported that appellant underwent left knee arthroscopy in 1987 for a softball injury. Dr. Glatzer stated that the record did not contain a copy of a 2003 MRI scan report, the August 17, 2004 surgery report or the pathology reports from either the April or August 2004 surgeries. In his physical examination, he noted that appellant walked without a limp and could walk on her heels and toes but that she was areflexic in both legs. Dr. Glatzer stated that her left knee had a range of motion from 0 to 80 degrees and that she had mild laxity of the lateral collateral ligament. He found no other abnormalities in either leg. Dr. Glatzer's review of anterior-posterior view x-rays of both knees showed narrowing of the medial joint lines. The left knee x-ray showed a tibial screw in the proximal tibial condyle and a shift of the tibial tubercle, which might also be "old Osgood-Schlatter's disease."

Dr. Glatzer found that appellant could return to her full job duties without any restrictions. He opined that she did have a permanent medical impairment in her knee, which he described as "tightness," but stated that it was based "solely on the surgical intervention of Dr. Fernandez" and not on the accepted employment injury. Dr. Glatzer also stated that appellant's obesity was a major and unexplored cause of her disability and found that weight reduction had not been raised as a treatment option. He noted that "weight reduction in women can rapidly reduce knee pains and any continuing degenerative changes in the knee that may be occurring." Dr. Glatzer stated that the employing establishment's investigative report, including

the video, provided clear evidence that appellant was able to “walk well and drive her car, which should not preclude her being able to do the same thing on the job.” He stated that, in his opinion, appellant would be unable to walk in sandals or flip-flops, as revealed by the video and photographs, if she truly had an unstable left knee. Dr. Glatzer stated that the only objective findings of residuals from the accepted injury were scars from her operations. He noted that range of motion was “purely subjective” and that he felt that there “was a certain degree of functional overlay” on the part of appellant. Dr. Glatzer found that appellant had reached maximum medical improvement and was in need of no further treatment.

On January 25, 2006 the Office issued a notice of proposed termination of appellant’s wage-loss benefits on the basis of Dr. Glatzer’s report. It informed her that she would continue to receive medical benefits as long as treatment was needed for her accepted condition. The Office stated that Dr. Glatzer’s report demonstrated that appellant’s accepted injury no longer prevented her from performing her regular duties.

On February 24, 2006 appellant responded to the notice of proposed termination with arguments against the sufficiency of Dr. Glatzer’s report and a new medical report from Dr. Fernandez. She argued that Dr. Glatzer’s medical opinion was not based on as complete a medical history as that of Dr. Fernandez, and that he did not request the documents, including pathology reports and an MRI scan, whose absence he mentioned in his report. Appellant contended that Dr. Glatzer’s opinions were largely based on the employing establishment’s surveillance video rather than on medical rationale. She stated that the investigative report emphasized by Dr. Glatzer did not show her doing anything outside of Dr. Fernandez’s restrictions. Appellant stated that she never claimed that she was unable to work, only that she was unable to take a job that was outside her medical restrictions. She provided the February 22, 2006 report of Dr. Fernandez, in which he stated that the only unreasonable aspect of the position offered by the employing establishment is that it would require her to drive 104 miles per day to travel to and from her duty station. Dr. Fernandez indicated that his review of the surveillance video showed her walking on flat surfaces, which he would expect her to be able to do, and descending steps at a graduation ceremony in a manner that allowed her to place most of the weight on the right leg. In an updated duty status report, Dr. Fernandez indicated that appellant was subject to the following limitations: five hours of carrying less than 30 pounds, two hours of standing, four hours of walking, no climbing, two hours of twisting, one hour of pulling, four hours of reaching above the shoulder, and two hours of driving a vehicle.

By decision dated March 6, 2006, the Office terminated appellant’s wage-loss benefits on the grounds that she had not submitted evidence sufficient to establish her ongoing disability. It found that she had the burden of bringing all necessary medical evidence with her to the examination and therefore that the missing evidence was not Dr. Glatzer’s responsibility. The Office noted that Dr. Fernandez did not provide objective evidence or medical reasoning to support his opinion that appellant was unable to drive for 104 miles each day. It also found that Dr. Glatzer provided an opinion that was fully rationalized and based on a complete and accurate medical history.

On June 22, 2006 appellant requested reconsideration of the termination of her wage-loss benefits. She submitted a copy of the September 22, 2003 MRI scan report that revealed “minor signal change in the free edge of the mid-body of the lateral meniscus” and the operative notes of

her 1987 surgery for osteochondritis dissecans of the medial femoral condyle. Appellant also submitted the March 29, 2006 report of Dr. Fernandez, who opined that she sustained a patellar subluxation or dislocation when she slipped on September 4, 2003. Dr. Fernandez noted that appellant's 1987 operative report revealed no evidence of instability or other dysfunction of the left knee patella. He stated that she had no problems with her knee from the time of her 1987 surgery until her accepted employment injury. Dr. Fernandez stated in his previous surgical reports that he had mistakenly reported that changes to the medial aspect of the patella were postsurgical changes from appellant's 1987 injury. As he now knew that her previous operation had nothing to do with the patella, he opined that those changes were new damage to the patellar medial retinaculum consistent with a dislocation. Dr. Fernandez reported that, after her surgery in April 2004, appellant developed severe athrofibrosis and therefore underwent another operation in August 2004. He stated that appellant had permanent quadriceps atrophy on the left side as compared with the right, as evidenced by differences of one and one and three-quarter inches respectively at three and six inches above the patella. Dr. Fernandez stated that this atrophy lead to patellofemoral dysfunction, which caused fatigue with extended walking or exertion and difficulty going up and down stairs, but no difficulty with uneven surfaces. He explained that fatigue and patellofemoral dysfunction with quadriceps atrophy would make it difficult for appellant to drive 104 miles each day and that her reaction time could therefore be significantly compromised.

