U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA A. KAYE and DEPARTMENT OF THE AIR FORCE, WRIGHT PATTERSON AIR FORCE BASE, Ohio

Docket No. 97-1713; Submitted on the Record;
Issued May 20, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on April 12, 1996 on the grounds that the residuals of her employment-related bilateral knee condition had ceased by that date; (2) whether the Office's prior termination of benefits on September 25, 1995 for employment-related back residuals was proper; (3) whether appellant is entitled to additional payment of expenses related to her medical care; (4) whether the Office properly denied review of its August 31, 1994 decision pertaining to the pay rate used for compensation purposes; (5) whether the Office properly suspended appellant's compensation benefits for a one-week period in January 1996; and (6) whether the Office properly denied appellant's request for a hearing.

Appellant, a 34-year-old computer specialist, fell on ice in the parking lot on December 8, 1989. Appellant stopped work one week later, claiming an injury to her right knee, left hip and left arm, with a subsequent claim of a back injury. Dr. Raymond J. Tesner, an osteopathic physician and sports medicine specialist, performed surgery on appellant's right knee two and one half weeks after her fall. The surgical reports indicate that Dr. Tesner initially suspected an anterior cruciate ligament or medial meniscus tear, and that surgery revealed patella dislocation, intra-articular loose bodies, and Grade IV chondromalacia. Dr. Tesner removed the loose bodies and performed a lateral retinacular release with shaving of the patella. Appellant returned to work for three weeks in January 1990, working four hours per day.

In February 1990 the Office accepted appellant's claim for effusion of the right knee, and removal of the loose bodies with authorization for the surgical expenses. At the end of February 1990, Dr. Tesner reported a full range of motion and the absence of fluid, but noted persistent weakness. He estimated a return to full-time work with one more month of physical therapy. However in April 1990 Dr. Tesner reported that appellant continued to require "a considerable amount of rehabilitation." Appellant resigned on April 9, 1990 and relocated to be with her family in California. Between April 23 and August 6, 1990 appellant was employed on a full-time basis as a human resources planning analyst earning approximately $15.00 per hour. She

sought further treatment in August 1990 at the Kerlan Jobe Orthopedic Clinic. Dr. Clarence L. Shields, a Board-certified orthopedic surgeon, treated her for instability of both knees, with a diagnosis of bilateral chondromalacia based on a computerized tomography (CT) scan in November 1990. Appellant submitted appropriate forms for reimbursement of certain expenses associated with her medical treatment, and was advised at that time of which expenses were reimbursable. An associate of Dr. Shields, Dr. William Dillin, a Board-certified orthopedic surgeon, treated appellant beginning October 1990 for complaints of back pain with diagnostic studies showing minimal disc narrowing.

In November 1990 appellant returned to work through a temporary agency, working as a computer specialist. Appellant remained under the care of Drs. Shields and Dillin, who noted that her recovery was prolonged because of the four-month gap in physical therapy in 1990 and suggested that her back pain was due to her altered gait. She was employed as full-time sales associate in a department store for one month between May and June 1991.

Appellant was treated at an emergency room facility on December 23, 1991, when she fell in a shopping mall due to giving way of her right knee. She claimed that she twisted her back when she fell, and based on contemporaneous medical reports from the emergency facility and follow-up treatment at the Kerlan Jobe Orthopedic Clinic, the Office accepted that appellant sustained a back strain as a consequence of her right knee injury. Due to continued symptoms, appellant stopped her temporary work at the end of January 1992. Following further tests, Dr. Shields released her from his care in June 1992, with a recommendation that she obtain treatment at a pain clinic.[1]

Under the care of Dr. Eugene A. Leone, an orthopedic surgeon, appellant obtained injection treatment which was unsuccessful at alleviating her symptoms. Dr. Leone interpreted the lumbar x-rays done in November 1990 to show a facet subluxation as well as the previously noted disc narrowing, and he noted that an electromyogram (EMG) revealed an L5 radiculopathy.[2] Appellant was treated again at an emergency room on September 15, 1992, after tripping in a bank when her right knee buckled and she struck a tripod on the floor, causing her to land on her left knee. A full set of x-rays were taken at the emergency room and she was

[1] Dr. Shields noted that a magnetic resonance imaging (MRI) scan performed on February 27, 1992 confirmed chondromalacia. The MRI results note preservation of the anterior and posterior cruciate ligaments, with lateral and medial menisci appearing in tact, and possible thinning of the patellar articular cartilage on the lateral facet. Dr. Shields referred appellant to Dr. Bertran Maltz, a rheumatologist, who evaluated appellant on May 18, 1992.

[2] The EMG results showed a slight L5 and S1 radiculopathy on the right and a moderate L5 radiculopathy on the left.

provided with a left knee immobilizer.[3] The Office accepted a left knee contusion as a consequential injury. She was referred back to Dr. Leone, who reported her complaints of aggravated symptoms in her left hip, left knee, right ankle, right foot, neck and low back. Appellant attempted further physical therapy for her left knee and lower back condition, which she discontinued due to the aggravated symptoms.

Appellant obtained authorization for a second opinion evaluation by Dr. Charles D. Tureck, a Board-certified orthopedic surgeon, who examined appellant in December 1992, and reported that he attributed appellant's early degenerative arthritis of both knees to the patellar malalignment. Dr. Tureck noted that because appellant preferred not to have artificial surfaces placed into the joint, he recommended a patellectomy to the right knee, followed by surgery to the left knee upon recovery.

