

periodic rolls in receipt of wage-loss compensation. A November 27, 2006 functional capacity evaluation demonstrated that he did not have the ambulatory endurance required to perform his duties as a letter carrier.

On February 2, 2007 the Office referred him to Dr. Sheldon Kaffen, Board-certified in orthopedic surgery, for a second opinion evaluation. The statement of accepted facts provided to Dr. Kaffen described the duties and physical requirements of a letter carrier and advised that the claim was accepted for a right knee collateral ligament strain.

On March 22, 2007 Dr. Wilber found that appellant could return to restricted duty. He reported that, when he performed appellant's right knee surgery, there was significant chondromalacia of the patella and the patellar groove in addition to a complex tear of the medial meniscus. The record indicates that appellant returned to light duty.

In an April 12, 2007 report, Dr. Kaffen noted the history of injury and reviewed appellant's medical treatment records. On examination, appellant complained of intermittent right knee pain. Dr. Kaffen advised that the only positive finding was tenderness in the anterior medial soft spot of the right knee. He diagnosed a medial meniscus tear of the right knee caused by the December 7, 2007 employment injury and found that there were no residuals of the condition on physical examination following surgery. Dr. Kaffen noted that neither the surgical report nor magnetic resonance imaging (MRI) scan were in the records forwarded to him; however, he concluded that appellant was capable of performing his full duties as a letter carrier as described in the statement of accepted facts.

On May 10, 2007 Dr. Wilber reiterated that appellant should remain on light duty.

The Office found a conflict in medical opinion between Dr. Wilber and Dr. Kaffen as to whether appellant had residuals of his accepted condition and his capacity for work. On August 1, 2007 appellant was referred to Dr. Robert Corn, a Board-certified orthopedic surgeon, selected as the impartial specialist. An amended statement of accepted facts indicated that the accepted condition was right knee collateral ligament strain.

In an August 23, 2007 report, Dr. Corn reviewed the history of injury and medical treatment and listed appellant's complaint of right knee pain and swelling, aggravated by stair climbing. He noted that the conditions of right knee sprain and a complex tear of the medial meniscus were accepted conditions. On examination, Dr. Corn found tenderness along the medial joint line and +2 effusion. Apley grind test yielded pain along the medial aspect of the right knee. Dr. Corn reviewed the duties of a letter carrier with appellant and stated that there was still definite objective evidence that he had not completely recovered from the right knee surgery. He listed effusion, thickening of the medial synovium, tenderness along the knee joint line and persistent weakness in the right lower extremity. Dr. Corn found that appellant could not return to his regular duties as a letter carrier. He advised that a new MRI scan should be obtained to determine the extent of any residual injury or meniscal damage that had either recurred or subsequently developed and that a functional capacity evaluation would be appropriate to objectively assess appellant's recovery.

On February 26, 2008 the employing establishment informed the Office that appellant stopped work for a nonwork-related procedure. On February 28, 2008 appellant advised the Office that he was off work to undergo a back procedure. He noted that Dr. Corn's office had contacted him for testing but he had not responded and the tests were not performed. Appellant returned to limited duty on March 6, 2008.

On March 27, 2008 Dr. Wilber noted that physical examination demonstrated mild effusion over the patellofemoral joint. He advised that appellant should continue limited-duty work with the restrictions previously recommended. Dr. Wilber noted that he was trying to amend the claim to include traumatic chondromalacia of the patella.¹

The record documents that prior to July 2, 2008 the MRI scan test and functional capacity evaluation recommended by Dr. Corn were not scheduled. A March 4, 2008 message stated that "per Carol, [physician] will give an assessment based on medical record." A July 2, 2008 note advised that Dr. Corn's August 23, 2007 referee examination was no longer valid because "the referee examiner has failed to provide an addendum to his report since September 19, 2007, after numerous requests, thus leaving the report incomplete."

The Office determined that the conflict in medical opinion between Dr. Wilber, and Dr. Kaffen remained unresolved. On August 20, 2008 it referred appellant to Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon, for an impartial evaluation. In a September 3, 2008 report, Dr. Kovach reported that the accepted condition was collateral ligament strain of the right knee. He reviewed the medical record and advised that the surgical report was not found. Examination of the right knee revealed no swelling or effusion and full extension and 130 degrees of flexion, no sign of valgus, varus, anterior or posterior instability and no angular deformity on weight bearing. Strength was 5/5 and McMurray's test negative. Dr. Kovach found minimal crepitation on flexion and extension of both knees and advised that appellant had reached maximum medical improvement. In response to Office questions, Dr. Kovach advised that the torn medial meniscus was work related but the chondromalacia was not. He stated that the accepted right collateral ligament strain had resolved and, because the torn meniscus had been surgically repaired, it no longer contributed to appellant's knee problems. Dr. Kovach advised that the chondromalacia was a preexisting condition. He found that the residuals of the December 7, 2005 work injury did not preclude appellant from performing the regular duties of his date-of-injury job as a letter carrier. Appellant had minimal objective findings on examination, a negative McMurray's test, no instability or joint tenderness to the right knee, no atrophy of the thigh or gross weakness in flexion and extension of his knee. Dr. Kovach concluded that appellant did not require any ongoing medical treatment for the accepted conditions.