By decision dated October 4, 2006, the Office issued a decision denying modification of the previous decision. It found that the March 29, 2006 report of Dr. Fernandez was relevant but lacked objective findings to support his findings of physical limitations. It found that the weight of the medical evidence rested with Dr. Glatzer, who found that appellant could return to work as a letter carrier without restriction.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment injury.²

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.³ Likewise, the implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁴ It is

¹ *Elaine Sneed*, 56 ECAB ____ (Docket No. 04-2039, issued March 7, 2005).

² *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

³ 5 U.S.C. §§ 8101-8193, 8123(a).

⁴ 20 C.F.R. § 10.321.

well established that, when 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 proper factual and medical background, must be given special weight.⁵

ANALYSIS

The Office accepted appellant's September 12, 2003 claim for tears of the lateral meniscus and medial meniscus in her left knee. Based on the medical opinion of Dr. Fernandez, a Board-certified orthopedic surgeon, the Office authorized her surgeries of April and August 2004 and placed her on the periodic rolls for temporary total disability. The issue to be determined is whether the Office has met its burden of proof that appellant's disability had ceased when it terminated her wage-loss benefits effective March 6, 2006.

Dr. Fernandez released appellant for work on November 1, 2004 with restrictions on walking, standing and driving. A functional capacity evaluation conducted on November 24, 2004 found that appellant had no restrictions on continuous sitting or driving. Dr. Fernandez disagreed with these results. On February 1, 2005 the employing establishment offered appellant a light-duty position at her date-of-injury duty station that met Dr. Fernandez's limitations. However, based on the restrictions of Dr. Fernandez, she refused the position because she would have to drive 52 miles each way to get to work and back.

In order to determine the suitability of the offered position, the Office sought a second opinion from Dr. Montane, a Board-certified orthopedic surgeon, who found that appellant had no restrictions on continually sitting or driving, but that she should not work in a position that required extensive standing or walking. To resolve the conflict between the opinions of Dr. Fernandez and Dr. Montane, the Office referred appellant to impartial medical examiner Dr. Glatzer, a Board-certified orthopedic surgeon, who found that appellant had no residuals from her accepted employment injury and that she could return to full duty without restrictions. He opined that she had permanent medical impairment in her left knee, but stated that it was based "solely on the surgical intervention of Dr. Fernandez," which he found to be unnecessary, unreasonable and unrelated to the September 4, 2003 employment injury. Based on Dr. Glatzer's opinion that appellant was able to return to work in full capacity, the Office terminated appellant's wage-loss benefits, after finding that an additional report by Dr. Fernandez challenging this finding was not adequately rationalized.

The Board finds further that the report of Dr. Glatzer is not sufficiently rationalized to carry the weight of the medical evidence. In his physical examination, he found that appellant had no reflexes in her legs and that her left knee had a diminished range of motion and mild laxity of the lateral collateral ligament. Dr. Glatzer indicated that appellant had "tightness" in her left knee, which he found to be a permanent medical impairment. In spite of these findings, he found that appellant was able to return to full duty. The rationale that he provided for this finding was that the employing establishment's surveillance video showed her driving and "walking well" while running errands, that range of motion tests were "purely subjective," and

⁵ Gloria J. Godfrey, 52 ECAB 486, 489 (2001).

that appellant would not have been able to walk in flip-flops if her left knee was unstable. The Board finds that this is insufficient to establish that appellant's disability had ceased.

The Board notes that Dr. Glatzer did not explain the basis for his determination that appellant would be able to meet the full requirements of her date-of-injury position merely because she could walk and drive while running errands. Dr. Glatzer did not explain how appellant's ability to run errands corresponded with her ability to work in her date-of-injury position as a letter carrier. The Board notes that Dr. Fernandez found that all of appellant's activities, as seen on the surveillance video, were within the work restrictions that he issued. The Board finds that the evidence showing appellant running errands is insufficient, by itself, to establish that she is able to return to her full-duty position without restrictions.

Dr. Glatzer discounted appellant's limited range of motion as evidence of physical limitations by stating that it was a purely subjective test and that he suspected "functional overlay" on appellant's part. This evidence is ambiguous, however, in light of the fact that he also found permanent impairment of appellant's left knee in the form of "tightness." Dr. Glatzer also opined that appellant's ability to walk in flip-flops or sandals indicated that she had no instability of the left knee. However, he did not explain the medical basis for this opinion. The Board finds that this rationale is not sufficient to establish that appellant has no remaining disability related to her employment injury.

Dr. Glatzer also stated that the "major cause of appellant's disability" was her gross obesity. He noted that "weight reduction in women can rapidly reduce knee pains and any continuing degenerative changes in the knee that may be occurring." The Board finds however that Dr. Glatzer provided no explanation of how or why he determined that obesity was "the major cause" of appellant's "disability."

The Board finds that the Office did not meet its burden of proof in relying on Dr. Glatzer's opinion as it is not adequately rationalized to establish that appellant has no remaining disability related to her employment injury.

CONCLUSION

The Board finds that Office did not meet its burden of proof to terminate appellant's compensation for wage-loss benefits effective March 6, 2006.⁶

⁶ In view of the disposition of the case, the issue of whether appellant has established continuing disability or residuals resulting from the September 4, 2003 employment injury is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2006 decision of the Office of Workers' Compensation Programs is reversed and remanded for development consistent with this opinion.

Issued: June 5, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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