

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNETTE M. GRAY and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Dallas, Tex.

*Docket No. 95-2884; Submitted on the Record;
Issued June 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's employment-related disability ceased by October 25, 1993, the date it terminated her compensation benefits; and (2) whether the Office abused its discretion by denying appellant's request for authorization of knee surgery.

On July 29, 1991 appellant then a 48-year-old clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she slipped and fell on a white slick spot and a yellow strapping bank injuring her knees and left hand.¹ The Office accepted the claim for contusion of the knees, left wrist strain and back strain on November 26, 1991. Appellant stopped work on the date of the injury and returned to work in January 1992 although she did not work a full five hours. Appellant again stopped work on September 6, 1992. The Office authorized bilateral arthroscopic surgery which was performed on September 10, 1992.

On April 13, 1993 the Office referred appellant to Dr. Mark Greenberg, a Board-certified orthopedic surgeon, for a second opinion.

In a report dated April 29, 1993, Dr. Charles E. Cook, a Board-certified orthopedic surgeon, opined that arthroscopic surgery of the left knee is unnecessary. Dr. Cook noted on physical examination that there was no instability or effusion in the left knee. Dr. Cook also noted that appellant "has retropatella symptoms which is not going to be addressable by arthroscopic intervention." Dr. Cook also opined that appellant "needs to return to work, light duty initially and work up to full duty that does not require a great deal of time standing on her feet." Dr. Cook also noted that the objective findings did not support appellant's continued

¹ The Board notes that at the time of the injury appellant was working five hours per day and receiving compensation for three hours for a previously accepted injury.

complaints. He noted that her right knee has returned to maximum medical improvement and that she has full range of motion of both wrists.

By letter dated June 7, 1993, the Office enclosed a copy of Dr. Cook's opinion for Dr. William D. Hospers, appellant's treating physician, to comment on. In a letter dated June 22, 1993, Dr. Hospers disagreed with Dr. Cook's recommendation that appellant return to an eight-hour workday and opined that appellant could work four² hours per day.

On September 23, 1993 the Office issued a notice of proposed termination of compensation.

By letter dated September 28, 1993, appellant responded to the Office's proposed notice of termination by noting that her physician disagrees with the opinions of Drs. Cook and McMaster regarding her disability.

By decision dated October 25, 1993, the Office terminated appellant's compensation benefits. The Office found that the medical evidence of record established that appellant's injury-related disability had ceased effective October 25, 1993. In so finding, the Office relied upon the opinion of Dr. Cook, the second opinion physician.

In a note dated October 27, 1993, Dr. James J. Pollifrone, appellant's treating physician, recommended that appellant have left "knee scope for probable partial meniscectomy." Dr. Pollifrone diagnosed degenerative osteoarthritis in the left knee and probable medial meniscus tear.

In a letter dated November 5, 1993, Dr. Pollifrone diagnosed "probable tear of the meniscus in the left knee with early osteoarthritic changes" on physical examination. Dr. Pollifrone opined that the knee injury is attributable to the accepted July 29, 1991 injury based on the history given by appellant and Dr. Hospers.

On November 19, 1993 the Office found a conflict in the medical evidence regarding the need for arthroscopic surgery on the left knee. By letter dated November 19, 1993, the Office referred appellant, along with some questions, a statement of accepted facts and the medical evidence, to Dr. Benzel C. McMaster to resolve the conflict in the medical evidence.

In a report dated January 5, 1994, Dr. McMaster opined that the requested surgery to the left knee is unrelated "by either history or chronological proximity to the injury" sustained on July 29, 1991. Dr. McMaster stated:

"It is interesting to note that at the time of the additional examination on April 29, 1993, no mention of her left knee was made. The first mention of the left knee was really a letter dated November 5, 1993 mentioning an examination on October 27, 1993. This is fully 2 years and 3 months post-accident. Therefore, in

² There is "5" handwritten above the number "4." On the note under p.s., appellant noted that "[s]omeone at Dept of Labor changed this upon my return to work from 4 hours to 5 hours."

terms of reasonable medical probability it is very difficult to assign any causation of her left knee symptoms to the accident of July 29, 1991.

Dr. McMaster also opined that appellant could return full time to her regular employment.

In a letter dated April 20, 1994, Dr. Hospers disagreed with Dr. McMaster's opinion regarding appellant's condition. Dr. Hospers noted that prior to appellant's July 29, 1991 employment injury that she had no pain in her knees and there he would "definitely attribute these conditions to the injury of July 29, 1991." Dr. Hospers also opined that appellant was incapable of work 8 hours per day and is only capable of working 4 hours per day due to the injury. Dr. Hoser also noted that prior to appellant's employment injury of July 29, 1991, she had no pain in her knees, wrist or right thigh and thus he would attribute her condition to the employment injury.