Following review by an Office medical adviser, the Office approved surgery for both knees.[4] Dr. Leone performed surgery on the right knee on April 23, 1993. After removal of the long leg cast, appellant underwent further physical therapy treatment but discontinued the weight-bearing part of the therapy due to continued complaints of pain. The record indicates that appellant was last evaluated by Dr. Leone on August 11, 1993, and that due to a change in his practice, she obtained further treatment the following year from Dr. John E. Stratton, a Board-certified orthopedic surgeon. Dr. Stratton reported a decreased range of motion of the right knee and weakness, for which he performed repeat surgery in March 1994. The surgery restored appellant's loss of range of motion.

In the spring of 1994, she also underwent further evaluation with respect to her back condition with Dr. Benjamin Landau, a Board-certified neurosurgeon and Dr. James M. Loddengaard, a Board-certified orthopedic surgeon. Both Drs. Landau and Loddengaard noted appellant's misperception that her previously diagnosed facet subluxation was a fracture of the back or the cause of her current condition. Dr. Landau specifically indicated that he disagreed with Dr. Leone's reading of the November 1990 back x-rays, and he reviewed other diagnostic tests which showed no basis for appellant's complaints. He noted that the positive EMG findings did not correlate with the other diagnostic test results. On the recommendation of Dr. Loddengaard, during his evaluation on May 12, 1994, repeat EMG studies were performed by a Board-certified neurologist which were interpreted as negative. Upon his reevaluation on

[3] Cervical spine x-rays showed "an aberrant configuration of the spinous process of C7 which gives the appearance of being a separate ossicle of ossification at the very tip of the spinous process itself." X-rays of the hip, ankle and foot were normal. Left knee x-rays showed preservation of the joint spaces and no evidence of fractures, recent or old, with no evidence of intra-articular loose bodies or aberrant calcification. A subsequent MRI of the cervical spine in October 1992 confirmed the aberrant configuration at C7 which was felt to be either a focal fat deposition or hemorrhage. An MRI of the lumbar spine in October 1992 showed "slight congenital stenosis from L3 to S1," "very early facet degenerative change at L4-5," "no central spinal canal stenosis," and "no disc degeneration, herniation, nor significant bulge."

[4] An Office medical adviser noted that appellant's knee condition was aggravated by her obesity and by the malalignment traction mechanism of the knee. The Office medical adviser indicated, however, that since a fall can aggravate chondromalacia he recommended surgery to both knees. The surgical records indicate that the surgery consisted of the following: "arthrotomy and exploration; patellectomy and patellar tenorrhaphy; medial and lateral meniscectomy; anterior cruciate ligament repair on tenorrhaphy at origin."

May 27, 1994 he reviewed the findings. Both physicians recommended a weight-reduction program to decrease appellant's back symptoms.

From May until August 1994 appellant requested continued compensation based on her $9.50 salary in private employment until January 1992. By decision dated August 31, 1994, the Office denied appellant's claim for a pay rate of $9.50 per hour, which she indicated she received as a temporary employee in her private employment. The Office found that her federal pay, with a rate of $8.55 per hour, or $342.00 per week, was the correct rate of pay. The Office cited the statutory provision for determining the pay rate, and noted in her case, the lack of full-time federal employment for six months after her injury.

Dr. Stratton diagnosed malalignment of the left knee, with lateral subluxation of the patella and secondary chondromalacia. He performed surgery on the left knee in the fall of 1994, which was authorized by the Office. Appellant also underwent further diagnostic testing with respect to her back condition under the care of Dr. William C. Kim, a Board-certified orthopedic surgeon, whose treatment the Office authorized.[5] In an April 1995 report, Dr. Kim reviewed the diagnostic tests and concluded that the results showed a lack of neurologic deficit and explanation for her continued back symptoms. He diagnosed "overload syndrome" noting that she had a deconditioned trunk musculature and was carrying too much weight for her spinal condition, as well as relative atrophy due to inactivity. Based on her insistence that the prior EMG results showed radiculopathy, he ordered further tests which were positive, but which he did not address in further reports.[6]

In June 1995 the Office authorized a 20-week weight-reduction program. The Office also referred appellant to Dr. Donald J. Sage, a Board-certified neurosurgeon, which was postponed from July until August 1995. The Office authorized three weeks of physical therapy treatment in July 1995, and advised both Dr. Kim's office and the physical therapist's office, that further physical therapy was not authorized pending Dr. Sage's evaluation.

In an August 13, 1995 report, Dr. Sage reported his findings and stated it was improbable for a lumbar spine problem to cause the perineal numbness and loss of sphincter control of which

[5] Further diagnostic tests confirmed the lack of a disc herniation. MRI results from September 28, 1994 were interpreted by a Board-certified radiologist as showing "borderline lower limits of normal spinal canal at the L3-4 and L4-5 level" with facets and lamina prominent at the L3-4 and L4-5 levels and slight degenerative changes at those levels. A computerized tomography scan without contrast on October 18, 1994, was interpreted by a Board-certified radiologist as showing a triangular-shaped spinal canal at L3-4 and L4-5 due to "prominent laminae and facets" with short pedicles noted at L4-5. The L3-4 region was seen as borderline to slightly stenotic. The CT scan without contrast was followed by a myelogram and a further CT scan with contrast on October 27, 1994, which was reported as normal.