In an August 26, 2008 report, Dr. Todd S. Hochman, Board-certified in internal medicine and pediatrics, provided an impairment rating for appellant's right knee. He advised that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*), appellant had 12 percent impairment to his right leg.

¹ On May 27, 2008 appellant filed a claim for a schedule award.

² A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

The Office obtained a copy of the August 7, 2006 surgical report, which it forwarded to Dr. Kovach together with medical evidence. It asked him to address whether appellant had chondromalacia of the patella and, if so, whether it was caused, aggravated, accelerated or precipitated by the December 7, 2005 employment injury. On October 29, 2008 Dr. Kovach reviewed the additional evidence, including the surgical report which showed that there was evaluation of the trochlea, the patella, medial joint space, the cruciate ligaments, the lateral joint space and lateral gutter of the right knee. The specific findings noted were a tear of the medial meniscus longus posterior horn, a small cartilage defect in the trochlea and a small cartilage defect on the right posterior lateral tibial plateau. Dr. Kovach advised that there was no mention of any specific pathology to the patella in the report and that surgery consisted of a resection of the torn medial meniscus. Based on his review of the report from surgery and other medical records, there was no description of chondromalacia patella such that the diagnosis of right chondromalacia patella was not substantiated and did not exist.

On November 21, 2008 the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of medical opinion was represented by Dr. Kovach and established that he no longer had disability or residuals due to the accepted condition. It noted that several requests were made for Dr. Corn to provide further evaluation based on the information of file but that an addendum report was not received.

On December 4, 2008 Dr. Wilber advised that appellant's knee was slowly improving and that his ongoing problem was with chondromalacia of the patellofemoral joint. He reviewed the surgical report and noted that it mentioned a lesion involving the trochlear groove, which is part of the patellofemoral joint. Dr. Wilber stated that appellant had a clear intraoperative picture in his chart that showed chondromalacia of the patellofemoral joint, especially in the area of the trochlear groove.

By decision dated December 29, 2008, the Office terminated appellant's compensation benefits finding that the accepted right knee collateral ligament strain had resolved and that the weight of medical opinion established that he could resume full duty as a letter carrier.

On January 4, 2009 appellant, through his attorney, requested a hearing. On February 19, 2009 counsel contended that an additional accepted condition was a complex tear of the right knee medial meniscus. Therefore, an incorrect statement of accepted facts had been provided to Dr. Kovach and his report was of reduced probative value. In reports dated January 8 to April 9, 2009, Dr. Wilber advised that appellant continued to have occasional pain and swelling of the right knee but could continue work with his restrictions.

At the May 12, 2009 hearing, counsel reiterated that the statement of accepted facts did not include a correct list of accepted conditions such that a new impartial examiner should be selected. He also contended that Dr. Kovach's opinion was not well rationalized concerning the condition of chondromalacia patella and that appellant was entitled to a schedule award.

In a July 15, 2009 decision, an Office hearing representative affirmed the December 29, 2008 decision. The hearing representative noted that, although the statement of accepted facts did not list the torn meniscus as an accepted condition, the second opinion and referee examiners

both found that the condition was work related but no longer disabling. Dr. Kovach found that, while the tear was work related, it had been repaired with surgery and was no longer disabling.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

Section 8123(a) of the Federal Employees' Compensation Act⁵ 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.⁶ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁷

ANALYSIS

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. The accepted conditions in this case are right knee medial collateral ligament strain and tear.

The Office found a conflict in medical evidence between appellant's attending physician, Dr. Wilber, and an Office referral physician, Dr. Kaffen as to whether there were continuing residuals and disability due to the employment injury. It initially referred appellant to Dr. Corn selected as the impartial medical specialist. In an August 23, 2007 report, Dr. Corn provided positive physical findings and advised that appellant had continuing residuals of his right knee injury. He noted, however, that to answer the questions posed he recommended that a functional capacity evaluation be obtained together with an MRI scan to further assess appellant's accepted knee condition. Although the record contains several e-mail messages and a memorandum of a telephone call with appellant, there is no evidence to establish that the Office authorized Dr. Corn to obtain the functional capacity evaluation or additional diagnostic testing or that scheduling was obtained. The Office's procedure manual provides that, if clarification or additional information is necessary from the impartial specialist, the claims examiner will write to the specialist to obtain the information.⁸ There is no evidence of record to establish that the

³ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

⁷ *Manuel Gill*, 52 ECAB 282 (2001).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Medical Examinations*, Chapter 3.500.5(b)(2) (March 1994).

claims examiner followed this procedure prior to referring appellant to Dr. Kovach for an impartial medical examination. The e-mails of record are not sufficient to establish that the Office conformed to its procedure manual in obtaining the additional information or tests recommended by Dr. Corn.

The Office's procedures provide that, when a second referee specialist's report is requested before the Office has attempted to clarify an original referee specialist's report, the second report must be excluded.⁹ The Board finds that Dr. Kovach's report should be excluded from the record because the Office did not follow its procedures. The Office failed to write to Dr. Corn to authorize the requested functional capacity evaluation or diagnostic test and request that he provide a supplemental report.¹⁰ For this reason, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.¹¹

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

⁹ *Id.* at Chapter 3.500.6.

¹⁰ *Id.*

¹¹ *Jaja K. Asaramo, supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the decision July 15, 2009 decision of the Office of Workers' Compensation Programs be reversed.

Issued: July 21, 2010
Washington, DC

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

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

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