



Office accepted his claim for right knee strain and chondromalacia of the right patellar. He worked in a limited-duty capacity following his employment injury.

A magnetic resonance imaging (MRI) scan obtained on May 7, 2003 revealed “abnormal marrow signal in the patella.” The radiologist indicated that, while “some of this, especially near the posterior pole of the patella may be secondary to subcondral degenerative change[s], the more generalized pattern suggests that this may be due to direct trauma.” The MRI scan showed no ligament tear.

The Office accepted that appellant sustained a recurrence of disability on August 13, 2003. On September 26, 2003 Dr. Donald P. Douglas, a Board-certified orthopedic surgeon, performed a right knee arthroscopy with chondroplasty of the medial femoral condyle and patella. The Office placed appellant on the periodic rolls effective October 5, 2003.

In a disability status report dated December 11, 2003, Dr. Douglas opined that appellant could return to limited-duty employment in the middle of January 2004 but would never be able to resume regular employment. He found that appellant should limit lifting and carrying to 20 pounds and standing, sitting and walking to 3 hours per day.<sup>1</sup>

In a duty status report dated March 8, 2004, Dr. Douglas indicated that appellant could sit for 8 hours per day, lift 10 pounds for 8 hours per day with breaks, push and pull for a half hour each day and stand for 3 hours per day.<sup>2</sup>

By letter dated March 26, 2004, the Office referred appellant to Dr. David P. Nichols, a Board-certified orthopedic surgeon, for a second opinion examination. In an accompanying statement of accepted facts, the Office noted that it had enclosed an investigative report from the employing establishment.<sup>3</sup>

In a report dated April 19, 2004, Dr. Nichols reviewed the medical reports of record and described the physical activities that appellant performed in the surveillance tape from the employing establishment. On physical examination he listed findings of “palpable crepitus on flexion and extension” of the right knee at the patellofemoral joint and of the left knee beneath the patella. Dr. Nichols diagnosed chondromalacia of the right patella. He stated:

“There is no indication that I can see that [appellant] actually sustained a right knee injury on April 1, 2003. He did not twist his knee, he did not fall onto his knee. [Appellant] states that the total distance that he dropped was six inches. He did not have pain at the time that he dropped. There is no mechanism for that

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<sup>1</sup> In a note on a prescription pad dated January 22, 2004, Dr. Douglas found that appellant was capable of a clerical job. The record also contains an unsigned report from him dated January 26, 2004, in which he indicated that appellant had reached maximum medical improvement and had a permanent partial disability.

<sup>2</sup> In an unsigned progress note dated March 2, 2004, Dr. Douglas indicated that appellant’s knee remained painful and that he was at maximum medical improvement. In an unsigned progress note dated March 16, 2004, he related that he spoke with appellant on that date about his work restrictions.

<sup>3</sup> The record does not contain a copy of the investigative report.

type of fall to cause chondromalacia of the patella. Chondromalacia is a degenerative condition related to stiffening of articular cartilage and wearing away of articular cartilage. It is not caused by a single incident such as [appellant] describes. Therefore, in my opinion, there is no reason to believe [he] actually sustained an injury to his right knee on April 1, 2003. [Appellant's] current knee pain is due to degenerative change in the knee cartilage and not to [t]his incident that occurred on April 1, 2003."

Dr. Nichols opined that appellant could resume his regular employment. In an accompanying work restriction evaluation, he indicated that appellant could perform his usual employment and listed restrictions of walking, standing, bending, squatting, kneeling and climbing of four hours per day.

On May 13, 2004 the Office notified appellant that it proposed to terminate his compensation on the grounds that the weight of the medical evidence, as represented by Dr. Nichols' opinion, established that he had no further injury-related disability.

By decision dated June 18, 2004, the Office terminated appellant's compensation and authorization for medical treatment effective April 16, 2004, on the grounds that he had no further condition or disability due to his accepted employment injury.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>5</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

The Office procedure manual provides as follows:

"When the [Office] medical adviser, second opinion specialist or referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."<sup>7</sup>

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<sup>4</sup> *Dorothy Jett*, 52 ECAB 246 (2001); *Jorge E. Sotomayor*, 52 ECAB 205 (2000).