[6] A repeat EMG in May 1995 revealed slightly abnormal responses in the S1 distribution, without any diffuse polyradicular pattern or reinnervation process. A somatosensory evoked response test of the L4, L5 and S1 nerve roots performed by Dr. Daniel A. Levine, a Board-certified neurologist, in June 1995, was reported as showing some latencies at S1 and L4 with the left latency borderline prolonged. Based on the results of the June 1995 test, appellant telephoned the Office to request authorization for lumbar surgery. She noted that she felt there was a bone fragment protruding through the nerves and spinal canal in her back at S1 through L5.

she complained, without any visible documentation on the diagnostic tests. Dr. Sage reported that he felt appellant's lumbosacral strains from her falls had resolved.

On August 22, 1995 the Office provided appellant a notice of termination of compensation on August 22, 1995, with respect to benefits for her accepted low back strain. Appellant contested the termination of her benefits for her back condition, on the basis of an evaluation on September 19, 1995 by Dr. Harold L. Segal, a Board-certified neurosurgeon, who diagnosed a possible sacral fracture based on the CT scan dated October 18, 1994.

By decision dated September 26, 1995, the Office terminated appellant's compensation benefits with respect to her accepted back condition, on the grounds that it was unrelated to her accepted lumbosacral strain or employment injury. Subsequent to the Office's September 27, 1995 decision, the Office received the report from Dr. Segal pertaining to his interpretation of a CT scan from October 18, 1994.[7]

With respect to her ongoing treatment and benefits for her accepted bilateral knee condition, the Office obtained reports from Dr. Stratton who reported that appellant could return to sedentary work, notwithstanding her continued knee instability. Appellant was referred to the vocational rehabilitation program, which was interrupted by appellant's failure to meet with the counselor. Continued reports from Dr. Stratton indicated that she underwent diagnostic testing of the left leg in November 1995 and that she reported increased symptoms after a fall again on December 6, 1995 in a department store.[8] Dr. Stratton recommended rest, ice and continued use of the knee immobilizer with a walker. He noted upon reevaluation on December 11, 1995 appellant's complaints of aggravated right knee pain and sense of catching, without documentation of any tear by an MRI scan on December 18, 1995. Dr. Stratton noted recommended that appellant not return to full-time work until the spring of 1996.

The Office referred appellant to Dr. Stuart Baumgard, a Board-certified orthopedic surgeon, for a second opinion evaluation, scheduled for January 3, 1996. Appellant did not attend the evaluation, based on her statements that the medical receptionist did not think

[7] Dr. Segal recommended against surgery but noted that she should obtain a Board-certified radiologist's interpretation of the results of the CT scan on October 18, 1994. In addition, he noted a difference in observation between the office, where appellant appeared to have great difficulty walking, and after the examination 10 minutes later when he observed appellant walking on the street.

[8] The emergency room treatment note indicates that appellant provided a history of a back fracture, as well as prior surgery on both knees.

Dr. Baumgard could examine her with a long-leg cast and her difficulty in driving that distance. The Office advised appellant on that date, that she was expected to attend the second opinion evaluation. By letter dated January 16, 1996, appellant objected generally to the requirement to undergo a second opinion evaluation and noted the problems in arranging transportation during the morning hours. By decision dated January 18, 1996, the Office found that appellant was in obstruction of the evaluation and suspended appellant's compensation benefits.

Reports by Dr. Stratton indicate that he removed appellant's cast on January 12, 1996, but that four days later, appellant returned and was evaluated by his associate for complaints of right knee pain. His associate placed a cast back on appellant's right leg and appellant was reevaluated by Dr. Stratton on January 23, 1996. Dr. Stratton reported that he bivalved the cast to examine her knee and he recommended that she remove the cast to exercise the knee, with restrictions from driving long distances due to the right cast.

By January 25, 1996 facsimile transmittal, appellant advised the Office that she had scheduled an evaluation with Dr. Baumgard on January 31, 1996. During the examination by Dr. Baumgard on January 31, 1996, appellant telephoned the Office to advise that Dr. Baumgard had, in fact, examined her previously.[9] By report dated January 31, 1996, Dr. Baumgard provided a full review of the history of appellant's employment injury and her subsequent falls from instability of the knees. Dr. Baumgard reviewed the diagnostic tests and the medical records. He reported his findings on examination, noting that appellant impeded the examination by refusing to have her right cast removed and by refusal to remove her left leg boot and her pants or support hose. Following the review of the medical records, Dr. Baumgard provided an 11-page discussion on appellant's condition. He attributed appellant's knee instability to "chondromalacia patella bilaterally, a condition wherein the cartilage on the articular surface of the patella degenerates in an unduly rapid rate due to usually idiopathic causes, but also accelerated if the patient has patellar malalignment and has been overweight (both of which the patient, of course, has)." Dr. Baumgard stated that chondromalacia can be asymptomatic and that a trauma can precipitate the onset of pain. He noted that the employment injury on December 8, 1989 at work probably precipitated the onset of pain and that the pain was sufficient for Dr. Tesner to perform an arthroscopic lateral release. Dr. Baumgard noted that absent the employment-related injury, her condition would have become symptomatic within 6 to 12 months due to the natural progression of the underlying disease of chondromalacia patella. He noted that the gradual onset of symptoms for 6 to 12 months before her fall on September 15, 1992, was evidence of the underlying disease of chondromalacia and he indicated that the fall on September 15, 1992 probably exacerbated her symptoms in that knee for a couple of months.

