

work for intermittent periods. On April 10, 2006 she returned to part-time light duty for four hours per day, three times per week. Appellant stopped working on May 26, 2006.

On June 9, 2006 appellant filed a Form CA-7 claim for compensation for wage loss from May 26 to June 9, 2006.

In a May 26, 2006 report, Dr. Darryl M. Kan, Board-certified in orthopedic surgery, stated:

“[Appellant] returns after the functional capacity evaluation. I reviewed this in detail. She is very limited with her lifting and carrying and even with sitting. [Appellant] lifts 20 pounds infrequently versus her lifting 15 pounds occasionally, carrying 15 pounds occasionally and sitting is frequent but her job requires constant sitting.

“[Appellant] has had considerable weakness as well after not going to physical therapy. She still has marked crepitus through the knee. [Appellant] has pain over the superior pole.

“Based on [her] functional capacity evaluation with all the limitations present, it is my opinion that [appellant] will not return to work in her present capacity and my recommendation would be for medical retirement. Due to the restrictions with even sitting I think that a modified position will be difficult for her [to] negotiate.”

By letter to appellant dated June 14, 2006, the Office stated that it had received notice that she was claiming a recurrence of disability. The Office asked appellant to submit medical evidence indicating that a material change had occurred which prevented her from doing her light-duty job.

In a work capacity evaluation dated July 17, 2006, Dr. Kan indicated that appellant could work a six-hour day, with restrictions of frequent but not constant sitting, occasional walking and standing, occasional lifting not exceeding 15 pounds, and no squatting, kneeling or climbing. In a report dated July 24, 2006, he stated:

“[Appellant] underwent a functional capacity evaluation on May 16, 2006. In that evaluation, the physical therapist, Lynette Masuda, opined that the patient could perform sedentary physical demand level for an eight-hour day with back lift capacity of 15 pounds; however, in the functional capacity evaluation results Ms. Masuda noted [that appellant] could not do constant sitting which the job required and was limited to frequent sitting. It does not appear that the patient would be able to perform sedentary duty as outlined by Ms. Masuda as sedentary duty would require constant sitting. *Thus, it appears the patient is totally disabled based on her current medical condition and functional capacity evaluation results.*” (Emphasis added.)

In order to determine appellant's current condition, the Office referred appellant for a second opinion examination with Dr. Robert S. Harvey, Board-certified in orthopedic surgery. In a report dated September 22, 2006, Dr. Harvey noted that his August 31, 2006 examination had demonstrated objective findings of palpable defect in the quadriceps tendon which were supported by findings from a magnetic resonance imaging scan. Appellant also had objective findings of chondromalacia of the patellar and arthritic changes in the joint. Dr. Harvey advised that appellant's diagnosed left knee conditions resulted in limited mobility of the knee, decreased strength, pain with motions causing traction of the quadriceps mechanism, and restricted ability to stand and sit. However, he disagreed with Dr. Kan's opinion that appellant was totally disabled. In a work restriction evaluation dated August 31, 2006, Dr. Harvey indicated that appellant could work a six-hour day, with restrictions of sitting and standing not exceeding two hours, lifting not exceeding 15 to 20 pounds, pushing and pulling not exceeding 40 pounds, and no bending, squatting, kneeling or climbing. He also recommended that appellant take a 10-minute break every hour, sit with her leg straight on occasion and make frequent position changes.

By letter dated October 31, 2006, the Office asked Dr. Kan to comment on Dr. Harvey's September 22, 2006 second opinion report, which accompanied the letter. Dr. Kan did not respond to this letter.

By decision dated December 15, 2006, the Office denied appellant's claim for benefits based on a recurrence of disability. The Office found that Dr. Harvey's referral opinion represented the weight of the medical evidence.

In a form request postmarked January 23, 2007, appellant requested an oral hearing.

By decision dated March 7, 2007, the Office denied appellant's request for an oral hearing. The Office stated that appellant's request was postmarked July 14, 2006, which was more than 30 days after the issuance of the Office's March 30, 2006 decision, and that she was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

¹ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

ANALYSIS

The Board finds that the case is not in posture for decision.

In the instant case, there is a conflict in the medical evidence. Dr. Kan opined in his July 24, 2006 report that appellant was totally disabled based on her current medical condition and the functional capacity evaluation results. He noted that the functional capacity evaluation indicated she could not perform constant sitting required by her light-duty job, as she was restricted from frequent sitting. In a September 22, 2006 referral report, Dr. Harvey stated that appellant's diagnosed left knee conditions resulted in limited mobility, decreased strength, pain and restrictions on standing and sitting, but disagreed with Dr. Kan's opinion that appellant was totally disabled. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."² Accordingly, the Board will set aside the Office's December 15, 2006 decision and remand the case to the Office for referral to an impartial medical specialist to resolve the conflict in medical evidence regarding whether appellant sustained a recurrence of disability causally related to her accepted left knee conditions as of May 26, 2006. After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Board finds that the Office's decision must be set aside and remanded to resolve the conflict in medical evidence.³

CONCLUSION

The Board finds that the case is not in posture for decision.

² Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

³ In light of the Board's decision to remand the case to the Office to adjudicate the recurrence issue, the Board need not consider the Office's March 7, 2007 nonmerit decision.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2007 and December 15, 2006 decisions of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further action consistent with this decision.

Issued: October 9, 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