<sup>5</sup> *Manuel Gill*, 52 EAB 282 (2001); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

## ANALYSIS -- ISSUE 1

In this case, the Office accepted that appellant sustained a right knee strain and chondromalacia of the patella due to an April 1, 2003 employment injury. Following his injury, he worked limited duty until August 13, 2003, when he stopped work. On September 26, 2003 Dr. Douglas performed an arthroscopy and chondroplasty of the medial femoral condyle and patella. He opined that appellant could return to work in the middle of January 1994 with permanent restrictions on lifting, carrying, standing and walking.

The Office referred appellant to Dr. Nichols for a second opinion evaluation. Based on his April 19, 2004 report, the Office terminated appellant's compensation. The Board finds, however, that Dr. Nichols' opinion is of diminished probative value and thus, not sufficient to constitute the weight of the medical evidence.

The Office, in its referral of appellant to Dr. Nichols, requested that he provide an opinion regarding whether appellant had recovered from his employment injury, whether he had any disabling residuals and whether he could return to his usual employment. In the accompanying statement of accepted facts, the Office advised Dr. Nichols that it had accepted right knee strain and chondromalacia of the right patella. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.<sup>8</sup> The Office procedure manual provides as follows:

“When the [Office] medical adviser, second opinion specialist or referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.”<sup>9</sup>

In a report dated April 19, 2004, Dr. Nichols diagnosed chondromalacia of the right patella. He found “no indication that [appellant] actually sustained an injury to his right knee” due to his fall at work on April 1, 2003 and that there was “no mechanism for that type of fall to cause chondromalacia of the patella.” Dr. Nichols attributed appellant's knee condition to degenerative changes “and not to [t]his incident that occurred on April 1, 2003.” Dr. Nichols, therefore, did not find that appellant had no further residuals of his right knee strain and chondromalacia of the patella, but instead determined that he did not experience an employment injury to his knee on April 1, 2003. To the extent that Dr. Nichols' opinion is outside the

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<sup>8</sup> *Helen Casillas*, 46 ECAB 1044 (1995).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

framework of the statement of accepted facts, it is based on an inaccurate history and thus, insufficient to meet the Office's burden of proof on the relevant issue in a termination of whether appellant has further employment-related residuals of his accepted condition.<sup>10</sup>

Additionally, Dr. Nichols determined that appellant could return to his usual employment as a letter carrier but restricted his walking, standing, bending, squatting, kneeling and climbing to four hours per day. He did not provide any explanation for his work restrictions. Dr. Nichols' opinion is thus, internally inconsistent as he found appellant capable of his regular employment but also listed significant work limitations. His opinion regarding disability is equivocal in nature and unexplained, it is of little probative value.<sup>11</sup>

The Office did not address whether it was attempting to rescind acceptance of appellant's claim based on Dr. Nichols' report. However, the Office did not inform appellant that it was contemplating rescission or actually rescind acceptance of appellant's right knee strain and right patella chondromalacia in its termination decision. As the Board has held, the Office must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.<sup>12</sup> The Office may not find that residuals of an accepted employment injury have ceased by a particular date when the evidence upon which the decision rests tends to support that, in fact, the injury never occurred.

Accordingly, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.<sup>13</sup>

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective April 16, 2004 as the weight of the medical evidence was insufficient to establish that he had no further employment-related disability as of that date.<sup>14</sup>

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<sup>10</sup> See *Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value).

<sup>11</sup> *Betty M. Regan*, 49 ECAB 496 (1998).

<sup>12</sup> *John M. Pittman*, 7 ECAB 514 (1955).

<sup>13</sup> Subsequent to the Office's June 18, 2004 decision, appellant submitted new evidence. The Board has no jurisdiction to review evidence for the first time on appeal that was not before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

<sup>14</sup> In view of the Board's reversal of the Office's termination decision, the issue of whether the Office properly terminated authorization for medical treatment is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 18, 2004 is reversed.

Issued: November 22, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member