[9] Dr. Baumgard had examined appellant on September 13, 1995 in the presence of her attorney, in conjunction with a law suit against the bank where she fell. The Office advised appellant that as long as he felt able to perform the evaluation in a nonprejudical manner, he could perform the evaluation and that the evaluation was not an impartial medical examination to resolve a conflict in the medical evidence. A few days after the evaluation, Dr. Baumgard telephoned the Office to report that appellant did not fully cooperate, in that she refused to have the right leg cast removed, and did not remove the tights or boot from her left leg which prevented full examination. When the Office requested appellant to return and to cooperate in the examination, appellant appeared in Dr. Baumgard's office. In a subsequent telephone call to the Office, he indicated that he had, in fact, full information to provide a second opinion evaluation. The Office resumed payment of compensation benefits, retroactive to the date of her examination.

Dr. Baumgard indicated that her knee surgeries, except for perhaps the first one in 1989, would have been necessary absent the falls occurring after 1989 and that her current bilateral knee condition was not due to her federal employment. He also addressed appellant's ability to perform a sedentary job despite her knee residuals, which he attributed to the underlying disease of chondromalacia patella.

By notice of proposed termination dated March 12, 1996, the Office advised appellant that her compensation benefits would be terminated within 30 days based on the report by Dr. Baumgard. Appellant objected to the termination of her benefits and sought reimbursement for expenses of telephone calls, and other expenses. She submitted a photocopy of a transmittal of the results of the CT scan without contrast performed on October 18, 1994, which noted on the transmittal a review of "T-12 to S-1" levels and "sacral Fx S1." By decision dated April 12, 1996, the Office terminated appellant's compensation benefits effective that date.

On April 16, 1996 appellant requested reconsideration. She included a copy of a March 11, 1996 report by Dr. Robert A. Kolenz, a Board-certified radiologist, who interpreted the CT scan results from October 18, 1994 as showing what appeared to be a "fracture through the pars interarticularis at S1 on the right side." He noted that the margins of the fracture did not appear to be sclerotic which would suggest an acute fracture. Dr. Kolenz did not specifically interpret the findings of the subsequent October 27, 1994 CT scan after the myelogram. He noted that the findings of the October 18, 1994 test were "suggested only in retrospect" on the October 27, 1994 test. Appellant also submitted an April 9, 1996 progress report by Dr. Stratton, in which he recommended continued physical therapy. She also submitted a report from Dr. Maltz, the rheumatologist who had examined her previously on May 18, 1992. Based on her history of injury and a review of the x-rays, he noted that appellant's patellar dislocation resulted from the fall at work, and that the x-rays showed no degenerative changes. He felt that appellant's weight gain of 40 to 50 pounds was secondary to her knee injury and that this weight gain prevented her from fully recovering from the symptoms of her employment injury.

On April 22, 1996 the Office approved expenses of $333.50. The Office denied reimbursement of the following expenses: travel reimbursement for 1994 based on the statutory one-year-time limitation; expenses for meals due to the distance traveled; the expense of telephone calls; travel to Dr. Loddengaard's office in the spring of 1994 since he was not authorized to treat appellant; travel for unauthorized physical therapy after October 31, 1995 and travel to Dr. Kim on December 15, 1995. The Office indicated that its reimbursement rate for mileage was $.30 per mile, as opposed to $.32 which she claimed.

On April 25 and May 6, 1996 appellant requested further reconsideration. She claimed that an incorrect pay rate was used for her compensation based on a copy of a Federal Employees' Compensation Act (FECA) Bulletin which provides for a pay rate to be based on private employment. She claimed that she was entitled to two to three weeks of compensation in January 1996 because of the lack of evidence to support the contention that she was in obstruction of the scheduled evaluation with Dr. Baumgard. She also claimed that Dr. Baumgard was disqualified as a second opinion physician because of his prior examination. She also noted the Office's policies that a claimant has the right to deny invasive testing and claimed that Dr. Baumgard was incorrect that her condition was due to a preexisting condition.

By decision dated May 20, 1996, the Office denied appellant's request for reimbursement of medical and other expenses, including telephone calls, travel and meals. By separate decision dated May 20, 1996, the Office denied as untimely appellant's request for review of the August 31, 1994 decision, on the applicable pay rate for appellant's compensation. The Office found that appellant had not established clear evidence of error with respect to its August 31, 1994 decision. By separate decision dated May 20, 1996, the Office modified the January 18, 1996 decision, by which the Office had found appellant in obstruction of the scheduled examination with Dr. Baumgard. The Office authorized payment of an additional five days of compensation between January 25 and 31, 1996, based on the fact that appellant had rescheduled the evaluation on January 25, 1996. The Office upheld its prior determination that appellant was in obstruction of the examination for the period January 18 to 24, 1996. By separate decision dated May 20, 1996, the Office reviewed the merits of appellant's claim relating to her continued back and knee symptoms. The Office found that the weight of the medical evidence continued to rest with the opinions of the second opinion physicians, Drs. Sage and Baumgard, who reported that appellant's ongoing conditions were not employment related.

