



## **FACTUAL HISTORY**

This case has previously been before the Board. The facts as set forth in the Board's prior decision are hereby incorporated by reference. The Board found that OWCP properly denied appellant's request for reconsideration of his recurrence of disability claim without reviewing the merits of the case.<sup>2</sup> The relevant facts are set forth below.

On January 23, 2008 appellant, then a 42-year-old truck driver, sustained a right knee condition as a result of repeated pushing, pulling, climbing and walking in performance of his federal duties. On April 4, 2008 OWCP accepted his claim for aggravation of localized primary osteoarthritis of the right leg.

In an August 4, 2008 note, Dr. Robert J. Highhouse, a treating Board-certified orthopedic surgeon, found that appellant was at maximum medical improvement without surgery. He noted permanent restrictions of a total lifting limit of 40 pounds, limited walking and standing, minimal squatting/climbing. Dr. Highhouse noted that he perform chores involving the upper extremities.

On September 24, 2008 OWCP referred appellant to Dr. Joseph E. Burkhardt, an osteopath, for a second opinion. In a report dated October 1, 2008, Dr. Burkhardt found that appellant did not have residuals of the accepted work-related aggravation of right leg osteoarthritis from his injury of February 27, 2003. He noted that appellant had extensive underlying degenerative osteoarthritis which was unrelated to the employment injury. Dr. Burkhardt stated that he did not know when the residuals of the employment injury ceased, but that as of the date of this examination, there were no clinical residuals. He noted that although there were no restrictions needed as relates to the employment injury, appellant was not capable of performing his preinjury duties as a truck driver given his severe osteoarthritis in his knees.

In a September 8, 2008 progress report, received by OWCP on November 17, 2008, Dr. Highhouse noted that appellant had severe right knee arthritis. He noted that appellant has an option of a knee replacement, but that he was more interested in regulation of his work duties. Dr. Highhouse noted that it would be beneficial if appellant would occasionally walk, but not anything strenuous or requiring him to walk or climb continuously. In a November 6, 2008 response to queries from OWCP, he indicated that he had nothing further to add to his prior reports.

OWCP found a conflict in medical opinion between Dr. Highhouse and Dr. Burkhardt. On May 4, 2009 it referred appellant to Dr. Edward Westerbeke, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a May 11, 2009 report, Dr. Westerbeke stated that appellant informed him that he sustained an injury on February 27, 2003 when he was pulling and pushing a cage filled with mail and twisted his knee. He diagnosed severe degenerative joint disease of the right knee and severe bilateral genu varum. Dr. Westerbeke noted that appellant had an arthroscopic medial meniscectomy in 2003 and, at that time, it was noted that he had bare bone to bare bone contact in the medial compartment of the right knee. He opined that this most likely had increased and caused continuing symptoms of degenerative

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<sup>2</sup> Docket No. 10-288 (issued August 16, 2010).

joint disease. Dr. Westerbeke stated that appellant's symptoms would cease only after a new knee joint was inserted. He noted that appellant's condition preceded his injury at the employing establishment and he presently did not have objective evidence of injury. Dr. Westerbeke noted that he was unable to speculate when the aggravation secondary to the injury ceased. He stated that appellant had objective evidence of degenerative joint disease. Dr. Westerbeke recommended a permanent sit-down job due to the degenerative joint disease and not due to appellant's accepted condition.

On November 13, 2009 OWCP issued a notice of proposed termination of compensation and medical benefits. It allotted appellant 60 days within which to respond. Appellant did not submit a response.

In a December 15, 2009 decision, OWCP terminated appellant's compensation and medical benefits effective that date.

By letter dated December 23, 2009, appellant, through counsel, requested an oral hearing.

In a December 14, 2009 opinion, Dr. Jose DeLeon, an internist, advised that he had seen appellant twice since September 22, 2009 and reviewed the medical records. He diagnosed severe osteoarthritis of the right knee, status post medial meniscus injury with arthroscopy and repair. Dr. DeLeon noted that appellant had undergone conservative treatment and had reached maximum medical improvement. He noted that it would be difficult to establish the actual cause of the severe osteoarthritis to appellant's right knee but he could not exclude the possibility that it arose in February 2003 while appellant performed his job. Dr. DeLeon noted there was no evidence of significant arthritis for the left knee. He supported work restrictions because prolonged walking and standing would aggravate appellant's symptoms.

At the telephonic hearing held on March 2, 2010, appellant testified that his employing establishment sent him home in July 2009 as it could no longer provide employment on a limited-duty status.

By decision dated May 11, 2010, the hearing representative affirmed the December 15, 2009 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> It may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.<sup>4</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for

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<sup>3</sup> *I.J.*, 59 ECAB 408 (2008); *Fermin G. Olascoago*, 13 ECAB 102, 104 (1961).

<sup>4</sup> *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>5</sup> *T.P.*, 58 ECAB 24 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.<sup>6</sup>

It is 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.<sup>7</sup>

### ANALYSIS

OWCP accepted appellant's claim for aggravation of localized primary osteoarthritis of the right leg and paid wage-loss compensation and medical benefits. It terminated appellant's compensation and medical benefits effective December 15, 2009 based on the report of the impartial medical specialist.

Appellant's treating orthopedic surgeon, Dr. Highhouse, advised that appellant had severe right knee arthritis. Dr. Burkhart, the second opinion physician, opined that appellant did not have residuals of the accepted aggravation of osteoarthritis in the right leg. He found appellant had extensive underlying degenerative osteoarthritis unrelated to the employment injury. In view of the conflict in medical opinion, OWCP properly referred appellant to Dr. Westerbeke for an impartial medical examination to determine whether the employment-related aggravation of appellant's osteoarthritis had ceased.

Dr. Westerbeke stated that appellant's employment injury may have symptomatically aggravated the osteoarthritis but that he did not feel that appellant continued to exhibit objective evidence of the injury. The Board finds that Dr. Westerbeke's report is not well rationalized or sufficient to terminate appellant's compensation benefits. Dr. Westerbeke reported that appellant's condition predated the employment injury. He concluded, however, that although appellant had no objective evidence of injury he was unable to state when the aggravation secondary to the injury ceased. Furthermore, Dr. Westerbeke stated that appellant had continuous symptoms which would cease only after he has a new knee joint inserted. The Board finds that Dr. Westerbeke's opinion is not sufficient to terminate appellant's compensation. His opinion consists of a brief paragraph that was couched in speculative terms. It does not clearly address when appellant's disability ceased or that he no longer had residuals from the accepted condition. Dr. Westerbeke's opinion cannot be given the special weight of the medical evidence afforded to an impartial medical examiner.

The Board finds that OWCP did not sustain its burden of proof, with the report of Dr. Westerbeke, to establish that the accepted aggravation of appellant's localized primary osteoarthritis in his right lower leg had ceased. The termination of appellant's compensation and medical benefits will be reversed.

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<sup>6</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 15, 2009 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injuries.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 11, 2010 is reversed.

Issued: July 15, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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