

On October 18, 2004 appellant, then a 57-year-old education technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on October 13, 2004 while retrieving equipment. On April 28, 2005 she underwent L4-S1 decompression laminectomy surgery. On May 13, 2005 the Office accepted the claim for lumbar sprain/strain, degenerative

L4 disc and lumbar radiculopathy.<sup>1</sup> Appellant received compensation for temporary total disability.

The Office noted in a February 29, 2008 memorandum that appellant was also claiming right knee, leg and foot conditions as a consequence of her employment injuries. In a March 6, 2008 report, an Office medical adviser stated that it was not clear what specific right knee condition was being claimed and an internal derangement would not be related to the accepted radiculopathy. The medical adviser noted that appellant had a history of right knee surgery.

As part of the development of the claim, the Office found that a conflict in medical opinion arose with respect to appellant's employment-related disability. Dr. Robert Kunkle, an attending orthopedic surgeon, opined in a March 13, 2008 report that appellant was totally disabled for work due to her employment-related back condition. In a December 19, 2007 report, Dr. Joan Sullivan, an orthopedic surgeon selected as a second opinion examiner, found appellant could work with restrictions.

By report dated May 14, 2008, Dr. Paul Williams, the Board-certified orthopedic surgeon selected as a referee examiner, advised that appellant could work with restrictions. The Office had also asked Dr. Williams for an opinion as to whether additional conditions had developed due to radiculopathy or degenerative disc disease. With respect to the right knee, Dr. Williams stated, "I do not think that is either related to her current back condition and probably pre dated this injury."

On August 28, 2008 appellant submitted medical reports from Dr. Kunkle regarding treatment for the right knee.<sup>2</sup> In a June 7, 2007 report, Dr. Kunkle diagnosed right knee chondromalacia patella with chronic inflammation and Baker's cyst. He stated that appellant was concerned that the chondromalacia was related to her foot drop and "this could possibly be the case, as the foot drop has obviously changed her gait and decreased her muscle mass and, therefore, the tracking of her patella on that side."

The Office found a conflict in medical opinion as to whether her right knee chondromalacia was causally related to the October 13, 2004 employment injury. Appellant was referred to Dr. Donald Hubbard, a Board-certified orthopedic surgeon, for a referee examination.

---

<sup>1</sup> A March 26, 2008 set of questions for a referee examiner stated that the claim had been accepted for lumbar radiculopathy.

<sup>2</sup> The reports were initially attributed by the Office to Dr. Jeff Harrison, an osteopath, as they also contain his name. Based on appellant's testimony before an Office hearing representative, the reports were prepared by Dr. Kunkle.

In a October 24, 2008 report, Dr. Hubbard provided history, reviewed medical evidence and offered results on physical examination. He stated that the chondromalacia was a broad diagnosis and it seemed reasonable on the surface to relate it to conditions of L3-4 herniated nucleus pulposus or material aggravation of degenerative lumbar spine disease. Dr. Hubbard further stated:

“However, upon review of the medical literature, in the absence of objective abnormal neuromuscular findings specifically of ongoing or chronic evidence of significant quadriceps muscle weakness such a conclusion cannot be made from an objective perspective and more probable than not basis. Only one [centimeter] of thigh atrophy would also support this conclusion.

“The chondromalacia of the medial femoral condyle is also hard to relate to the work-related injury of October 13, 2004 and is most probably secondary to early degenerative joint disease. This condition may or may not have been aggravated by the accepted condition of right lower extremity radiculopathy with weakness of right extensor hallucis longus with disturbed gait and reported necessity for right foot surgery and related treatment. Medical literature indicates a relationship exists between tibiofemoral compartment osteoarthritis of the knee and forceful heel strike during gait the opposite of what [appellant] experienced with the reported drop foot gait pattern.”

By a November 21, 2008 decision, the Office found that appellant’s right knee condition was not causally related to the October 13, 2004 employment injury.