On June 14, 1996 appellant telephoned the Office to request an oral hearing, as well as further rehabilitation or a schedule award. Appellant responded to a June 16, 1996 letter from the Office with a written request for an oral hearing dated July 25, 1995. Appellant provided copies of previously submitted material, and maintained that the Office decisions were incorrect.[10]

By decision dated July 30, 1996, the Office denied appellant's request for an oral hearing, on the grounds that she had previously requested reconsideration.

Appellant requested reconsideration of the Office decisions. In addition to other previously submitted records, she submitted an August 15, 1996 report by Dr. Stratton pertaining to two falls within two weeks, when her right knee gave out. Dr. Stratton diagnosed contusion of the left knee related to her right knee giving way, and he recommended continued use of the Townsend brace notwithstanding appellant's complaints that the brace was ineffective because it was loose and would slip off her knee.

By subsequent decision dated October 3, 1996, the Office denied a review of the merits of appellant's claim on the grounds that the material she submitted was repetitious.

The Board finds that the Office properly terminated appellant's compensation benefits on April 12, 1996 on the basis that the residuals of her employment-related bilateral knee condition had ceased by that date.

[10] The record indicates that the Inspector General's Office of the Department of Labor contacted Dr. Baumgard's office to determine whether Dr. Baumgard was influenced by his conversations with the Office. The investigator noted Dr. Baumgard's denial that he was influenced by his communications with the Office.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability had ceased or that it is no longer related to the employment.[11]

The Office accepted that appellant sustained an effusion of the right knee on December 8, 1989 when she fell on ice in the parking lot. Because of persistent symptoms, Dr. Tesner recommended arthroscopic surgery of the right knee to determine the presence of a medial or anterior cruciate ligament tear. Dr. Tesner found no evidence of a tear but found instead, patella dislocation, intra-articular loose bodies and grade IV chondromolacia. This demonstrates a preexisting degenerative condition to appellant's right knee. While the Office paid the surgical expenses and approved the removal of the loose bodies, it did not accept at this time, the condition of grade IV chondromalacia as employment related. Nor did the Office accept at this time, the condition of patella dislocation.[12] Nevertheless, based on appellant's instability of the knee which continued after the surgery the Office approved further medical treatment. Eight months after her injury, appellant obtained treatment for instability of both knees. Diagnostic testing in the fall of 1990 revealed chondromalacia of the left knee, in addition to the right knee. While Dr. Shields, a Board-certified orthopedic surgeon, initially felt that appellant's continued symptoms were due to a gap in physical therapy treatment, he later diagnosed an underlying arthritis condition and referred appellant to a rheumatologist. However, the rheumatologist who evaluated her did not feel her knee condition was due to arthritis. She continued under the care of Dr. Leone, an orthopedic surgeon, who treated her bilateral knee symptoms without addressing the relationship between appellant's symptoms and her prior employment injury to her right knee. Based on appellant's fall in a bank in September 1992, the Office accepted that appellant sustained a contusion of the left knee. Thereafter, appellant obtained an evaluation with Dr. Tureck who diagnosed patellar malalignment which caused early degenerative arthritis of both knees. The Board notes that the Office did not accept the condition of patellar malalignment of both knees as caused by her employment injury or consequential fall in September 1992. However, on the basis of an Office medical adviser's opinion that falls can aggravate chondromalacia, the Office approved repeat surgery for the right knee and surgery for the left knee as well. In 1994 Dr. Stratton, a Board-certified orthopedic surgeon, performed repeat surgery on the right knee, followed by left knee surgery eight months later. Appellant remained under Dr. Stratton's care, who related appellant's condition to her initial employment injury, but did not provide any rationale for his opinion on how appellant's accepted injury would cause or contribute to her diagnosed conditions.

Dr. Baumgard, a Board-certified orthopedic surgeon and Office referral physician, provided a comprehensive report dated January 31, 1996 in which he explained the nature of

[11] *Patricia A. Keller*, 45 ECAB 278 (1993); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[12] In order to establish a causal relationship between an employment incident and a claimed condition, a physician must provide an explanation with medical rationale to support the conclusion that the condition was caused, aggravated, or precipitated by the employment incident. *Kathryn Haggerty*, 45 ECAB 383 (1994); *Gary L. Fowler*, 45 ECAB 365 (1994). The fact that a condition manifests itself or worsens during a period of employment, or that work activities produce symptoms revelatory of an underlying condition, does not raise an inference of causal relationship between a claimed condition and employment factors. *Ruby I. Fish*, 46 ECAB 276 (1994).

appellant's underlying condition of chondromalacia of both knees, and negated a causal relationship between appellant's current condition and her employment injury. Dr. Baumgard reviewed the history of appellant's initial fall, her subsequent falls, and the medical evidence of file. He reported that the fall at work on December 8, 1989 precipitated the symptoms in the right knee, which had been asymptomatic up until that time. Dr. Baumgard reviewed the history of appellant's left knee symptoms, which gradually increased following the right knee injury. He explained the nature of chondromalacia as asymptomatic often until a traumatic event, such as a fall, and stated that both the knee malalignment and overweight condition of appellant accelerated her underlying disease of chondromalacia. He reported, therefore, that appellant's fall in December 1989 precipitated or accelerated the normal process in the right leg, but noted that the new chondromalacia condition would have become symptomatic within 6 to 12 months due to the natural progression of the disease process. He added that the subsequent surgeries would have been necessary regardless of the fall.