By letter decision dated March 25, 1994, the Office informed appellant that her request for left knee surgery was denied based upon the report given by Dr. McMaster.

In a letter dated March 25, 1994, appellant requested a copy of her file and requested a hearing on the refusal of surgery.

A hearing was held on September 28, 1995 at which appellant was represented by her union representative.

By decision dated January 25, 1995, the hearing representative affirmed the Office's decision dated October 25, 1993 which found that appellant's injury related disability had ceased, but remanded for the Office to resolve a conflict in the medical opinion evidence on whether surgery to appellant's left knee was warranted. The hearing representative found Dr. Hospers' opinion to be unrationalized and credited the opinion of Dr. Cook, which he found to be supported by the objective evidence and rationalized. The Hearing representative thus found that the weight of the medical evidence, as represented by Dr. Cook's opinion, established that appellant was not disabled for her date of injury job due to her July 29, 1991 accepted employment injury. Regarding appellant's request for knee surgery, the hearing representative found that Dr. McMaster's opinion was not based upon an accurate history of the injury as evidence in the record indicated that the Office at one time had approved surgery for both knees. On remand, the Office was instructed to supply all the medical records to Dr. McMaster for his review and for him to issue a supplemental report.

In a letter dated March 6, 1995, the Office enclosed a copy of all the medical evidence and a statement of accepted facts for Dr. McMaster to issue a supplemental report on whether surgery for the left knee was warranted. The Office also informed Dr. McMaster that the Office had accepted that appellant had injured both knees and Dr. Hospers has always indicated that appellant had bilateral knee strains. In a supplemental report dated April 11, 1995, Dr. McMaster, after review of the additional records including those from Dr. Hospers, opined

that the medical records showed that appellant had bilateral knee injury, but that the record contained no mention of “any significant problem” regarding appellant’s left knee until her referral to Dr. James J. Pollifrone which was noted in the original report. Dr. McMaster also noted:

“I have carefully reviewed the operative report of Dr. Pollifrone and find that the changes found at arthroscopy were not acute changes but rather degenerative changes most commonly seen with degenerative arthritis and cannot be explained as a direct result of the fall the patient sustained on July 29, 1991. In terms of reasonable medical probability, the patient likely has changes very similar to those in her left knee that has subsequently acted up primarily because of her obesity and in my opinion cannot be directly attributable to the injuries sustained on the July 29, 1991 date. I stand by my original contention that there is simply no evidence of ongoing problems and it is unreasonable in terms of medical history to assume that a problem that suddenly appears or has become significant some two years after the original injury is directly connected to the incident. I feel that Dr. Hospers’ contention is not reasonable based upon the objective data contained in the record and that what [appellant] is complaining about is a natural consequence of degenerative arthritis and not directly related to the trauma she sustained. My reason for denying the surgery remains the same. That is that there is nothing in her clinical e[x]amination that would suggest that a surgically treatable lesion exists. Degenerative changes of the knee are simply not amenable to arthroscopic debridement.”

By decision dated May 24, 1995, the Office found that appellant’s request for surgery on her left knee was not related to her accepted July 29, 1991 employment injury. Specifically, the Office found the opinion of Dr. McMaster that the changes in appellant’s knee were commonly seen with degenerative arthritis and unrelated to the accepted employment injury of July 29, 1991, to be rationalized and supported by the medical evidence of record.

By letter dated August 20, 1995, appellant requested reconsideration of the May 24, 1995 Office decision denying her request for surgery on her left knee.

In a decision dated September 1, 1995, the Office denied appellant’s request for modification of the May 24, 1995 decision denying her request for surgery on her left knee.³

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ If

³ The record reflects that on August 20, 1995 appellant sought reconsideration before the Office and filed an appeal with the Board. It is well established that the Board and the Office may not simultaneously have jurisdiction over the same issue in the same case. *Russell E. Lerman*, 43 ECAB 770, 772 (1992); *Jerald H. Miller*, 33 ECAB 2007, 2009-10 (1982). Consequently, the Office did not have jurisdiction to issue the September 1, 1995 decision and it is found null and void.

⁴ *Pedro Beltran*, 44 ECAB 222 (1992); *Mary E. Jones*, 40 ECAB 1125 (1989).

the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits shifts to appellant.⁵

The weight of the medical evidence of record, as represented by the opinion of Dr. Cook, the second opinion specialist and Board-certified orthopedic surgeon, supports that the employee has no disability due to the accepted employment injury of her left knee. In a report dated April 29, 1993, Dr. Cook found that there was no instability of effusion in the left knee on physical examination and that appellant needed to return to work with light duty initially. He also noted that the objective evidence did not support appellant's continued complaints.