Appellant requested a hearing before an Office hearing representative, which was held on March 30, 2009. In a January 6, 2009 report, Dr. Kunkle reiterated his opinion that the right knee condition was causally related to the employment injury. He stated that “the neurologic deficit she experienced in that lower extremity, including her foot drop dramatically changed her gait and decreased the muscle mass that allows central tracking of the patella.”

In a May 22, 2009 decision, an Office hearing representative affirmed the November 21, 2008 decision. The hearing representative found that, although Dr. Hubbard was selected in accord with Office procedures, the referral was flawed as the Office had improperly identified the reports from Dr. Kunkle as authored by Dr. Harrison. According to the hearing representative, the referral to Dr. Hubbard was “unnecessary” because Dr. Williams had resolved the conflict between Drs. Kunkle and Sullivan. The hearing representative found that the opinion of Dr. Williams was entitled to special weight and the additional reports from Dr. Kunkle were not sufficient to overcome the referee opinion.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>3</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or

---

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup>

With regard to consequential injuries, the general rule is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause.<sup>5</sup>

### ANALYSIS

Appellant has alleged that her right knee condition is a consequence of her accepted lumbar conditions. She contends that the accepted back conditions caused weakness to the lower extremities and a change in gait. The hearing representative found there was a conflict in the medical evidence resolved by the May 14, 2008 report of Dr. Williams. However, the Board finds there was not a conflict with respect to the right knee. Dr. Sullivan, selected as a second opinion examiner, did not discuss the right knee. The reports from Dr. Kunkle, the attending physician, addressing the right knee, were not submitted until after Dr. Williams' report. With respect to a right knee condition, Dr. Williams is not an impartial referee physician, but rather a second opinion examiner.<sup>6</sup>

The November 21, 2008 Office decision was based on a determination that Dr. Hubbard was also referee examiner based on a conflict between Dr. Williams and Dr. Harrison. As noted by the hearing representative, the reports attributed to Dr. Harrison were apparently authored by Dr. Kunkle. The Board finds that no conflict existed with regard to the right knee. Dr. Kunkle based his opinion on causal relationship on a foot drop, which resulted in an altered gait and led to appellant's right knee condition. A foot drop is not an accepted employment-related condition and, therefore, the opinion on causal relationship is of diminished probative value. Dr. Williams provided only a brief opinion that the right knee was not employment related, without providing additional explanation. When medical reports are of diminished probative value, there is no conflict in the medical evidence warranting referral to a referee physician.<sup>7</sup> In this case, the referral to Dr. Hubbard is a second opinion examiner.<sup>8</sup>

The October 24, 2008 report from Dr. Hubbard is a lengthy report with an extensive recitation of the prior medical evidence. The opinion on the relevant issue, however, requires clarification. Dr. Hubbard stated that the chondromalacia of the medial femoral condyle was "hard to relate" to the employment injury, but then stated that it "may or may not" have been aggravated by an employment injury. It is not clear whether the initial statement was limited to actual causation, as opposed to aggravation. Dr. Hubbard tended to negate the concept of a foot

---

<sup>4</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *See Debra L. Dillworth*, 57 ECAB 516 (2006).

<sup>6</sup> *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>7</sup> *See Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>8</sup> *Id.*

drop as causing the diagnosed right knee condition, but qualified his opinion with the “may or may not” statement as to aggravation. When the Office refers a claimant for a second opinion evaluation, it has the responsibility to secure a report that adequately addresses the relevant issues.<sup>9</sup>

On remand the Office should request clarification from Dr. Hubbard and secure a rationalized opinion as to whether a diagnosed right knee condition was causally related to the October 13, 2004 employment injury.<sup>10</sup> After such further development as the Office deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision and additional development of the medical evidence is necessary.

---

<sup>9</sup> See *Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

<sup>10</sup> The factual background provided should include a clear statement as to the accepted conditions in this case. The February 25, 2008 “addendum” to the statement of accepted facts that did not discuss the accepted conditions. As noted, there are references to lumbar radiculopathy as an accepted condition, but this was not included in the Office’s initial acceptance letter dated March 13, 2005.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 22, 2009 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 2, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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