Appellant claimed that Dr. Baumgard should not be recognized as a second opinion physician, since he had examined her previously in September 1995 with respect to her law suit against the bank when she fell in August 1992. The Board notes that a second opinion physician may evaluate a claimant twice. The need for impartiality and the lack of verbal contact with the Office extends only to impartial medical specialists who are chosen to resolve a conflict in the medical evidence.[13] Since there were no comprehensive reports from any treating physicians pertaining to her bilateral knee condition the Board finds that the reports of Dr. Stratton are insufficient to create a conflict of medical opinion. The Board finds that Dr. Baumgard's report was thorough, well rationalized, and represents the weight of the medical evidence. His report establishes that appellant's ongoing knee condition is no longer related to the fall at work in December 1989 or the subsequent fall on her left knee in September 1992, but due to the progression of her underlying degenerative chondromalacia condition. Accordingly, the Office properly terminated appellant's compensation benefits effective April 12, 1996.

The Board finds that the Office's termination of benefits on September 25, 1995 for appellant's employment-related back condition was proper.

The Office accepted that as a result of a fall on December 23, 1991, due to the continued instability of appellant's right knee, appellant sustained a lumbar strain. Appellant had claimed that her lumbar pain related to her initial fall at work on December 8, 1989, but the record indicates that she did not seek treatment for her back pain until the fall of the following year, when she was being treated for her knee condition. Diagnostic studies at that time showed minimal disc narrowing. Dr. Dillin, a Board-certified orthopedic surgeon, noted the relationship between appellant's altered gait due to her right knee injury and her back pain. While Dr. Leone, felt that there was objective evidence of nerve root compression on the basis of positive EMG results, the diagnostic tests of the lumbar spine revealed a lack of a disc herniation or other

[13] *See generally Eva M. Morgan*, 47 ECAB ____ (Docket No. 94-1022, issued February 20, 1996) (where the Board held that the ability to participate in the selection of a physician accrues only with respect to the referral to an impartial medical specialist); *cf. Carl D. Johnson*, 46 ECAB 804 (1995); *George A. Johnson*, 43 ECAB 712 (1992) (relating to the need for a completely independent evaluation by an impartial medical specialist chosen to resolve a conflict in the medical opinion).

findings suggestive of nerve root compression. During a complete work up in the spring of 1994, Dr. Landau, addressed positive EMG results which he stated did not correlate with other diagnostic test findings. Dr. Loddengaard noted that the repeat EMG was within normal limits. The Office authorized further treatment by Dr. Kim who, following further tests, concluded that appellant's back symptoms were due to an "overload syndrome," characterized by a deconditioned trunk musculature with too much weight for her spine, and relative atrophy due to physical inactivity. An EMG subsequently ordered by Dr. Kim was interpreted as showing an L5 radiculopathy, which he did not address in subsequent reports. Dr. Sage evaluated appellant in August 1995 and performed a full review of the medical evidence. He concluded that appellant's symptoms were not due to lumbar strains from either the initial December 8, 1989 employment fall or subsequent falls, which he opined had resolved without further residual. Dr. Sage noted the extent of appellant's complaints of perineal numbness and loss of sphincter control, and indicated that these symptoms were out of proportion from the findings on the diagnostic studies. The Board finds that the report by Dr. Sage is thorough and well rationalized. His report establishes that the accepted lumbar strain condition due to the employment injury, had resolved. Therefore the Office properly terminated appellant's compensation benefits for her lumbar strain effective September 26, 1995.

While appellant submitted subsequent evidence from a Board-certified neurosurgeon and a Board-certified radiologist, pertaining to interpretations of a CT scan obtained on October 18, 1994, the reports do not establish any injury due to the accepted falls. The Board notes that following her initial injury on December 8, 1989, she did not seek treatment for her back condition until October 1990, when referred to Dr. Dillin. With respect to any further claims for a lumbar condition due to the consequential falls, appellant has not submitted any medical reports from a physician addressing the complete diagnostic studies with rationale to support an opinion on a diagnosis relating to the consequential falls. The specific report from the Board-certified radiologist addressing the CT results from October 18, 1994 does not address continuing residuals due to the accepted lumbar strain. The radiologist did not address the period of treatment, review diagnostic tests of record or provide an adequate explanation for the finding of a "possible" sacral fracture on the October 27, 1994 CT scan or explain how such a diagnosed condition would be related to specific falls in 1989, 1991 and 1992.[14]

The Board finds that with respect to additional payment of expenses related to her medical care, the Office abused its discretion in not paying for appellant's transportation to Dr. Loddengaard in the spring of 1994. The Office refused payment of transportation costs on the grounds that the treatment by Dr. Loddengaard was unauthorized. The Board notes however, that the record indicates Dr. Loddengaard's May 12, 1994 examination was authorized by the Office, as well as the repeat EMG testing he recommended. On May 27, 1994 he examined appellant on a follow-up basis to evaluate the EMG results. Thus, the record is not clear why her transportation costs were denied. The Board finds however, that with respect to the other claimed expenses, appellant has not demonstrated entitlement to reimbursement for the expenses.

