United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
	)	**Docket No. 07-896**
and	)	**Issued: September 17, 2007**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Kearny, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 15, 2007 appellant filed a timely appeal of the merit decision of the Office of Workers' Compensation Programs' dated August 24, 2006 terminating her compensation and medical benefits. She also filed a timely appeal of a January 5, 2007 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective September 2, 2006 on the basis that she did not have any remaining residuals causally related to her March 14, 2005 accepted employment injury; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 14, 2005 appellant, then a 55-year-old clerk, sustained injury when she was struck by a broken postal cart which caused her to fall and injure her right knee. On May 19,

2005 the Office accepted her claim for a right knee contusion and torn medial meniscus. Appellant stopped work on August 16, 2005. She underwent a right knee arthroscopy and partial medial meniscectomy on August 18, 2005.

On November 18, 2005 Dr. Marc W. Urquhart, an attending Board-certified orthopedic surgeon, noted that appellant had medial compartmental arthritis and was a candidate of medial compartment arthroplasty. On March 12, 2006 the Office medical adviser suggested an additional medical opinion to determine the appropriateness of the recommended surgery in relation to appellant's work injury of March 14, 2005. In a December 16, 2005 report, Dr. Marc Urquhart noted that appellant continued to have knee pain with decreased swelling.

In a report dated February 6, 2006, Dr. Erica Rowe-Urquhart, an attending orthopedic surgeon, noted that appellant was "having exquisite inflammatory sensation secondary to medial compartment osteoarthritis." In a report of the same date, she found that appellant was unable to do any work and recommended physical and occupational therapy. Dr. Rowe-Urquhart noted that appellant's condition was related to her work. In a March 13, 2006 report, she noted that appellant was a good candidate for a unicompartmental arthroplasty. Dr. Rowe-Urquhart noted that she would like appellant "to have this procedure before she develops a significant varus deformity which will preclude this minimally invasive procedure."

On March 9, 2006 the Office referred appellant to Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated March 25, 2006, Dr. Rubinfeld diagnosed osteoarthritis in appellant's right knee supported by examination findings of crepitus with discomfort in the right knee. He also noted that the right knee arthroscopy and x-ray reports were consistent with this diagnosis. Dr. Rubinfeld opined that appellant had fully recovered from the effects of the March 14, 2005 work-related injury and was not prevented from returning to her job by the work injury, although he did note restrictions due to her preexisting arthritis. He opined: "The prognosis for the accepted work[-]related condition is good and no further treatment, including surgery, is required for this condition." Dr. Rubinfeld further indicated that the surgical procedure proposed by appellant's rating physician was related to her preexisting arthritis. He concluded: "The nature of the work injury was such that it would not cause an arthritic condition."

In a June 19, 2006 report, Dr. Rowe-Urquhart noted that, in the past several months, appellant experienced worsening of her right knee condition although she had been treated with physical therapy. Appellant had increasing dependence on a cane for ambulation with significant medial joint line pain and tenderness. Dr. Rowe-Urquhart also noted that appellant had adopted a sedentary lifestyle which has resulted in significant weight gain. She noted appellant's diagnosis as right knee degenerative joint disease, medial compartment and chondosis. Dr. Rowe-Urquhart recommended that appellant refrain from work-related activities until definitive treatment.

The Office found a conflict in medical opinion between Dr. Rowe-Urquhart and Dr. Rubinfeld. On June 16, 2006 the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office advised appellant that, if she had a substantive objection to the selected physician, that she should make her objections known. No objections were noted.

In a medical report dated July 6, 2006, Dr. Dennis diagnosed: (1) strain of the right knee secondary to a fall on the cement floor; (2) twist injury to the right knee resulting in a tear of the medial meniscus which was appropriately and timely treated; (3) status post right knee medial meniscectomy;[1] (4) magnification of symptoms; and (5) no current evidence to confirm osteoarthritic changes of the knee and no evidence to confirm that her osteoarthritis was severe enough to warrant consideration of a hemi-arthroplasty. He noted that appellant's condition, not including diagnosis of arthritic changes to the knee, was due to the fall at work. Dr. Dennis opined that the arthritic condition was not due to the fall and that, if it had been, such aggravation had ceased. He further noted:

> "In my opinion [appellant] has fully recovered from the injuries incurred on March 15, 2005. There were no current objective findings that relate to ongoing or permanent residuals as related to this injury other than the arthroscopic scars. [Appellant's] condition has resolved. The delay in recovery is superimposed upon the full organic tissue recovery for reasons that I do not understand nor can I explain."

Dr. Dennis noted that appellant could return to work full duty with no restrictions. She no longer had a cushion to buffer her knee, but there was no indication that the condition of the medial meniscectomy would alter her overall function on a permanent basis. Dr. Dennis stated that appellant did not carry indications for a hemi-arthroplasty as there was no evidence of a clinical objective basis of arthritis, a collapse of the medial joint line, an inflammation or increased warmth about the knee or significant arthritic changes. He noted that appellant was only 56 years old and that she had not been informed about the risk and severity of a total knee joint replacement.

On July 24, 2006 the Office issued a proposal to terminate appellant's compensation and medical benefits.

In a letter dated August 11, 2006, appellant responded to Dr. Dennis' report by stating that, when Dr. Dennis asked her to stand, she stood for approximately 30 seconds on each leg. She stated that when Dr. Dennis pushed on her knee she was in pain and asked him to stop. Appellant indicated that she was properly taught to use the cane with her left hand, but due to problems with her left shoulder, she used her right hand.

