U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL M. KENNEDY and U.S. POSTAL SERVICE,
POST OFFICE, Sun City, AZ

Docket No. 01-101; Submitted on the Record;
Issued January 9, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation; (2) whether appellant met her burden of proof to establish that she had any disability after January 1, 1997 causally related to her employment injury; and (3) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden to terminate appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[1]

In the present case, on June 6, 1990 appellant, then a 43-year-old letter carrier, sustained an employment-related left knee strain when she was startled by a dog on her employment duties. She did not stop work and received compensation for intermittent periods of disability. On October 17, 1991 she sustained a recurrence of disability and underwent authorized arthroscopic surgery December 2, 1991. She received appropriate compensation and on February 6, 1992 returned to limited duty for four hours per day. She continued to receive compensation for four hours per day and on August 8, 1992 returned to a full eight-hour workday of limited duty. On May 7, 1996 she submitted a schedule award claim.

The Office continued to develop the claim and on September 24, 1997 referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to

[1] *See Patricia A. Keller*, 45 ECAB 278 (1993).

Dr. Joseph S. Gimbel, a Board-certified orthopedic surgeon, for a second opinion evaluation. The statement of accepted facts provided to Dr. Gimbel indicated that appellant's accepted conditions were left knee strain and medial meniscal tear. By decision dated January 6, 1998, the Office granted appellant a schedule award for a five percent impairment for partial loss of use of the left leg for the period November 3, 1993 to February 11, 1994, for a total of 14.4 weeks of compensation.[2]

In 1998 appellant was again referred to Dr. Gimbel and a new statement of accepted facts was prepared, which indicated that appellant's accepted conditions were left knee strain with chondromalacia and lumbar and cervical strains. He provided a report dated April 3, 1998 and based on his opinion by letter dated September 11, 1998, the Office proposed to terminate appellant's compensation. Appellant submitted nothing in response and by decision dated October 13, 1998, the Office finalized the termination decision.

On October 22, 1998 appellant's representative requested a hearing that was held on May 5, 1999. In a decision dated July 9, 1999 and finalized July 14, 1999, an Office hearing representative affirmed the prior decisions. On August 17, 1999 appellant requested reconsideration and in an October 27, 1999 decision, the Office denied her request. On December 1, 1999 appellant's representative requested reconsideration and submitted reports dated August 9 and September 28, 1999 from Dr. Richard K. Peairs, a Board-certified orthopedic surgeon. By decision dated February 22, 2000, the Office denied modification of the prior decision. On April 5, 2000 appellant's representative again requested reconsideration and submitted a March 20, 2000 report from Dr. Peairs. In a September 20, 2000 decision, the Office denied appellant's request for reconsideration. The instant appeal follows.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[3]

The medical evidence relevant to the termination of compensation in this case includes[4] a June 6, 1996 fitness-for-duty examination, in which Dr. Ashley Lewis Park, a Board-certified physiatrist, diagnosed chronic left knee pain secondary to chondromalacia of the medial femoral condyle and patellofemoral joint status/post chondroplasty. He advised that appellant needed sedentary to light-duty work. Dr. Gimbel, a Board-certified orthopedic surgeon, provided a second opinion evaluation dated October 13, 1997, in which he advised that appellant had

[2] This decision is not on appeal before the Board.

[3] *Gary R. Sieber*, 46 ECAB 215 (1994).

[4] Older medical evidence includes an operative report dated December 2, 1991, in which Dr. Thomas Bodnar, appellant's treating Board-certified orthopedic surgeon, postoperatively diagnosed chondromalacia of the medial femoral condyle and patellofemoral joint. Dr. Thomas G. Roesner, a Board-certified orthopedic surgeon, provided a second opinion evaluation dated January 25, 1994, in which he diagnosed, *inter alia*, patellofemoral chondromalacia. Dr. James C. Nauman, also Board-certified in orthopedics, provided a November 3, 1993 fitness-for-duty examination, in which he diagnosed bilateral clinical chondromalacia.

minimal, if any, residuals of the June 6, 1990 work injury, concluding that she could perform the duties of a letter carrier. In an attached work capacity evaluation, Dr. Gimbel provided restrictions on lifting of 75 pounds, squatting, kneeling and climbing and advised that appellant should limit bicycle riding. He also provided an evaluation under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[5] (hereinafter A.M.A., *Guides*) regarding appellant's entitlement to a schedule award.[6]

Dr. Elliott Katz, a Board-certified orthopedic surgeon, who became appellant's treating physician in January 1998, provided an office note dated January 12, 1998, in which he diagnosed status/post work injury of the left knee with a chondral lesion of the medial femoral condyle and chondromalacia patella. In an attached duty status report, Dr. Katz advised that appellant could sit, grasp and keyboard for eight hours per day, walk, twist and pull for one hour per day, drive for one to two hours per day and could not climb, kneel, bend, stoop or operate machinery. He provided a 20-pound lifting restriction. In a report dated February 26, 1998, Dr. Katz commented that he had reviewed a videotape of appellant's December 1991 surgery, advising that it revealed an extensive chondral lesion and an extensive area of chondromalacia of the patella which were shaved by Dr. Bodnar. Dr. Katz further noted that the patella was "extensively damaged," and that x-rays taken in his office demonstrated narrowing of the medial compartments in both knees. He concluded:

> "The conclusion that [she] can do all of her duties as a letter carrier, including carrying heavy sacks of mail, seems to fly in [the] face of the facts as we have seen. She is symptomatic and she has had a significant joint injury. She should have been given permanent impairment and I do not feel that 5 percent is a reasonable permanent impairment of her knee, since she has had a markedly damaged joint surface. It is possible [she] may need further surgery in the future and I think it would be reasonable, if not certainly judicious in good practice, to restore [her] to the light-duty status she has been on over the past several years."