[14] While the studies in 1992 showed slight congenital stenosis from L3 to L1 and very early facet degenerative changes at L4-5, and the studies in 1994 confirmed facets and lamina prominent at the L3-4 and L4-5 levels with slight degenerative changes at those levels, appellant has not submitted any reports from any physicians relating these findings to her employment injury or to her subsequent falls.

Medical expenses, along with transportation and other expenses incidental to securing medical care, are covered by section 8103 of the Act.[15] This section provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of any disability, or aid in lessening the amount of any monthly compensation. The employee may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances and supplies.[16] Section 10.413 of the Office's regulations impose a time limitation on the submission of bills for reimbursement of medical expenses.[17] Under 20 C.F.R. § 10.413, the Office will not reimburse claimants or providers for medical treatment and expenses if the bill is submitted more than one year beyond the calendar year in which the expense was incurred or the service or supply provided or more than one year beyond the calendar year in which the claim was first accepted as compensable by the Office, whichever is later.[18]

The Office has the general objective of ensuring that an employee recovers from an injury to the fullest extent possible in the shortest amount of time. In this regard, the Board has held that the Office has broad administrative discretion in choosing the means to achieve this goal, and that the only limitation on the Office's authority is that of reasonableness.[19]

The Board finds that the Office did not abuse its discretion with respect to the denial of reimbursement for travel to physical therapy after October 31, 1995 and Dr. Kim's evaluation on December 15, 1995. The record shows that in July 1995 the Office authorized three weeks of further physical therapy for appellant's back and advised both the physical therapist's office and Dr. Kim's office of the lack of further authorization pending the scheduled evaluation with Dr. Sage. On September 25, 1995 payment of expenses for further back treatment was terminated. With respect to appellant's phone calls, she requested reimbursement of phone calls made to the Office after January 26, 1996. The Board has held that such expenses are personal in

[15] 5 U.S.C. § 8103(a).

[16] 20 C.F.R. § 10.401(a).

[17] 20 C.F.R. § 10.413; *see Carol E. Donahue*, 43 ECAB 315 (1991); *Allen L. Artz*, 43 ECAB 631 (1992).

[18] *Id.*

[19] *Peggy J. Reed*, 46 ECAB 139 (1994); *Marla Davis*, 45 ECAB 828 (1994). While the Office has broad discretionary authority to approve appropriate medical treatment obtained after the initial choice of physicians and without prior authorization from the Office, the Board has held that the Office nevertheless has discretionary authority to approve unauthorized medical care which it finds necessary and reasonable and is required to exercise that discretion. *Id.*; *see also Billy Ware Forbes*, 45 ECAB 157 (1993).

nature and not part of any direct medical care.[20] With respect to the claimed reimbursement for travel in 1994 which was submitted more than one year after the travel, the Board finds that the Office regulations prohibit payment of such expenses. While appellant claimed that she did not have the sufficient form, the Board notes that since the fall of 1990 she was aware of the procedures to submit forms for reimbursement of expenses associated with medical treatment. With respect to reimbursement for meals, the Board notes that such expenses are considered incidental to medical treatment where there is a considerable distance to the physician providing treatment.[21] In this case, the Office did not abuse its discretion in denying reimbursement for meals based on the short distance to appellant's physicians. The Board notes that $.30 per mile for travel is the correct amount of payment for mileage reimbursement, as opposed to $.32 claimed by appellant.[22]

The Board finds further that the Office properly denied a review of its August 31, 1994 decision pertaining to the pay rate used for compensation purposes.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[23] The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.[24] In those cases where a request for reconsideration is not timely filed, the Board has held, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[25] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office, and the evidence must be manifest on its fact that the Office committed an error.[26] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[27] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[28]

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[20] *Wanda L. Campbell*, 44 ECAB 633 (1993) (finding that telephone calls to the Office are not reimburseable, but that telephone calls to authorized physicians were considered reasonable and necessary for obtaining medical services).

[21] *Jeffrey R. Davis*, 35 ECAB 950 (1984); *Pearl J. Pomerantz*, 34 ECAB 798 (1983); *Francis N. Adams*, 20 ECAB 383 (1969).

[22] The Board notes that under FECA Bulletin No. 96-13, issued June 24, 1996, the mileage rate was increased from $.30 to $.31 per mile.

[23] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[24] 20 C.F.R. § 10.138(b)(2).

[25] *Thankamma Mathews*, 44 ECAB 765 (1993).

[26] *See Dean D. Beets*, 43 ECAB 1153 (1992); *Leona N. Travis*, 43 ECAB 227 (1991)

[27] *See Jesus D. Sanchez*, *supra* note 23.

[28] *See Leona N. Travis*, *supra* note 26.

In the instant case, appellant contended in her April 25 and May 6, 1996 reconsideration request, that the August 31, 1994 decision relating to her pay rate was incorrect. Since more than one year passed before her request for reconsideration of the August 31, 1994 decision, the Office properly determined that her request for reconsideration was not timely. The Office reviewed the copy of a FECA Memorandum she submitted in support of her contention that the Office erred. Appellant alleged, in essence, that the exact language of the FECA Memorandum indicated only a return to full-time employment, and did not specify full-time federal employment for a six-month period. The Board notes that the FECA Memorandum does, in fact, state that a six-month full-time federal employment period is required prior to the use of a subsequent private employment pay rate upon a subsequent work stoppage. Appellant was citing a more general summary at the bottom of the memorandum. The use of the federal employment pay rate is consistent with the FECA Memorandum, as well as Board precedent.[29] The Board finds therefore that appellant has not established clear evidence of error with respect to the Office's August 31, 1994 decision.

