# United States Department of Labor
# Employees' Compensation Appeals Board

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| **B.C., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1746** |
| | ) | **Issued: September 24, 2009** |
| **DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Oakland, CA, Employer** | ) | |

*Appearances:*
*Sylvia R. Johnson*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On June 3, 2008 appellant filed a timely appeal of a June 11, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative denying her claim for eight hours of wage loss per week for the period March 1, 2004 through March 31, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits and nonmerits of this case.

### ***ISSUE***

The issue is whether appellant is entitled to compensation for eight hours wage loss per week from March 1, 2004 through March 31, 2006.

On appeal, appellant, through her representative, contends that the Office incorrectly determined that she could work 40 hours a week. She noted that the Office improperly relied upon the report of a referral physician as it was based on inaccurate facts and was not rationalized medical opinion. Appellant's representative alternatively argued that there was a conflict in medical opinion requiring referral to an impartial medical examiner.

## ***FACTUAL HISTORY***

On January 11, 2000 appellant, then a 24-year-old customer service representative, slipped and fell on wet carpet and scraped and bruised her right knee. The Office accepted her claim for right arm strain, right knee contusion, right meniscus tear and internal derangement of the knee. On December 1, 2000 Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, performed an arthroscopy of the right knee. On March 18, 2002 he performed a right tibial transfer and right retinacular release.

Appellant returned to work in a limited-duty position as a customer service representative six hours a day, three days a week on June 2, 2003. She gradually increased her work hours and, by July 18, 2003, worked 40 hours per week.[1] However, appellant decreased her work to 32 hours a week as of March 1, 2004.

On August 25, 2004 Dr. Nolan noted that appellant experienced constant throbbing pain in her right knee. The pain at the posterior aspect radiated into the upper extremities to the posterior aspect of the elbow, laterally into the brachioradialis. Dr. Nolan indicated that appellant should continue common sense precautions at work, at home and recreation. He advised that she continue modified work at 32 hours a week. In subsequent reports, Dr. Nolan reiterated his work limitations for appellant.

In a July 30, 2003 decision, the Office denied appellant's request for surgery, psychological therapy, pool therapy, weight control and patellar resurfacing as a result of the January 11, 2000 work injury.

Pursuant to appellant's request, an oral hearing was held on July 27, 2005. By decision dated December 27, 2005, the Office hearing representative remanded the case for further development of the medical evidence. At the hearing, Dr. Nolan and appellant's treating psychologist, Dr. Gail Borque, appeared. He discussed appellant's surgeries and her complaints of pain. After appellant returned to work, she experienced persistent knee pain, specifically anterior to the patella femoral joint. She ambulated with a crutch. Dr. Nolan noted that appellant was currently working Monday, Tuesday, Thursday and Friday, and that work had intensified her symptoms and she needed a day off. He noted that patients given a midweek break could get through the remainder of the week and do better. Dr. Borque testified that she had been treating appellant since October 7, 2002 for pain management and depression as a result of the industrial injury. She diagnosed chronic pain, depression or mood disorder secondary to a medical condition and adjustment disorder with anxiety. Dr. Borque discussed treatment stating that, after two days at work, appellant needed a day to rest so that the inflammation could go down. Rest was also appropriate due to appellant's pain medication. Dr. Borque agreed that a 32-hour workweek was appropriate for appellant.

[1] In a July 7, 2004 report, Dr. Nolan found that appellant should continue her modified work status, 32 hours per week. He noted that appellant continued to experience throbbing pain in her right knee which she described as slight, occurring occasionally, radiating from the anterior aspect of the knee intermittently into the medial and lateral calf.

On March 10, 2005 appellant alleged a recurrence of disability of the January 11, 2000 employment injury commencing May 12, 2003. She filed wage-loss claims through March 31, 2006, contending that she was unable to work 40 hours a week and was reduced to 32 hours a week by her attending physicians. The employing establishment contended that appellant voluntarily reduced her work days to 32 hours and that appellant worked 8 hours a day on Monday, Tuesday, Thursday and Friday.

The Office referred appellant to Dr. Robert Hepps, a Board-certified psychiatrist, for an evaluation of appellant's condition. On March 1, 2006 Dr. Hepps advised that appellant suffered from an adjustment disorder with mixed anxiety and depressed mood, which was mostly resolved. He also diagnosed pain disorder causally related to her employment injury. From the standpoint of appellant's psychiatric condition, Dr. Hepps found that she was capable of working a 40-hour week.

In a March 8, 2006 report, Dr. Nolan reiterated that appellant was limited to working 32 hours (four days) per week.

