



her accepted employment-related injuries.<sup>1</sup> The Board found that a conflict in the medical opinion evidence was created between Drs. William F. Fishbaugh, Jr., and George P. Whitelaw, attending physicians, and Dr. Lawrence F. Geuss, an Office referral physician, as to whether appellant had any continuing employment-related residuals. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts and the history relevant to the present issue are hereafter set forth.<sup>2</sup>

Following the issuance of the Board's June 27, 2003 decision, the Office, by letter dated November 24, 2003, referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. John F. McConville, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a December 12, 2003 medical report, Dr. McConville reviewed appellant's medical records and history of her employment-related injuries. On physical examination, he reported very satisfactory range of motion of both the right and left knee with no evidence of joint effusion. There was no indication of instability either anteriorly, posteriorly or mediolaterally. Dr. McConville stated that the excessive lateral posture of the patellar was developmental and in no way related to the work injury. He opined that appellant no longer continued to suffer from residuals of her accepted employment injuries. Dr. McConville indicated that she was capable of performing the duties of a modified letter carrier, eight hours a day.

By decision dated January 13, 2004, the Office terminated appellant's compensation benefits effective January 25, 2004 on the grounds that she no longer had any employment-related residuals or disability. The Office accorded special weight to Dr. McConville's December 12, 2003 report as an impartial medical specialist.

On January 15, 2004 appellant requested an oral hearing before an Office hearing representative. In an August 20, 2004 decision, a hearing representative set aside the January 13, 2004 decision and remanded the case to the Office for further action, finding that Dr. McConville's December 12, 2003 opinion was not sufficiently rationalized and based on a complete factual and medical history. On remand, the hearing representative directed the Office to refer appellant to another impartial medical examiner to resolve the conflict in the medical opinion evidence regarding her continuing employment-related disability.

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<sup>1</sup> Docket No. 02-2373 (issued June 27, 2003).

<sup>2</sup> On June 2, 1992 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim assigned file number 01-0302133 alleging that on April 23, 1992 she was involved in a motor vehicle accident while in the performance of duty, which caused bone chips in her right knee. The Office accepted her claim for bilateral knee contusions and fracture of the distal end of the right femur. On September 1, 1993 appellant filed an occupational disease claim assigned file number 01-0313292. She alleged that on August 4, 1993 she first realized that her left knee had become bad due to a combination of her federal employment, April 23, 1992 employment-related injuries and walking differently as she favored her right knee which added extra strain on her left knee. The Office accepted appellant's claim for aggravation of degenerative joint disease in both knees and internal derangement of the left knee and fracture of the distal end of the right femur. The Office later combined her claims assigned file numbers 01-302133 and 01-0313292 into a master case file assigned number 01-0313292.

By letter dated December 10, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. David W. Howe, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a January 19, 2005 report, Dr. Howe reviewed the Office's November 25, 2003 statement of accepted facts and history of appellant's employment, April 23, 1992 employment-related injuries and medical treatment. He reported essentially normal findings on physical examination. Dr. Howe diagnosed bilateral patellofemoral osteoarthritis. He stated that appellant's symptom of anterior knee pain, which was aggravated by stair climbing and squatting, was consistent with bilateral patellofemoral osteoarthritis. His physical examination revealed objective evidence of this condition in the form of reproducible crepitus at both patellofemoral joints with lateral tracking of both patellae. Dr. Howe stated that x-rays confirmed evidence of patellofemoral osteoarthritis as early as 1993. He further stated that appellant's hypervalgus alignment aggravated her symptoms, as well as, her obesity. Dr. Howe opined that she sustained a contusion of both knees as a result of the April 23, 1992 employment injury "but did not fracture the patella or dislocate the patellofemoral joint on either side." He stated that this injury resulted in a temporary aggravation of appellant's underlying but asymptomatic patellofemoral arthritis for no more than 24 months. The fact that her knee symptoms had become progressively worse overtime was a reflection of the progressive nature of arthritis and not the result of her work injury. Dr. Howe stated that appellant's current symptoms and functional limitations were no longer attributable to the April 23, 1992 employment injuries, the effects of which likely resolved within two years. Regarding her work capacity, he stated that she could not perform the duties of a modified letter carrier as described in the accompanying statement of accepted facts. Dr. Howe indicated that the specific physical limitations and work restrictions he prescribed were attributable to appellant's patellofemoral arthritis and not to the April 23, 1992 employment injuries. In a work capacity evaluation dated January 10, 2005, Dr. Howe stated that appellant was capable of working eight hours a day and noted her physical restrictions.