In a report dated April 30, 1998, Dr. Gimbel noted that he had reexamined appellant that day. He noted reviewing the April 10, 1998 statement of accepted facts and additional medical evidence. On examination of the knee Dr. Gimbel noted no evidence of atrophy and good strength of the quadriceps with minimal posterior medial joint line tenderness and "surprisingly" no tenderness to the patella to compression. Anterior drawer and Lachman's tests were negative with no effusion present. Gait was normal. He diagnosed chondromalacia, medial femoral condyle and medial patellar facet as confirmed by arthroscopy and chondroplasty in 1991; chronic low back pain secondary to a lower back injury in 1984; and thoracic back pain related to a September 24, 1990 claim.[7] Dr. Gimbel noted that examination of her back was negative

[5] A.M.A., *Guides* (4th ed. 1993).

[6] In a December 27, 1997 report, an Office medical adviser evaluated appellant's entitlement to a schedule award. Dr. Gimbel noted surgical findings of intact menisci and chondromalacia present. Based on the surgical finding of chondromalacia and, utilizing Table 62 of the A.M.A., *Guides*, the Office medical adviser indicated that appellant was entitled to a five percent permanent impairment of the left lower extremity, which was granted on January 6, 1998.

[7] The record indicates that on September 14, 1990 appellant sustained employment-related lumbosacral and cervical strains.

except for an area of tenderness over the rib medial to the scapula and advised that the record contained objective evidence of degenerative disc disease. Regarding the diagnosis of chondromalacia, he stated:

> "It is obvious that [appellant's] first injury was in 1989. This was a nonindustrial injury at which time it was apparent that [she] sustained a dislocated patella that necessitated her being out of work for a period of three months. This was followed by her bicycle injury and subsequent examination by Dr. Nauman, which rev[ealed] minimal if any findings. Functional capacity evaluation on September 5, 1990 revealed [she] was able to complete all functional activities related to her job description. [Her] next knee injury was at a social event in October of 1990, at which time it appears that [she] redislocated her knee again. It was following this third injury that [she] subsequently underwent an arthroscopy and chondroplasty.
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> "Based on review of multiple reports, it is apparent that [her] first injury in 1989 was probably responsible for the onset of her knee problems.... Following a third injury at a social outing which was a[n] apparently nonindustrial injury, [she] had increasing complaints leading up to her arthroscopic procedure confirming chondromalacia of the medial femoral condyle and patella.... It is felt that [she] had a temporary aggravation of her knee as a result of her June 1990 industrial injury when [she] twisted her knee on her bike. Subsequent evaluations following this injury revealed a normal functioning knee. It is probably that [her] knee problems are related to her nonindustrial injuries with temporary aggravation being sustained in June of 1990. It is apparent that by findings through arthroscopy [she] will have progressive knee problems based on the chondromalacia present at the time of surgery. It is felt that [her] initial knee problems started with a nonindustrial injury in 1989 followed by temporary aggravation in June of 1990 and then a subsequent dislocation of the patella in October of 1990."

Dr. Gimbel concluded:

> "At this time it is felt that residuals of the work injury of June 6, 1990 do not persist. [She], however, does have physical limitations attribut[ed] to her preexisting knee injury and subsequent chondromalacia found at the time of arthroscopy. These limitations would be repetitive bending, squatting, climbing, [and] walking for long distances. In reality it would preclude her job as a mail carrier."

In an office note dated May 11, 1998, Dr. Katz advised that he did not examine appellant's knee, rather focused on her complaints of back and neck complaints. X-rays of the cervical spine revealed diffuse degenerative disc disease of the cervical spine, especially at C4-5 and marked hypertrophic spurring at C5-6, C6-7 and below with encroachment of the neural foramina at C5-6 and C6-7. Dr. Katz diagnosed scapulothoracic syndrome with pain and degenerative disc disease of the cervical spine. He recommended cervical magnetic resonance imaging scan.

Initially, the Board notes that the Office accepted that on October 17, 1991 appellant sustained a recurrence of disability, paid appropriate compensation and authorized surgery. Furthermore, appellant's accepted conditions include left knee strain with chondromalacia.

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act,[8] to resolve the conflict in the medical opinion.

In this case, the Office terminated appellant's compensation based on the opinion of Dr. Gimbel, who provided a second opinion evaluation for the Office. The Board, however, finds that a conflict of medical opinion remains with regard to the nature and extent of any residual disability. He found that appellant could return to her regular duty. However, Dr. Katz, appellant's treating physician, opined that appellant had residuals and limited-duty restrictions due to the accepted injury. Consequently, there is conflict of medical opinion and the Office did not meet its burden of proof in terminating appellant's compensation.[9] In light of the Board's finding regarding the first issue, whether appellant established that she had any continuing disability[10] or whether the Office abused its discretion in denying merit review is moot.

[8] 5 U.S.C. § 8123(a).

[9] *See Gail D. Painton*, 41 ECAB 492 (1990). To resolve this conflict, the Office should have referred the case record, including all test results and a statement of accepted facts to a Board-certified specialist for resolution of the conflict.

[10] The Board notes that on reconsideration appellant submitted report dated August 9, 1999, in which Dr. Peairs, a Board-certified orthopedic surgeon, diagnosed chondromalacia of the patella of the left knee, hamstring tendinitis of the left knee and torn medial meniscus of the left knee. He reviewed the videotape of the 1991 surgical procedure and advised that appellant's knee condition was aggravated by the June 6, 1990 employment injury. Dr. Peairs concluded that she should be on permanent light duty. In a September 28, 1999 report, he noted reviewing a magnetic resonance imaging, which showed no meniscal tear.

The September 20 and February 22, 2000 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
January 9, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member