On August 14, 2006 Dr. Rowe-Urquhart noted that appellant continued to have knee pain and discomfort. She recommended that appellant have a hemi-arthroplasty, but that appellant had undergone a course of Synvisc as per her second opinion. In a note dated August 15, 2006, her attending physicians indicated that appellant had the following treatments for knee arthritis: physical therapy, cortisteroid injections, activity modification, weight management and drug therapy. Due to the failure of these therapies, the physicians recommended viscosupplement injections.

[1] Dr. Dennis noted that he did not have the full operative note from the right knee medial menisectomy or the Polaroid film. He noted that, if these films became available, he would appreciate the opportunity to review them.

By decision dated August 24, 2006, the Office terminated appellant's compensation and medical benefits effective September 2, 2006.

On October 27, 2006 appellant requested reconsideration. She submitted a copy of the operative report from her August 18, 2005 right knee arthroscopy and partial medial menisectomy.

In an October 9, 2006 report, Dr. Rowe-Urquhart released appellant to return to light-duty work with restrictions. In a note of the same date, she noted that appellant continued to have significant tenderness and pain along the lateral and medial joint line. Dr. Rowe-Urquhart advised that appellant should continue with physical therapy. In a November 29, 2006 report, Dr. Marc Urquhart noted that appellant continued to complain of medial-sided right knee pain. He noted a recurrent injury on November 20, 2006 while appellant was at work when she twisted and pivoted on her right knee and felt a sudden onset of excruciating pain in the medial aspect of her right knee. Dr. Marc Urquhart noted that x-rays taken at Clara Maas Hospital immediately after the injury demonstrated evidence of osteophyte formation of the medial compartment with some joint space narrowing as well as sclerosis. Appellant also submitted the medical reports that had previously been submitted and reports of her physical therapists.

By decision dated January 5, 2007, the Office denied reconsideration without further merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.[5]

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the Untied States and the physician of an employee, a third physician will be appointed to make an examination.[6] Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist is entitled to

[2] *Curtis Hall*, 45 ECAB 316 (1994).

[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[4] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[5] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[6] 5 U.S.C. § 8128(a).

special weight if sufficiently well rationalized and based upon a proper factual review of the case.[7]

ANALYSIS -- ISSUE 1

The Office properly found that a conflict existed in the medical evidence between appellant's treating physicians, Dr. Marc Urquhart and Dr. Rowe-Urquhart, and the second opinion physician, Dr. Rubinfeld, with regard to whether she had any continuing residuals and disability related to her March 14, 2005 injury. Accordingly, the Office referred appellant to Dr. Dennis to resolve the conflict.

In a report dated July 6, 2006, Dr. Dennis opined that appellant had fully recovered from the injuries she sustained on March 14, 2005. He noted that appellant's strain of her right knee secondary to her employment injury was appropriately and timely treated, that there was magnification of symptoms and that there was no current evidence to confirm osteoarthritic changes of the knee. Dr. Dennis opined that appellant's preexisting arthritic condition was not due to the fall and that, if it had been, any aggravation had ceased. He concluded that appellant could return to full-duty work without restrictions.

The Board finds that the Office properly relied on the impartial medical examiner's report in determining that appellant's accepted employment injury had resolved. The opinion of Dr. Dennis was sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, he reviewed his medical records. Appellant's reports constitute the special weight of the medical opinion evidence.

The August 14 and 15, 2006 notes of Dr. Rowe-Urquhart are insufficient to overcome the special weight of the medical evidence as represented by Dr. Dennis as they were on one side of the conflict Dr. Dennis resolved and thus they cannot now create another conflict.[8]

On appeal, appellant's attorney raised objections to the choice of physicians for the second opinion and impartial medical examinations. The Board notes that she was provided an opportunity to object to the choice of the impartial medical examiner but chose not to do so. Instead, appellant raised her objection for the first time on appeal. As she did not raise these objections before the Office, the Board is precluded from reviewing these arguments raised for the first time on appeal.[9]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument

[7] *Barry Neutach*, 54 ECAB 313 (2003).

[8] *See Howard Y. Miyashiro,* 43 ECAB 1101 (1992).

[9] *See* 5 U.S.C. § 501.2(c).

not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[10]

ANALYSIS -- ISSUE 2

The Board finds that appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. With regard to the evidence submitted with her request, several of the medical reports are duplicative of reports already in the record. The new reports by Dr. Marc Urquhart and Dr. Rowe-Urquhart generally contain statement cumulative of reports in the record previously considered. The Board has held that evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.[11] The Board notes that appellant alleges that she has a new x-ray but no such x-ray or report was in the record before the Office. Dr. Marc Urquhart noted that appellant sustained a recurrent injury on November 20, 2006; however, this is irrelevant to the threshold issue.

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. Thus, she has not met the criteria to have the Office reopen her case for review on the merits.[12]

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation and medical benefits effective September 2, 2006 on the basis that she did not have any remaining residuals causally related to her March 14, 2005 accepted employment injury. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2)(i-iii).

[11] *See James E. Norris*, 52 ECAB 93 (2000).

[12] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 5, 2007 and August 24, 2006 are affirmed.

Issued: September 17, 2007
Washington, DC

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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