On April 4, 2006 the Office referred appellant to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon. In a May 10, 2006 report, Dr. Auerbach noted that appellant was currently working 32 hours a week. He diagnosed resolved strain of the right shoulder and right elbow, right knee strain and probable sublaxibility and subluxation of the right kneecap, positive patellofemoral compression syndrome and probable patellar chondromalacia, right knee. Dr. Auerbach opined that no further medical treatment was needed for right shoulder, right elbow, right arm or right knee except for occasional visits to her treating physician and occasional use of nonnarcotic pain medication. He advised that she was able to perform her regular work on a full-time basis.

By decision dated June 21, 2006, the Office accepted appellant's claim for adjustment disorder with mixed anxiety and depressed mood and pain disorder associated with psychological factors.

By decision dated June 22, 2006, the Office denied authorization for pool therapy, a weight control program and further knee surgery.

By decision dated August 14, 2006, the Office terminated appellant's compensation and medical benefits for her right arm condition. However, by decision dated February 7, 2007, an Office hearing representative set this decision aside and remanded for further development of the medical evidence.

In a decision dated October 27, 2006, the Office found that appellant was capable of working 40 hours a week and denied wage-loss benefits from May 1, 2004 through March 31, 2006.

By letter dated November 7, 2006, appellant requested an oral hearing with regard to this decision. At the hearing held on March 28, 2007, appellant's counsel contended that Dr. Auerbach's medical opinion was deficient and that he was biased. Appellant testified with regard to her job duties, the physical requirements of her job, and that sitting for long periods

affected her knee. She had not been working on Wednesdays, and used that date for appointment and errands.

By decision dated June 11, 2007, the Office hearing representative affirmed the denial of wage-loss compensation from May 1, 2004 through March 31, 2006.

## ***LEGAL PRECEDENT***

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or 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 he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[2] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[3]

Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is 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.[4]

## ***ANALYSIS***

The Office accepted that appellant sustained a right arm strain, right knee contusion, right meniscus tear and internal derangement of the right knee. It paid compensation and medical benefits. Appellant returned to work on June 2, 2003 for six hours a day, three days a week and to full duty at 40 hours a week by July 18, 2003. However, on May 1, 2004, she reduced her work hours to 32 hours a week. Appellant filed claims for compensation for the period May 1, 2004 through March 31, 2006 for the eight hours of work she contends that she is unable to work a week due to residuals of her injury.

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[2] *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "*Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

[3] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack*, 50 ECAB 498, 503 (1999).

[4] 5 U.S.C. § 8123(a); *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

In support of her claim for disability, appellant submitted reports from Dr. Nolan, a treating orthopedic surgeon, who found that appellant was limited to working four eight-hour days a week due to pain. Dr. Nolan testified that appellant had knee pain at the patella femoral joint and ambulated with a crutch. He noted that giving a patient with ongoing symptoms such as appellant a midweek break and allowing them two days' work, one day rest, two more days' work, helped them to get through the week better. Dr. Nolan stated that, after two days with her knee in a bent position and the patella femoral joint under load, the pain intensified. If provided a midweek break, she could work better. The Office referred appellant to Dr. Auerbach for a second opinion. Dr. Auerbach disagreed with Dr. Nolan, advising that appellant did not require further medical treatment for her work injuries, with the exception of occasional medical visits and the use of nonnarcotic pain medication. He found that she was able to return to her regular work on a full-time basis. The Board finds that there is an unresolved conflict in medical opinion between appellant's treating physician, Dr. Nolan, and Dr. Auerbach, the second opinion physician, with regard to her capacity to work full-time duty. The case will be remanded to the Office to refer appellant to an impartial medical specialist to resolve this conflict.[5]

On June 21, 2006 the Office accepted appellant's claim for an adjustment disorder with mixed anxiety and depressed mood and pain disorder associated with psychologic factors. The Board notes that Dr. Borque, the psychologist who treated appellant for pain management, agreed with Dr. Nolan that appellant should only work 32 hours a week. Dr. Borque noted that appellant needed a day to rest for the inflammation to go down, for her stress and due to her pain medication. Dr. Hepps, the Board-certified psychiatrist to whom the Office referred appellant, diagnosed an adjustment disorder with mixed anxiety and depressed mood which he found to be mostly resolved. He found that she was capable of working a 40-hour week considering only the psychiatric factors.[6] Accordingly, there is an unresolved conflict with regard to appellant's capacity to work full time due to her accepted psychiatric conditions.

On remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to appropriate Board-certified specialists to determine whether she was capable of working full time during the period claimed. After this and such other development as it deems necessary, the Office should issue an appropriate decision.

## ***CONCLUSION***

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

[5] *Id.*

[6] On appeal, appellant contends that Dr. Hepps was under the mistaken impression that appellant was working a 40-hour week. Dr. Hepps clearly noted that appellant was currently working 32 hours a week (8 hours a day, 4 days a week).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 11, 2007 is vacated and the case remanded for further consideration consistent with this opinion.

Issued: September 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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