The Board finds that Dr. Cook's conclusion is rationalized and is based on an accurate factual and medical background following diagnostic testing. There is no rationalized medical opinion from the employee's attending physician supporting a continuing medical condition that is causally related to the July 29, 1991 employment injury. Dr. Hospers provided no explanation or rationale in support of his conclusion that appellant was still disabled as a result of the July 29, 1991 employment injury.⁶ Furthermore, Dr. McMaster, the independent medical examiner, opined that appellant was no longer disabled from her accepted employment injury. The Board, therefore, finds that the weight of the medical evidence in the opinions of Dr. Cook, the second opinion physician, and Dr. McMaster, the independent medical examiner, represents the weight of the evidence establishing that appellant was no longer totally disabled due to her accepted employment injury.

The Board further finds that the Office did not abuse its discretionary authority in denying appellant's request for authorization of knee surgery.

In the present case, the Office accepted appellant's claim for contusion of the knee, back sprain and left wrist sprain and the resulting arthroscopic surgery on the right knee. Once the Office found that appellant's condition was causally related to his federal employment, appellant became entitled to treatment for his condition under the provisions of the Federal Employees' Compensation Act.⁷

Section 8103 of the Act provides, in part:

“(a) The United States shall furnish to an employee who is injured while in the performance of duty, the service, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation. These service, appliances, and supplies shall be furnished.... (3) By or on the order of the United States

⁵ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

⁶ *Arlonia B. Taylor*, 44 ECAB 591 (1993).

⁷ 5 U.S.C. §§ 8101-8193.

medical officers and hospitals, or, at the employee's option, by or on the order of physicians and hospitals designated or approved by the Secretary.”⁸

In interpreting section 8103, the Board has recognized that the Office, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under the Act.⁹ The Office has the general objective of insuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal.¹⁰ The only limitation on the Office's authority is that of reasonableness.¹¹ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹²

In the present case, the Office's rejection of appellant's request for surgery rests on the evaluation and opinion of Dr. McMaster, the selected impartial medical examiner.

In his supplemental report dated April 11, 1995, Dr. McMaster reviewed appellant's history, medical records, medical treatment and the statement of accepted facts which indicated that the Office originally authorized surgery for both knees. Dr. McMaster opined that there was nothing on clinical examination to suggest that a surgically treatable lesion exists. He also noted that based upon the medical history and the results from the surgery on the right knee, that the changes in the knee were attributable to degenerative arthritis and were not a direct result of the July 29, 1991 employment injury. Dr. McMaster also pointed out that Dr. Hospers' opinion is not based upon the objective date in the record.

The Board notes that Dr. McMaster is serving in the capacity of an impartial medical examiner and, based upon his report, appellant's left knee condition is not due to her July 29, 1991 employment injury, but was due to appellant's obesity and degenerative arthritis. In this regard, the report of the impartial medical examiner is sufficiently well rationalized and based on a proper medical background, and must be given special weight.¹³ The Board finds that the report of Dr. McMaster is sufficiently rationalized and is based upon a complete and thorough review of appellant's history of medical treatment and previous surgery. Based upon the reports obtained from Dr. McMaster, the evidence does not establish that the Office abused its discretion in denying appellant's request for surgery for her accepted left knee condition as it has not been established by Dr. McMaster that such surgery is “likely to cure or give relief” to

⁸ 5 U.S.C. § 8103(a).

⁹ *Daniel J. Perea*, 42 ECAB 214 (1990); *Daniel Wietchy*, 34 ECAB 670, 672 (1983).

¹⁰ *Perea*, *supra* note 8; *see M. Lou Riesch*, 34 ECAB 1001, 1002 (1983).

¹¹ *Perea* *supra* note 8; *Joe F. Williamson*, 36 ECAB 494, 497 (1985).

¹² *Perea*, *supra* note 8; *Rosa Lee Jones*, 36 ECAB 679, 683 (1985).

¹³ *Louis G. Psyras*, 39 ECAB 264 (1987).

appellant's accepted knee condition. In the absence of an emergency or other unusual consideration,¹⁴ prior authorization by the Office is required for "all service, appliances, or supplies" prescribed or recommended by a qualified physician.¹⁵

The decisions of the Office of Workers' Compensation Programs dated May 24 and January 25, 1995 are hereby affirmed.

Dated, Washington, D.C.
June 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹⁴ See 20 C.F.R. § 10.401(f).

¹⁵ 20 C.F.R. § 10.401(a).