By letter dated March 4, 2005, the Office requested that Dr. Howe submit a supplemental report addressing the issue of whether appellant's employment related August 4, 2003 bilateral aggravation of degenerative joint disease of the knees and fracture of the distal end of the right patella had resolved or still contributed to her ongoing disability.<sup>3</sup>

In a supplemental report dated March 21, 2005, Dr. Howe stated that when he examined appellant on January 4, 2005, "she was quite clear in stating that there was only *one* injury of her knees -- that being the one she sustained on April 23, 1992." (Emphasis in the original). Based on his review of the statement of accepted facts, Dr. Howe could not ascertain any specific

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<sup>3</sup> The Board notes that it appears that the Office inadvertently stated that appellant sustained an injury on August 4, 2003 rather than referring to August 4, 1993 as the date she alleged in her CA-2 form that she first realized that her left knee problems were caused by her employment and April 23, 1992 employment-related injuries.

injury that occurred on August 4, 2003.<sup>4</sup> He noted that it referred to a worsening of left knee symptoms attributable to appellant having to favor the right knee in the course of her work duties. Dr. Lhowe stated that the events described in her claim did not comprise an injury with permanent implications for her left knee. He reiterated his prior diagnosis of bilateral patellofemoral arthritis. Dr. Lhowe stated that this condition was progressive in nature and was going to become worse as time went on whether appellant sat, stood or walked. He indicated that she could certainly experience more pain if she placed a load on her patellofemoral joints but this would not alter the natural history of her condition. Dr. Lhowe concluded that the August 4, 2003 employment-related injuries had resolved and no longer contributed to appellant's disability at that time.

By letter dated April 29, 2005, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Lhowe's January 19 and March 21, 2005 reports. The medical evidence established that her current medical conditions were not caused by her work duties or accepted employment injuries. The Office provided 30 days in which appellant could respond to this notice. Appellant did not respond within the allotted time period.

By decision dated June 29, 2005, the Office terminated appellant's compensation benefits effective that date on the grounds that she no longer had any employment-related residuals or disability. The Office accorded special weight to Dr. Lhowe's January 19 and March 21, 2005 medical opinions as an impartial medical specialist.

On July 5, 2005 appellant requested an oral hearing before a hearing representative.

Following the March 30, 2006 hearing appellant argued that the termination of her compensation benefits based on Dr. Lhowe's January 19 and March 21, 2005 reports was incorrect and the decision should be reversed. She stated that his finding that she did not sustain a fracture of the patella was outside the statement of accepted facts. Appellant noted that the Office had accepted that she sustained a right fracture of the distal end of the femur as a consequence of the April 23, 1992 employment injury. She further contended that Dr. Lhowe's March 21, 2005 statement that he could not ascertain that she sustained an injury on August 4, 1993 was contradictory in light of his ultimate finding that the injuries she claimed on that date had resolved and no longer contributed to her continuing disability. Appellant stated that the August 4, 1993 date was administratively assigned by the Office as the date of injury for her occupational disease claim and not a traumatic injury claim. She related that Dr. Lhowe was unable to identify a specific injury sustained on August 4, 1993 because she did not sustain a traumatic injury rather she developed an occupational disease which involved an insidious onset of injury. Appellant argued that he incorrectly stated that the facts of her claim did not comprise an injury to the left knee as the Office had accepted her claim for internal derangement of the left knee. She also argued that Dr. Whitelaw's opinion that her accepted fracture caused loose bodies in the knee which required surgical removal, demonstrated that she continued to suffer residuals of her accepted employment injuries.