The Board finds that the Office properly suspended appellant's compensation benefits for a one-week period in January 1996.

Section 8123 (a) of the Act authorizes the Office to require an employee who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.[30] The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office.[31] The regulations governing the Office provide that an injured employee "shall be required to submit to examination by a U.S. Medical Officer or by a qualified private physician approved by the Office as frequently and at such times and places as in the opinion of the Office may be reasonably necessary."[32] The only limitation on this authority is that of reasonableness.[33] The Act provides that "[i]f an employee refuses to submit to or obstruct an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops."[34] The Office procedures provide for a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction.[35]

The Office referred appellant for a second opinion evaluation by Dr. Baumgard for January 3, 1996. The medical reports from Dr. Stratton in December 1995 indicate that while

[29] *See Andrew Aaron, Jr.*, Docket No. 95-1827 (issued October 23, 1996); *Alan T. Webb*, Docket No. 94-1173 (issued February 16, 1996); *Danny A. Nelson*, 33 ECAB 1356 (1982).

[30] 5 U.S.C. § 8123(a).

[31] *Corlisia L. Sims (Smith)*, 46 ECAB 172, 180 (1994); *James C. Talbert*, 42 ECAB 974, 976 (1991).

[32] 20 C.F.R. § 10.407(a).

[33] *See William G. Saviolidis*, 35 ECAB 283, 286 (1983); *Joseph W. Bianco*, 19 ECAB 426, 428 (1968).

[34] 5 U.S.C. § 8123 (d).

[35] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

medically, Dr. Stratton and his associate did not feel a full-length cast was necessary, appellant was frustrated with continued knee instability and obtained a full-length cast from the associate in Dr. Stratton's absence. The presence of a full-length cast became the basis for appellant's objections in attending her examination with Dr. Baumgard. She cited a conversation she had with a medical receptionist pertaining to the lack of usefulness of an examination but at the same time however, attended an evaluation with Dr. Plut, whose name she received from Dr. Stratton. Appellant, however, objected to the January 3, 1996 evaluation with Dr. Baumgard, based apparently on the fact that the physician was further away, and that the cast impeded a full examination. The record indicates that after she was advised on January 3, 1996 of her obligation to attend the examination with Dr. Baumgard, she had her cast removed by Dr. Stratton, but four days later requested his associate place another cast on her leg. The Office did not suspend her compensation benefits until it received a January 16, 1996 statement from appellant, who communicated her opposition for having to attend the evaluation. The Office suspended appellant's compensation benefits effective January 18, 1996, which met the requirement of the 14-day period to allow a claimant to explain his or her refusal to attend an examination. After her compensation benefits were suspended, appellant was treated the following week by Dr. Stratton, who at that time, removed her cast to examine the knee and also supported her claim that she could not drive long distances with the cast on. While the Office initially suspended appellant's compensation benefits until the date of her examination on January 31, 1996, the Office later allowed her compensation for the period between the time she rescheduled the evaluation and the date of the evaluation. Under these circumstances, the Board finds that the Office was reasonable in suspending compensation benefits for one week, due to a finding that she obstructed the examination until she rescheduled it on January 25, 1996.

The Board finds further that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act,[36] provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[37]

The Office's procedures implementing this section are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). The regulations state that a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made prior to requesting a hearing, or if a written review of the record of an Office hearing representative has already taken place.[38]

[36] 5 U.S.C. § 8124(b)(1).

[37] *Id.*

[38] 20 C.F.R. § 10.131(a).

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and has held that the Office must exercise its discretion in such cases.[39]

In this case, after the May 20, 1996 decisions issued by the Office, appellant telephoned the Office to request an oral hearing on June 14, 1996. She submitted a written letter dated July 25, 1996 requesting an oral hearing. The Office found by decision dated July 30, 1996, that appellant had previously requested reconsideration of the prior Office decisions dated August 30, 1994, September 26, 1995, January 18 and April 12, 1996. As appellant had previously requested reconsideration, the Board finds that she was not entitled to an oral hearing as a matter of right.[40] The Office however, exercised its discretion to hold a hearing, and found however, that appellant could submit additional evidence through the reconsideration process. The Board has held that the denial of a hearing on this ground represents a proper exercise of the Office's discretionary authority.[41]

The Office of Workers' Compensation Programs' decisions dated July 30, May 20, and April 12, 1996 are hereby affirmed, and the decision dated May 20, 1996 on the denial of medical expenses is affirmed, as modified.

Dated, Washington, D.C.
May 20, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[39] *See, e.g., Tammy J. Kenow*, 44 ECAB 619 (1993) (untimely request); *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing); *Rudolph Bermann*, 26 ECAB 354 (1975) (injury occurring prior to effective date of the statutory amendments providing a right to hearing).

[40] The Board notes as well that she was also not entitled to an oral hearing as a matter of right on the grounds that her written request for an oral hearing was not received within 30 days of the May 20, 1996 decisions.

[41] *Robert Lombardo*, 40 ECAB 1038 (1989).