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<sup>4</sup> It appears that Dr. Lhowe inadvertently stated that appellant sustained an injury on August 4, 2003 rather than August 4, 1993 as he mentioned the latter date in his March 21, 2005 report when he referred to the Office's request for additional information regarding the issue of whether appellant had any continuing residuals or disability causally related to the August 4, 1993 employment injury.

In a decision dated June 29, 2006, a hearing representative affirmed the June 29, 2005 decision. The hearing representative accorded special weight to Dr. Lhowe's January 19 and March 21, 2005 medical reports as an impartial medical specialist.

### **LEGAL PRECEDENT**

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 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.<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>

Section 8123(a) of the Federal Employees' Compensation Act<sup>7</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination.<sup>8</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>9</sup>

### **ANALYSIS**

Appellant's claim was accepted for bilateral knee contusions, fracture of the distal end of the right femur, aggravation of degenerative joint disease in both knees and internal derangement of the left knee. The Board notes that, contrary to appellant's contention on appeal, a conflict in the medical opinion evidence was created between her attending physicians, Drs. Fishbaugh and Whitelaw, and Dr. Geuss, an Office referral physician, as to whether she had any continuing residuals or total disability causally related to her accepted employment-related bilateral knee contusions and fracture of the distal end of the right femur, aggravation of degenerative joint disease in both knees and internal derangement of the knee. Both Drs. Fishbaugh and Whitelaw opined that the April 23, 1992 employment injury continued to aggravate appellant's preexisting degenerative arthritis and caused an osteochondral fracture with loose bodies. Dr. Geuss opined that the April 23, 1992 employment injury only temporarily aggravated appellant's preexisting degenerative arthritis condition and that she could perform her modified work duties.

The Board, in its June 27, 2003 decision, properly instructed the Office to refer appellant to Dr. Lhowe, selected as the impartial medical specialist. The Office terminated appellant's compensation benefits on the basis of Dr. Lhowe's January 19 and March 21, 2005 reports. The

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<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>6</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>9</sup> *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

Board finds, however, that his opinions are of diminished probative value and are not entitled to the special weight accorded an impartial medical specialist. In a January 19, 2005 report, Dr. Lhowe stated that, appellant only sustained contusions of both knees. He did not accept that she sustained a fracture. Dr. Lhowe stated that appellant “did not fracture the patella or dislocate the patellofemoral joint on either side.” The record, however, reflects the Office’s acceptance that on April 23, 1992, appellant sustained a fracture of the distal end of the right femur in the performance of duty.

In the March 21, 2005 report, Dr. Lhowe stated that, appellant only sustained an injury to her knees on April 23, 1992. He did not accept that she sustained a left knee condition on August 4, 2003,<sup>10</sup> indicating that “she was quite clear in stating that there was only *one* injury of her knees -- that being the one she sustained on April 23, 1992.” (Emphasis in the original.) Dr. Lhowe stated that he could not ascertain any specific injury sustained by appellant on August 4, 1993 based on his review of the November 25, 2003 statement of accepted facts. However, the record reflects that the Office accepted appellant’s occupational disease claim for aggravation of degenerative joint disease, internal derangement of the left knee and fracture of the distal end of the right femur, which appellant contended that she became aware of and its relationship to factors of her federal employment on August 4, 1993.

The Board finds that Dr. Lhowe’s January 19 and March 21, 2005 opinions are based on an incomplete and inaccurate factual and medical background. Therefore, they are not entitled to the special weight accorded an impartial medical specialist.<sup>11</sup> Moreover, the Board finds that, since Dr. Lhowe’s opinions do not resolve the conflict in the medical evidence as to whether appellant had any continuing residuals or disability causally related to her accepted employment-related injuries, the Office did not meet its burden of proof in terminating her compensation benefits.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant’s compensation benefits effective June 29, 2005 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

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<sup>10</sup> See *supra* note 4.

<sup>11</sup> *Gwendolyn Merriweather*, 50 ECAB 410, 415-16 (1999); *James R. Driscoll*, 50 ECAB 146, 154-55 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 10, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board